RECENT DEVELOPMENTS IN KANSAS OIL AND GAS LAW

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Four statutes and nearly forty cases in the last three years have made their mark on the substance of Kansas oil and gas law. No single area of the law received particular emphasis during this period. Rather, the statutes and cases covered a wide range of issues, from the basic question of whether a given lease has terminated for failure of the lessee to produce in paying quantities to the more esoteric consideration of the effect of the Natural Gas Policy Act of 1978 on indefinite government price escalator clauses.

I. “PRODUCTION IN PAYING QUANTITIES”

The typical oil and gas lease states that the lessee’s interest shall last for a specific period of time (i.e., a primary term) and then for so long thereafter as oil or gas is produced in paying quantities. This arrangement represents an accommodation of the interests of both parties involved: the lessor’s interest in obtaining royalties from the activity of a motivated lessee and the lessee’s interest in not being bound to long-range rental obligations in the event of an unsuccessful venture. Although the thereafter clause is a familiar item in oil and gas leases, it continues to present litigable questions. Three Kansas cases during the survey period offer interesting examples.

The case providing the most extensive and noteworthy discussion of the subject is Texasco, Inc. v. Fox. The plaintiffs, the owners of a term mineral interest and their lessee, sought a declaratory judgment to establish that their interests were still in effect. Both the lease and the mineral interest were to last for so long as there was production of oil or gas in paying quantities. The essential question in the case was whether such production had been occurring. Resolution of this question hinged on two issues: the determination of an appropriate accounting period and evaluation of whether the depreciation of equipment should be charged as an expense against profits.

The trial court had considered the lessee’s annual accounting statements over a thirteen-year period and made a separate determination of profitability for

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4 The motivation for the lawsuit developed when the reversioners padlocked a gate across the entrance to the property and refused the lessee access, claiming that the lease had terminated for lack of production in paying quantities.

5 The lease stated only that it would continue in effect for “as long as production continues” and did not require that the production be in “commercial quantities” or in “paying quantities.” Quoting Kelwood Farms, Inc. v. Ritchie, 1 Kan. App. 2d 472, 571 P.2d 338 (1977), the court stated that despite the absence of such an express requirement, it has “no hesitancy in adding that all rights under that instrument terminate when production in paying quantities ceases.” 228 Kan. at 592, 618 P.2d at 847. The issue, then, was whether there had been such production.
each year. The Kansas Supreme Court held that this was inappropriate, because it was not pertinent that the lease failed to produce a profit over certain short periods.\textsuperscript{6} The consideration should be made “over a relatively long period of time in order to expose the operation to the leveling influences of time.”\textsuperscript{7} Although determinations of profitability are not properly based on narrow, isolated segments of time, the court also recognized that an outer limit to the time period must be considered: “On the other hand, the use of an unreasonably long period would entail using past glories during flush production to determine a lease’s present condition, which would give a distorted result not reflective of the current status of the lease.”\textsuperscript{8}

The court provided little specific guidance on striking a balance between a time period too short and one too long, but, quoting a leading treatise, it did offer the general test that a reasonable time period should be long enough to provide the prudent operator with information sufficient to decide whether to continue the operation.\textsuperscript{9} This test, which combines past record and potential performance, is perhaps as specific as any court can be on the matter, and it is consistent with the common view that the question be an objective consideration.\textsuperscript{10}

In determining whether there had been production in paying quantities, the court also considered whether the depreciation of equipment should be charged against profits. Consistent with the general view, the court held that depreciation should not be regarded as an expense.\textsuperscript{11} The expenses considered are limited to ongoing operating expenses and do not include the initial cost of drilling and equipping the well. Lifting expenses—the current expenses of removing the minerals from a producing formation to the surface—are the relevant items to be deducted, not the devaluation of capital expenditures. Only the current, ongoing status of the enterprise determines whether a reasonably prudent operator would continue, and once the initial capital expenditures have been made, the lessee should have the right to recoup the investment over as long a period of time as the lessee wishes.\textsuperscript{12} The question of profitability is subject to a reasonable period of time, and the lease remains in effect if income exceeds operating expenses over that time, even if the overall venture results in a loss due to the initial drilling and equipping costs.

A subsequent case from the supreme court also held that the lease in question remained in effect. The main issue in \textit{Pray v. Premier Petroleum, Inc.}\textsuperscript{13} was whether the cost of building a gas pipeline should be considered in determining whether there was production in paying quantities.\textsuperscript{14} After completing a producing well on the lessor’s property, the lessee chose to invoke a shut-in royalty clause, rather

\begin{itemize}
\item \textsuperscript{6} 228 Kan. at 592-93, 618 P.2d at 848.
\item \textsuperscript{7} \textit{Id.} at 593, 618 P.2d at 848.
\item \textsuperscript{8} \textit{Id.}
\item \textsuperscript{9} \textit{Id.}, (citing 2 E. KUNTZ, \textit{OIL AND GAS} § 26.7(u) (1964); Annot. 43 A.L.R.3d 60, 60-62 (1972)).
\item \textsuperscript{10} 3 H. WILLIAMS & C. MEYERS, \textit{supra} note 2, § 604.6.
\item \textsuperscript{11} 228 Kan. at 594, 618 P.2d at 848; see generally 3 H. WILLIAMS & C. MEYERS, \textit{supra} note 2, § 604.6(b).
\item \textsuperscript{12} 3 H. WILLIAMS & C. MEYERS, \textit{supra} note 2, § 604.6(b).
\item \textsuperscript{13} 233 Kan. 351, 662 P.2d 255 (1983).
\item \textsuperscript{14} As in \textit{Texas. Inc. v. Fox}, this requirement of production in paying quantities was implied by the court. The lease stated that it would continue in effect “as long as gas is produced,” without expressly requiring that production be in paying quantities. The court held that the term “in paying quantities,” although not expressly stated, is implied in the habendum clause. 233 Kan. at 353 (citing \textit{Texas. Inc. v. Fox} and \textit{Wrestler v. Colt}, 7 Kan. App. 2d 553, 644 P.2d 1342 (1982)).
\end{itemize}
than to build a pipeline to connect the well with the nearest gas line, three miles away. Even when a shut-in royalty clause does not require a well capable of producing in paying quantities, the law will imply such a requirement.\textsuperscript{15} The essential question in this case, then, was whether the gas well was capable of producing in paying quantities. The lessors argued that the lease had terminated, asserting that the cost of connecting the gas well to the pipeline would render the well unprofitable.

The trial court agreed, but the supreme court reversed for two reasons. First, terminating the lease would contravene the shut-in royalty clause, for which the lessee presumably paid valuable consideration. The shut-in royalty clause is generally designed to excuse production by the lessee in exactly the situation involved in this case, in which the lessee completed a well capable of producing in paying quantities, but production was prevented by lack of a reasonably accessible market.\textsuperscript{16}

The court offered a second reason. Consistent with its view in \textit{Texaco, Inc. v. Fox}, the court regarded pipeline costs as capital expenses, not to be considered in determining profitability. Only "direct" costs, or "current costs of operations in producing and marketing," are to be considered; these costs do not include the cost of pipeline construction.\textsuperscript{17}

One case during the survey period from the Kansas Court of Appeals also concerned this question of whether there had been production in paying quantities. In \textit{Wrestler v. Colt},\textsuperscript{18} only four of the lessee's fifty-three wells on the leased premises were producing; only one hundred barrels of oil had been produced from the lease in the preceding three years; and fourteen years had passed since secondary recovery ended. In addition, continued operation by the lessee would arguably require that the non-producing wells be plugged, as mandated by Kansas law,\textsuperscript{19} thus causing considerable additional expense to be charged against profits. Other expenses had also occurred for which the lessee failed to account, such as taxes and road maintenance.

One of the key questions in the case was whether the lessees had indeed incurred the obligation to plug the non-producing wells. The lessees were so obligated if the court could find that they had abandoned these wells. They argued that they had not abandoned the wells but had only temporarily ceased production. Their plans were to reinstate production by means of a new tertiary recovery system based on polymer injection. This method was still in the experimental phase and was being tested on a nearby lease. The court held that the lessee's actions constituted permanent, not temporary, cessation of production.\textsuperscript{20} The

\textsuperscript{15} 233 Kan. at 354, 662 P.2d at 258.
\textsuperscript{16} \textit{Id.} at 356, 662 P.2d at 259.
\textsuperscript{17} The court stated that direct costs "include labor, trucking, transportation expense, replacement and repair of equipment, taxes, license and permit fees, operator's time on the lease, maintenance and repair of roads, entrances, and gates, and expenses encountered in complying with state laws which require the plugging of abandoned wells and prevention of pollution." 233 Kan. at 355, 662 P.2d at 259 (quoting \textit{Reese Enterprises, Inc. v. Lawson}, 220 Kan. 300, 314-15, 553 P.2d 885, 898 (1976)).
\textsuperscript{18} 7 Kan. App. 2d 553, 644 P.2d 1342 (1982). Again, the lease did not expressly require that production occur "in paying quantities." This requirement, however, is implied by law. 7 Kan. App. 2d at 555, 644 P.2d at 1344 (citing \textit{Reese Enterprises}, 220 Kan. 300, 553 P.2d 885).
\textsuperscript{20} 7 Kan. App. 2d at 558-59, 644 P.2d at 1347.
court emphasized that the lessees could not estimate when the experimental phase would be completed, or determine whether it would be successful, or, if the method proved successful generally, whether it would be adaptable to the particular lease in question.\textsuperscript{21} In the court’s opinion, the lessees’ plan for continued production was simply too speculative and tenuous for the cessation to be regarded as only temporary. The court stated that because continued production from these wells depended upon “prospective but unassured” methods, the wells had been abandoned and the lessees were obligated to plug them.\textsuperscript{22} The expense of plugging was therefore a proper consideration in determining whether the lease had terminated by its own terms for lack of production in paying quantities.

One other case from the court of appeals, \textit{Medlin v. Mainline U.S.A., Inc.},\textsuperscript{23} presents a different angle on the question of whether a lease continues to be in effect. In \textit{Medlin}, the lessee conceded failure to produce in paying quantities by the end of the primary term. The lessee argued, however, that a “commencement clause” in the lease extended the lessee’s working interest. This clause stated that if the lessee had begun a well before the end of the primary term, the lease would continue in effect, even if production had not yet resulted. The clause required that the lessee complete the well with reasonable diligence and that oil or gas be produced in paying quantities as a result. The question was whether the lessee had acted “with reasonable diligence” in accordance with the commencement clause. The two wells on the leased property had been cased and cemented by the end of the primary term, and a core sample had been submitted for laboratory analysis. Two months after the primary term ended, the laboratory analysis was completed; it indicated that the wells were capable of profitable production. Four months later, the lessee had the two wells fractured, and at this point the lessors blocked access to the premises and instituted the action to quiet title. The trial court found that all of this activity could have been done within one week and that the lessee, who had instead taken six months to perform these tasks, had not acted with “reasonable diligence and dispatch.” The supreme court deferred to the trial court and affirmed its findings, terminating the lease.\textsuperscript{24}

In summary, these cases from the survey period offer no particularly startling or innovative answers to questions concerning the continued effectiveness of a lease and the existence of “production in paying quantities.” Rather, the cases are consistent with the general view of the issues involved.

\section*{II. The Effect of Off-Tract Production When The Subject Premises Have Been Unitized}

An interesting situation occurs when premises that are the subject of a term mineral interest are unitized with other premises and production occurs on the other premises. The issue is whether this off-tract production is sufficient to perpetuate the term mineral interest. Two cases during the survey period considered this question, which has not yet been clearly resolved in many states.\textsuperscript{25}

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\textsuperscript{21} \textit{Id.}
\textsuperscript{22} 7 Kan. App. 2d at 558, 644 P.2d at 1347 (citing Kahm v. Arkansas River Gas Co., 122 Kan. 786, 253 P. 563 (1927)).
\textsuperscript{24} \textit{Id.} at 35-38, 648 P.2d at 279-81.
\textsuperscript{25} See generally 6 H. Williams & C. Meyers, supra note 2, §§ 961-961.4.
including Kansas.

In *Classen v. Federal Land Bank of Wichita*,26 the original fee owner of two adjacent tracts (referred to as tract 1 and tract 3 in the court’s opinion) sold the tracts, reserving a one-fourth term mineral interest.27 The owner of the remaining three-fourths interest in the mineral rights, who was also the holder of the reversion following the term mineral interest, leased the two tracts to a lessee who later unitized tract 1 with other land. Tract 3 was not unitized. Subsequently, gas production occurred on the unit, but the producing well was not located on tract 1. The question was whether the off-tract production was sufficient to sustain the term mineral interest in either tract 1 or tract 3. The holder of the one-fourth term mineral interest argued that the off-tract production constituted actual production from tract 1 because tract 1 was included in the gas unit and the successful well was draining gas from under tract 1. Therefore, the production was sufficient to sustain the term mineral interest on tract 1. The holder of the one-fourth interest also argued that the unit gas production was sufficient to sustain the term mineral interest on tract 3, because the term mineral interest in both tracts was created by the same document, which provided for perpetuation so long as oil or gas was produced. In response, the reversioners argued that to sustain these mineral interests, the production must come from a well physically located on one of the two tracts.

A trilogy of prior Kansas cases, cited and discussed by the *Classen* court, formed an obstacle to the continuation of the mineral interest.28 These three cases seem to hold that off-tract production does not sustain such a mineral interest, even if the mineral interest and the productive land were part of the same unit. In *Dewell v. Federal Land Bank*,29 the court held that the payment of a shut-in gas royalty in itself did not extend a term mineral interest beyond the primary term because the payment did not constitute “production.”30 Subsequently, in *Stratmann v. Stratmann*,31 the *Dewell* holding was misstated and extended; the *Stratmann* opinion misinterpreted *Dewell* as holding that off-tract production on land with which the tract was unitized did not sustain a term mineral interest on the tract.32 Finally, in *Smith v. Home Royalty Association, Inc.*,33 the only case of the trio factually on point, the court held that production on off-tract lands did not sustain a term mineral interest on the tract, even when both parcels of land were contained within the same unit.34 *Dewell* and *Stratmann* were cited as authority.35

Even in the face of *Smith v. Home Royalty Association*, the *Classen* court held that the mineral interest on tract 1 remained in force by reason of the off-tract production within the unit.36 The court did not attempt to distinguish *Smith*, nor

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27 The interest was to last for twenty years and for so long thereafter as oil or gas was produced. Tract 2, which was adjacent to tract 1 but not to tract 3, is the subject of *Friesen v. Federal Land Bank of Wichita*, 227 Kan. 522, 608 P.2d 915 (1980), discussed infra at text accompanying notes 40-43.
30 Id. at 263, 380 P.2d at 384.
32 Id. at 663, 465 P.2d at 944.
34 Id. at 614, 498 P.2d at 103.
35 Id. at 611-12, 498 P.2d at 101.
36 228 Kan. at 433-35, 617 P.2d at 1262-64.
did the court expressly overrule it. Instead, the court chose only to “modify” the prior cases and to state that those decisions were “disapproved.”37 The court’s basis for this “modification” was the need, in view of “a frightening and progressive energy crisis due principally to a shortage of petroleum reserves,”38 to encourage gas production at minimum waste. Efficient production is promoted, the court said, by encouraging voluntary unitization. The question remains whether there will be a reinstatement of the Smith position when the court is able to find that the energy crisis has passed. The court also failed to explain why its logic did not apply to tract 3. A holding sustaining the mineral interest on tract 3 would certainly have encouraged voluntary unitization. But the court held that this mineral interest, which was not part of the unit, was therefore not sustained by the off-tract production.39

The court’s conclusion in Classen regarding tract 1 was not consistent with prior Kansas law and was particularly unexpected in view of its decision in a previously decided companion case, Friesen v. Federal Land Bank of Wichita.40 Friesen involved another tract, tract 2, which the original fee owner also had conveyed, reserving a one-fourth term mineral interest. The term expired with no mineral production. Later, the conveyees of the reversioner brought this action to quiet title.

No producing well was physically located on tract 2 when the twenty year term expired. But the one-fourth mineral rights owner argued that the term mineral interest in all three tracts was created by the same document, which provided for perpetuation so long as oil and gas were produced. Therefore, because there had been drainage from under tract 1 by the producing well on the neighboring unit, the term interest owner argued that this production perpetuated the term mineral interest in tract 2, as well as in the two tracts involved in Classen (tracts 1 and 3). Tract 2, like tract 3 but unlike tract 1 in Classen, was not part of the unit on which the successful gas well was located. Consistent with its later decision involving tract 3 in Classen, the court disagreed with the term mineral rights owner and held that the producing well did not perpetuate its mineral interest under tract 2.41

The Friesen and Classen decisions are not directly inconsistent with each other. The two cases are distinguishable on the basis that tract 1 in Classen was part of the productive unit and tract 2 in Friesen was not. But the Friesen court favorably cited the Smith trilogy and quoted the Smith assertion that “the holdings in Dewell and Stratmann have become a rule of property in this state.”42 The Friesen court also stated that off-tract production perpetuates a lease if part of the leased premises is part of a producing unit, but noted that this vicarious perpetuation does not apply to mineral deeds.43 In view of this restricted position, the Classen deci-

37 Id. at 437, 617 P.2d at 1263.
38 Id. at 435, 617 P.2d at 1264.
39 Courts in some other states would disagree and would hold that even the mineral interest in tract 3 continues in effect. 228 Kan. at 436, 617 P.2d at 1263 (citing Panhandle Eastern Pipe Line Co. v. Isaacson, 255 P.2d 669 (10th Cir. 1958) (applying Oklahoma law) and Southern Royalty Co. v. Humble Oil & Ref. Co., 151 Tex. 324, 249 S.W.2d 914 (1952)).
41 Id. at 526, 608 P.2d at 919.
42 Id. at 525, 608 P.2d at 918 (quoting Smith., 209 Kan. at 614, 498 P.2d at 102).
43 277 Kan. at 525, 608 P.2d at 918 (citing Somers v. Harris Trust & Savings Bank, 1 Kan. App. 2d 397, 566 P.2d 775 (1977)).
sion six months later represents a notable change in attitude.

The effect of unitization agreements on leases was considered in two federal cases during the survey period. Both cases involve the applicability of unitization agreements to wells drilled from a formation or level different from the level of the prior well that prompted the unitization agreement. In *Anadarko Production Company v. Taylor*, the issue was whether a unitization agreement, entered into in 1944 in order to obtain the maximum allowable production rate from a 1936 well producing from the Hugoton formation, now entitled owners of land within the unit to royalties from a 1975 well located on the unit but producing from a different formation. The plaintiff-producer operated the 1975 well, but not the 1936 well, and brought an interpleader action against all the landowners in the unit to determine its obligation to pay royalties. Although *Anadarko* did not consider whether off-tract production sustains a given term mineral interest, as did *Classen* and *Friessen*, it does offer an interesting discussion of the scope and effect of a unitization agreement.

Resolution of the case hinged on the intent of the parties to the unitization agreement. The court found that this intent was to limit the scope of the agreement to production from the formation from which the 1936 well was producing. Thus, royalties from production by the 1975 well were owing only to the lessors of the particular tract on which that well was located, and not to all the parties to the unitization agreement. The court derived this intent from certain clauses contained in various documents executed by the landowners. In particular, the court reviewed the leases entered into by the owners of the land on which the 1975 well was located (Texaco and Coulter), modifications of these leases, and the unitization agreement. Although these documents did not specify the effect of the unitization agreement, the court concluded that in view of the "obvious interrelationship" between the Kansas Corporation Commission's Hugoton Proration Order and the unitization agreement, "the only reasonable interpretation of the instruments in question is that the parties only intended the Hugoton formation to be controlled by the agreement." The documents included, for example, an intent clause in the modification of the Texaco lease stating that the lease was to be amended when the Kansas Corporation Commission entered an order granting the maximum allowable to the 1936 well. Modifications to the Coulter lease, as well as to the unitization agreement itself, also contained language indicating an intent to limit it to the Hugoton formation. Although the court based its disposition of this case on the interpretation of a particular agreement, and did not offer much in general principle, the case is typical of courts' struggles to construe those agreements in determining the effect of off-tract or different-level production.

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45 In 1944, after the completion of this well, the Kansas Corporation Commission issued a Basic Proration Order for the Hugoton Gas Field, in part to regulate the production rates of wells drawing from the Hugoton formation. In response to the regulations imposed by the Order, the producer, the owner of the land containing the 1936 well, and owners of land adjacent to that land executed a unitization agreement creating a gas production unit in order to obtain the maximum allowable production rate from the 1936 well. *Id.* at 105.
47 *Id.* at 109.
48 *Id.*
49 *Id.* at 109-10.
The *Anadarko* case was cited in the other federal case from the survey period, *Morgan v. Mobil Oil Corporation.* As did *Anadarko*, this case dealt with the effect of a unitization agreement on the vertical scope of a lease. Unlike the court in *Anadarko*, the *Morgan* court held that the unitization agreement applied to all horizons. In *Morgan*, lessors of three tracts within a single unit sought to terminate leases with the defendant with respect to geological formations below the Panoma-Council Grove formation. A successful gas well from a deeper formation (the Morrow formation) had been completed on the premises. When the lessee submitted to the lessors a division order based upon a 1938 unitization agreement and its 1974 amendment, the lessors argued that the unitization agreement did not apply to formations below the Panoma-Council Grove formation and that the lease rights to these lower formations had terminated. The court rejected the lessors' position, concluding that the unitization agreement, coupled with a successful well previously drilled in the Panoma-Council Grove formation, perpetuated the lessee's rights to all formations.

As in *Anadarko*, the *Morgan* court's conclusion was based on a finding of the parties' intent. The court started with general principles regarding the effects of unitization, one of which is that "[t]he life of the lease is extended as to all included tracts beyond the primary term and for as long as oil, gas or other minerals are produced from any one of the tracts included..." The court noted the broad language of the 1938 agreement, which stated in part:

The production of oil and/or gas from said unitized area in paying quantities, shall perpetuate the oil and gas rights of Lessee under all of said leases in said entire unitized area and relieve Lessee from all further obligation to drill and/or to pay delay rentals under any and all leases covering lands within said area... 

The 1974 amendment contained identical language, and neither document contained any horizontal or vertical limitations on perpetuation. The court also noted that the unitization agreement stated that production from the unitized "area" would sustain the leases and held that the word "area" applied to both horizontal and vertical divisions. Thus, both general law and the language of the particular instruments pointed toward perpetuation. The court also thought it significant that there was no Pugh clause, which generally excludes from perpetuation those portions of a lease that are not within the unit.

Finally, the court distinguished *Anadarko* by noting that it involved the division of royalties and not the partial termination of leases. This seems to be a rather facile distinction, and it should be noted that the court did not offer any reason why this distinction is significant. The court would have been more accurate had it simply said that each of the two cases turned on the intent of the

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51 Id. at 113.
52 Id. at 112.
54 556 F. Supp. at 111.
55 Id. at 113.
56 Id. at 113-14.
57 Id. at 114.
III. THE Royalty-MINERAL Distinction

Two cases during the survey period dealt with the problem of categorizing a given interest as either a royalty interest or a mineral interest.\textsuperscript{58} One of the cases gave a general definition of each, stating that a royalty interest "refers to the right to share in the production of oil and gas at severance" and is personal property, whereas a mineral interest "refers to oil and gas in place" and is real property.\textsuperscript{59} The distinction carries with it important ramifications, some of which are illustrated particularly well by the two cases. More generally, the distinction can determine the quantum of production to which the interest holder is entitled;\textsuperscript{60} whether the interest holder has the right to share in bonus payments and delay rentals;\textsuperscript{61} and whether the interest holder has the power to execute leases or to explore and to develop the premises himself.\textsuperscript{62}

In Kansas, the distinction may also determine whether the interest violates the Rule against Perpetuities,\textsuperscript{63} as demonstrated by \textit{Cosgrove v. Young}.\textsuperscript{64} The initial question in that case was whether a certain conveyance was of a royalty interest or of a right to minerals in place. In holding that a royalty interest had been conveyed, the court noted that resolution of this question is generally based on the intent of the parties as derived from the language of the conveying instrument.\textsuperscript{65} The court emphasized that no express right of ingress and egress was granted to the conveyee.\textsuperscript{66} This absence of an express easement is typically a key factor in determining whether a given interest is a mineral interest or a royalty interest.\textsuperscript{67} Logically, the question of whether a party was given the right to enter the premises should have a bearing on whether the party was also given the right to develop the minerals; the latter right would be meaningless without the former.

The court mentioned two other reasons for finding a royalty interest. The conveying document made no mention of minerals "in and under the land."\textsuperscript{68} A royalty interest is generally regarded as an interest in minerals that have been removed from under the surface, and not in minerals under the surface. There was also an absence of transferability and leasing rights. These rights are part


\textsuperscript{59} Palmer v. Brandenburg, 8 Kan. App. 2d at 158-59, 651 P.2d at 965.

\textsuperscript{60} A 1/8 royalty interest entitles the holder to 1/8 of production, whereas a 1/8 mineral interest generally entitles the holder to only 1/64 of production (1/8 of the typical 1/8 royalty). \textit{See generally} 1 H. Williams & C. Meyers, \textit{supra} note 2, § 303.1.

\textsuperscript{61} "The owner of a mineral interest is entitled to participate in lease bonus and delay rental unless the instrument provides otherwise. The owner of a royalty interest does not participate in either bonus or rental, unless a contrary provision appears in the instrument." \textit{Id.} § 303.2.

\textsuperscript{62} The owner of a mineral interest generally enjoys this power, whereas the owner of a royalty interest generally does not. \textit{Id.} §§ 303.3, 303.4.

\textsuperscript{63} \textit{See} Lathrop v. Eyestone, 170 Kan. 419, 227 P.2d 136 (1951); 1 H. Williams & C. Meyers, \textit{supra} note 2, § 303.6.

\textsuperscript{64} 230 Kan. 705, 642 P.2d 75 (1982).

\textsuperscript{65} \textit{Id.} at 706, 642 P.2d at 77.

\textsuperscript{66} \textit{Id.} at 712, 642 P.2d at 81-82.

\textsuperscript{67} \textit{See} 1 H. Williams & C. Meyers, \textit{supra} note 2, § 304.13.

\textsuperscript{68} 230 Kan. at 712, 642 P.2d at 82.
and parcel of ownership of minerals, and the court considered their omission significant.\textsuperscript{69}

In the course of its discussion, the court ran through a useful history of Kansas cases on the subject.\textsuperscript{70} The closest factually was \textit{Shepard v. John Hancock Mutual Life Insurance Co.},\textsuperscript{71} a 1962 case in which the court found a reservation to be a mineral interest but for reasons that supported the \textit{Cosgrove} court's finding of a royalty interest.\textsuperscript{72} In \textit{Shepard}, the court noted that although the reservation was a fractional "share of production," which points toward a royalty, this was outweighed by the facts that the reservation included the "right of ingress and egress"\textsuperscript{73} and that the reservation was of minerals "in and under the said land."\textsuperscript{74} Neither the presence in \textit{Shepard} nor the absence in \textit{Cosgrove v. Young} of these two items was dispositive, but in an exercise of construction, they are two factors that should have some bearing on whether the interest is a royalty or a mineral interest.

In terms of consequence, the most pertinent case cited in the \textit{Cosgrove} opinion is the 1951 case of \textit{Lathrop v. Eyestone}.\textsuperscript{75} In that case, the court held that a perpetual royalty interest had been conveyed, and that this conveyance was in violation of the Rule against Perpetuities.\textsuperscript{76} The \textit{Lathrop} court reasoned that the interest was contingent and might not become vested within the period of the Rule, noting that the mineral rights owners may never execute a lease of the minerals that would trigger payment of royalties. This position of the Kansas court appears to be unique,\textsuperscript{77} but as the \textit{Cosgrove} decision demonstrates, this Kansas anomaly continues to be applicable law.

The \textit{Cosgrove} court, after finding the interest in question to be a royalty interest, held that the interest did violate the Rule against Perpetuities.\textsuperscript{78} The court noted that the conveyance did not commit the conveyor or his successors to enter into any lease at any particular time; indeed, it was possible here, as in \textit{Lathrop}, for the grantor to develop the minerals himself, without ever entering into any lease. Thus, the royalty payments could conceivably not commence until after the expiration of the period of the Rule, if ever. The court supported its decision by noting that thirty-one years actually elapsed between the time of the conveyance and the initial obligation to pay royalties due to successful production.

For a royalty conveyance in Kansas to be effective, it apparently must be limited to existing leases or in some other way limited to the period of the Rule. In a

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\textsuperscript{69} \textit{Id.}

\textsuperscript{70} 230 Kan. at 709-12, 642 P.2d at 79-81.


\textsuperscript{72} 189 Kan. at 131-32, 368 P.2d at 24-25.

\textsuperscript{73} "An assignment or reservation of a royalty interest does not carry the right to explore for and remove the minerals in place, and the right of ingress and egress would not be necessary if all that was reserved was merely a right to share in production from the land as distinguished from the right to develop the same for the production of the minerals reserved." \textit{Shepard}, 189 Kan. at 131-32, 368 P.2d at 24, \textit{quoted in Cosgrove}, 230 Kan. at 711, 642 P.2d at 81.

\textsuperscript{74} 189 Kan. at 132, 368 P.2d at 24.

\textsuperscript{75} 176 Kan. 419, 227 P.2d 136 (1951).

\textsuperscript{76} \textit{Id.} at 428-29, 227 P.2d at 143-44.

\textsuperscript{77} "Since no other state has yet held perpetual royalty[ies] void under the Rule against Perpetuities, the mineral-royalty distinction is not made outside of Kansas for this purpose, nor will the duration of interests depend upon the distinction, in so far as determination of duration is influenced by possible invalidity under the perpetuities rule." \textit{1 H. WILLIAMS & C. MEYERS}, supra note 2, § 303.6.

\textsuperscript{78} 230 Kan. at 715, 642 P.2d at 83-84.
\end{flushleft}
vigorou dissent, Justice Herd argued against the Kansas position stated in *Lathrop*. Quoting from a leading treatise, he stated that *Lathrop* renders perpetual nonparticipating royalty interests ineffective and argued that conveyees in Kansas will therefore insist upon a participating fractional interest of the mineral estate, safe from the Rule. The result would be multiple ownership of mineral estates held in common tenancy, which would hamper conveyancing and development.

In addition to attacking *Lathrop* for its practical ramifications, Justice Herd also questioned the conceptual soundness of the decision. He noted that cases from other jurisdictions regard perpetual non-participating royalties as vested, and therefore not subject to the Rule. Going one step further, he quoted from one of these cases in which the court concluded that such an interest is not even a future interest, but instead is a present interest, and is therefore one that necessarily cannot be contingent and subject to the Rule. The argument for this position is that a perpetual non-participating royalty, unlike the classic contingent remainder, is not an interest that the holder stands to forfeit upon the occurrence of a stated condition. There may be uncertainty as to whether the interest will bear tangible fruit, but if the premises do yield production and royalties, the royalties will certainly go to the royalty owner and not to anyone else. The owner's vested interest is in an indeterminable quantum, but it is a vested interest nonetheless, and not one that is defeasible for the benefit of another party.

Ultimately, Justice Herd asserted that *Lathrop* should be overruled, but that an alternative would be simply to distinguish *Lathrop* from the current case on the basis that the instruments in *Lathrop* made the conveyance contingent upon future leases, whereas the instrument in *Cosegrove* was silent on this and simply directed the lessees to pay royalties to the conveyee. Justice Herd's alternative has some appeal, but the majority would have reached a far better result if it had simply overruled *Lathrop*, which is not supported by any other jurisdiction, lacks conceptual validity, and does not in any way promote the purposes of the Rule against Perpetuities to eliminate dead-hand control and to foster the alienability of future interests.

The other major case from the survey period dealing with the mineral-royalty distinction comes from the Kansas Court of Appeals. The conclusion in *Palmer v. Brandenburg* was that a reservation, pursuant to a journal entry in a prior partition proceeding, was of a term mineral interest, not a royalty. This was in spite of language in the journal entry of partition reserving “all of the oil and gas . . . which may be produced, saved and marketed” from the land. This language

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79 230 Kan. at 723, 642 P.2d at 89, (Herd, J., dissenting) (citing H. Williams & C. Meyers, supra note 2, § 325).
80 Id.
81 Id.
82 230 Kan. at 724-25, 642 P.2d at 90 (Herd, J., dissenting) (quoting Hanson, 224 Ark. at 435-36, 274 S.W.2d at 362).
83 230 Kan. at 725, 642 P.2d at 90 (Herd, J., dissenting).
85 Id. at 161, 651 P.2d at 967.
usually indicates the conveyance or reservation of a royalty interest, since the emphasis of the language is on minerals that have been removed from under the surface. Apparently, the journal entry did not expressly state whether the reservation was of a royalty or a mineral interest. It also made no mention of the usual items that typically indicate a mineral interest; there was no reservation of minerals “in and under and that may be produced from” the land, no reservation of easement rights of ingress and egress, and no retained right to lease.

The only point that the court could raise in support of a mineral interest was that the reservation was of “all of the oil and gas . . . which may be produced, saved and marketed . . .” The court focused on the word “all” and compared it to the basic description of a royalty as a “right to share in production.” It supported this with a statement from a prior case that “the term ‘royalty’ has reference to a right to share in production of oil and gas at severance.” On this basis alone, the court concluded that the reservation was of a mineral interest.

In the court’s view, the reservation of “all” of an interest, rather than a “share” or “part,” was sufficient to establish a mineral interest instead of a royalty interest, even though the reservation was of only those minerals that were “produced, saved and marketed.”

IV. THE STATUS OF ROYALTIES: PERSONALITY OR REALTY?

On a related question, the Kansas courts had occasion to affirm the position that accrued royalty interests are personality, not realty. Most jurisdictions agree with this characterization, which carries with it important consequences.

An example of these consequences is shown by Cosgrove v. Young, in which the court, after holding that the interest conveyed was a royalty interest, ruled that the interest could not be lost by adverse possession. The court stated that “[a]verse possession applies only to real property.” It followed that “[o]ne cannot obtain a royalty interest by adverse possession.”

A typical case in this area is Kumberg v. Kumberg. The question in Kumberg was whether a devise of “net profits” from certain land included royalties from a gas lease on that land. With little substantive discussion of the issue, the court of appeals affirmed the trial court’s conclusion that royalties, since they are personality, were included in “net profits” under the will and were to be distributed in

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86. See 1 H. Williams & C. Meyers, supra note 2, § 304.7, cited in 8 Kan. App. 2d at 159, 651 P.2d at 965.
87. This language typically indicates a mineral interest. 1 H. Williams & C. Meyers, supra note 2, § 304.5.
88. 8 Kan. App. 2d at 159, 651 P.2d at 965-66.
89. Id., at 159, 651 P.2d at 966 (court’s emphasis).
90. Id., at 159-60, 651 P.2d at 966 (court’s emphasis).
92. 8 Kan. App. 2d at 167, 651 P.2d at 967.
93. Id.
94. E.g., Shepard, 189 Kan. at 125, 368 P.2d at 19.
95. See R. Hemingway, Oil and Gas, § 2.3 (1983); see also 1 H. Williams & C. Meyers, supra note 2, § 213.
96. 230 Kan. 705, 642 P.2d 75 (1982) (for the part of this case dealing with the royalty-mineral interest distinction, see supra notes 63-83 and accompanying text).
97. Id., at 720, 642 P.2d at 87.
98. Id. (citing Stratmann v. Stratmann, 6 Kan. App. 2d 403, 408, 628 P.2d 1080, 1085 (1981)).
accordance with the Uniform Principal and Income Act.\textsuperscript{100}

All of this assumes an accrued royalty interest. A more interesting question in
Kansas arises in cases dealing with unaccrued royalty interests. Such a case is In re
Estate of Sellens,\textsuperscript{101} in which, as in Kumberg, the question of the status of a royalty
interest arose during the process of construing a will. The testator in Sellens de-
vised to his wife all of his personal property, certain real estate in fee, and a life
estate in half of the residue; to his children he devised the other half of the resi-
due and the remainder after the wife’s life estate. Certain parts of the realty were
subject to oil and gas leases and were productive. The question was whether the
right to receive unaccrued royalties was personalty and therefore the sole prop-
erty of the wife, or realty and therefore to be disposed of by the residuary clause.
The trial court held that the unaccrued royalties were personal property; the
court of appeals reversed.\textsuperscript{102}

The position of the courts on this point has been sufficiently vague to cause
uncertainty among the treatise writers. Professor Richard Hemingway states:

The decisions have been inconsistent in their definition of the lessor’s in-
terest in unaccrued royalty, i.e., royalty to be paid from future production
under the lease. It may be stated, however, that, with the exception of Kan-
sas and perhaps one or two other jurisdictions, the lessor’s interest in
unaccrued royalty is held to be a real property interest.\textsuperscript{103}

He cites Lathrop v. Eyestone\textsuperscript{104} as authority for this statement.\textsuperscript{105}

The “inconsistency” to which Professor Hemingway referred probably derives
from the “hybrid” nature of the oil and gas lease, which for some purposes is
effectively deemed a royalty interest and for other purposes a personalty inter-
est.\textsuperscript{106} But, says the Sellens court, a lessor’s rights to a royalty do not derive from
the lease but rather are reserved out of the initial mineral estate.\textsuperscript{107} Just as the
mineral interest itself is realty, so also is an interest in unaccrued royalties. In
the court’s words, such an interest is “uncaptured” and of “an undetermined amount
or location.”\textsuperscript{108} Only when the minerals have actually been “captured and sev-
ered from the realty” does the royalty interest become personal property.\textsuperscript{109}

The Sellens court apparently would disagree with the assertion that Kansas
holds a minority view on the status of unaccrued royalties. The court had no
trouble distinguishing Lathrop and other cases cited by the wife, the devisee of
the personal property. It stated that those cases defined royalty as a share in production
of minerals at severance and therefore had no bearing on the status of unac-
crued royalties.\textsuperscript{110} The court had more difficulty distinguishing Tegarden v.
Beers,\textsuperscript{111} a 1954 case holding that an unaccrued royalty interest is personalty.\textsuperscript{112}

\textsuperscript{100} Id. at 643, 623 P.2d at 512; see generally Kan. Stat. Ann. §§ 58-901 to -917 (1983), and in particular, § 58-909, which provides for the distribution of royalties.


\textsuperscript{102} Id. at 52, 637 P.2d at 486.

\textsuperscript{103} R. Hemingway, supra note 95, § 2.5(B), at 53 (emphasis added); see also 1 H. William & C. Mey-

ers, supra note 2, § 214.1.

\textsuperscript{104} 170 Kan. 419, 227 P.2d 136 (1951).

\textsuperscript{105} R. Hemingway, supra note 95.

\textsuperscript{106} 7 Kan. App. 2d at 50-51, 637 P.2d at 485.

\textsuperscript{107} Id. at 51, 637 P.2d at 486.

\textsuperscript{108} Id.

\textsuperscript{109} Id.

\textsuperscript{110} Id. at 50, 637 P.2d at 485.

\textsuperscript{111} 175 Kan. 610, 265 P.2d 845 (1954).

\textsuperscript{112} Id. at 614, 265 P.2d at 848.
The *Sellen* court offered the unsatisfactory explanation that the interest in *Teggarden* was created by a postnuptial contract rather than by a lease.\(^{113}\) When discussing royalties generated by a lease, the court had earlier stated that the lessor’s royalty rights are carved from the original mineral estate and do not originate with the lease;\(^{114}\) thus, the personality- or reality-nature of a lease is irrelevant to the status of an unaccrued royalty. Yet, in distinguishing *Teggarden v. Beers*, it was inexplicably significant to the *Sellen* court that a postnuptial contract was the basis for the royalty.\(^{115}\)

It is hoped that when the Kansas Supreme Court next considers this question, it will take its cue from the *Sellen* decision. The bar and the public would be well-served by a definitive statement characterizing unaccrued royalties as an interest in real property. Such a measure would not only be logical, but would be supported overwhelmingly by decisions from the other states.\(^{116}\)

V. MECHANIC’S LIENS

Two noteworthy cases\(^{117}\) from the survey period concern application of the Kansas oil and gas mechanic’s lien statute.\(^{118}\) In both cases, a supplier of materials sought to impose a mechanic’s lien on the materials, but failed to establish that it was included by the statute as a party entitled to a lien. The cases demonstrate the limits of the Kansas statute, confirm the tendency of courts to construe oil and gas lien statutes strictly,\(^{119}\) and, more generally, offer interesting examples of statutory interpretation.

In *Fender Pipe and Supply, Inc. v. Jenkins*,\(^{120}\) the supplier Fender sold certain rods and tubing to an oil and gas lessee for use in a well being drilled by the lessee. The tubing was used in the well, but the rods were not. The well proved to be a failure, and the lessee sold the rods and tubing to the defendants, who removed them from the premises. Subsequently, the plaintiff filed a lien on the rods and tubing pursuant to the Kansas oil and gas mechanic’s lien statute.

The Kansas Court of Appeals affirmed the trial court’s judgment allowing a lien on the tubing but denying a lien on the rods.\(^{121}\) The basis for the trial court’s judgment, and for the appellate court’s affirmation, was that the rods had not been *used* in the drilling operations. The statute applied to materials and supplies that were “used” in oil and gas operations. The appellate court applied a strict construction of the statute and said that it was not enough that the rods had been furnished to the lessee or that they had been temporarily stored on the premises; the rods had to have been actually used in the well operations in order

\(^{113}\) 7 Kan. App. 2d at 52, 637 P.2d at 486.

\(^{114}\) Id. at 51, 637 P.2d at 486.

\(^{115}\) Id. at 52, 637 P.2d at 486.


\(^{121}\) Id.
to be covered by the lien statute.\textsuperscript{122} Consistent with its strict constructionist view, the court rejected the plaintiff’s argument that a different standard should be applied in a case in which the materials or supplies are provided directly to the lessee; the statute simply did not provide for such a distinction.

During the survey period, the Kansas Supreme Court also determined that a supplier to a materialman is not entitled to a mechanic’s lien under the oil and gas mechanic’s lien statute. In \textit{Interlake, Inc. v. Kansas Power & Light Co.},\textsuperscript{123} the Kansas Supreme Court, like the court of appeals in \textit{Fender Pipe}, took a strict constructionist stance, finding no express provision in the statute for a supplier to a materialman.\textsuperscript{124} In that case, a gas pipeline owner, Kansas Power & Light Company (KPL), undertook to build a certain pipeline and ordered pipe from Continental Pipe & Tube Corporation. Continental informed KPL that it would procure the pipe from the plaintiff Interlake; Continental at no time had physical possession of the pipe. There was no verbal or written agreement between plaintiff and KPL. KPL paid Continental the full price, but Continental only partially paid the plaintiff before going bankrupt. The plaintiff then claimed a mechanic’s lien on the pipeline. The court of appeals agreed, but the supreme court ultimately reversed.

KPL argued that Continental was only a materialman, and that Interlake was therefore a materialman of a materialman. Because the statute did not expressly provide for a lien for a materialman of a materialman, Interlake was not entitled to a lien in this case.\textsuperscript{125} KPL conceded that the statute (chapter 55, section 208 of the Kansas Statutes Annotated) does cover a materialman of a subcontractor and a materialman of a contractor.\textsuperscript{126} But KPL argued that because Continental was neither a subcontractor nor a contractor, its materialman, Interlake, was not entitled to a lien. In KPL’s strict view, Continental’s lack of status was critical.

The court of appeals, however, took a different view and held the plaintiff was entitled to a mechanic’s lien. The status or “descriptive label” was not the critical point; rather, the court seemed to adopt a test that considered the intent and reasonable expectations of the parties:

What is important here is that Continental had a contractual relation with KPL to procure certain pipe; Continental entered into an agreement with Interlake, whereby, with KPL’s knowledge and at its direction, Interlake delivered the pipe to KPL, in care of KPL’s designated pipecoater in Illinois, thence to be transported to KPL for use on its property in Meade County, the pipe being so earmarked from the beginning of Continental’s transaction with Interlake; and finally the pipe was used on KPL’s property, as intended from the beginning by all concerned.\textsuperscript{127}

Thus, in contrast to \textit{Fender Pipe} and other Kansas cases,\textsuperscript{128} the court of appeals in \textit{Interlake} refrained from a strict interpretation of the lien statute.

This view drew a sharp response from Judge Abbott. His dissenting opinion

\textsuperscript{122} \textit{Id.} at 101-02, 612 P.2d at 1254.
\textsuperscript{123} 251 Kan. 251, 644 P.2d 385 (1982).
\textsuperscript{124} \textit{Id.} at 256-57, 644 P.2d at 1254-55.
\textsuperscript{125} \textit{Interlake, Inc. v. Kansas Power & Light Co.}, 7 Kan. App. 2d at 18, 637 P.2d at 466.
\textsuperscript{126} \textit{Id.} at 19-20, 637 P.2d at 467. Although the statute does not expressly provide protection for suppliers of materials to contractors, the statute was judicially extended to provide this protection in Mountain Iron & Supply Co. v. Branum, 200 Kan. 38, 434 P.2d 1015 (1967). \textit{See infra} note 135.
\textsuperscript{127} 7 Kan. App. 2d at 21-22, 637 P.2d at 468.
\textsuperscript{128} \textit{E.g., Gaudreau v. Smith}, 137 Kan. at 644, 21 P.2d at 330.
proceeded from the basic premise that oil and gas lien statutes should be "strictly construed," with their scope "not to be extended beyond that clearly granted by the legislature." He argued that Interlake was the "supplier of a supplier" and not the supplier of a contractor or subcontractor; Continental simply did not fit the definition of contractor or subcontractor. KPL had awarded the contract to another party to serve as contractor, and this other party had no dealings with either Continental or Interlake.

In Judge Abbott's view, the essential question was the status of Continental. Particularly, the main issue to be decided was whether Continental was a contractor. Judge Abbott's definition of a contractor was one who "actually construct[s] some part of the improvement." Continental clearly did not fit this definition; thus, Interlake was not the supplier of a contractor. This logical argument does have some force, and Judge Abbott buttressed his position with the policy consideration that under the majority opinion, oil and gas lessees would be compelled to ensure that even the remotest supplier and its employees had been paid. This, said Judge Abbott, clearly was not the intent of the legislature in devising the oil and gas lien statute.

On appeal, the Kansas Supreme Court agreed with Judge Abbott and reversed the court of appeals, again employing a strict construction of the lien statute. The supreme court expressed the issue as "whether Interlake comes within any classification afforded protection under the pertinent statutes." The court delineated the groups of entities entitled to such protection as follows:

K.S.A. 55-208 expressly affords protection to: (1) a legal entity furnishing machinery or supplies to a subcontractor under a contractor; (2) a person performing labor under a subcontract with the contractor; and (3) an artisan or day laborer employed by a contractor. Protection was judicially extended to a fourth category in Mountain Iron. That fourth category is suppliers of materials to a contractor.

Interlake's task, then, was to establish that Continental was either a subcontractor or a contractor under the first or fourth category. The court employed the test that Judge Abbott had used, found that Continental did not "actually construct" any of the improvements on the premises, and concluded that Continental was neither a subcontractor nor a contractor. Far short of applying physical labor to the construction of the pipeline, Continental did not at any time have physical possession of the pipe. Continental, therefore, was a materialman at best. Interlake could only be considered a supplier to a materialman and therefore was not included within the scope of the lien statute.

The key to both the Fender Pipe and the Interlake decisions was the restrictive


\[\text{130} \text{ 7 Kan. App. 2d at 23, 637 P.2d at 469.}\]

\[\text{131} \text{ Id. at 25, 637 P.2d at 470 (paraphrasing KAN. STAT. ANN. § 44-717(b)(3) (1981)).}\]

\[\text{132} \text{ 7 Kan. App. 2d at 26-27, 637 P.2d at 471-72 (Abbott, J., dissenting).}\]

\[\text{133} \text{ 231 Kan. at 251, 644 P.2d at 385.}\]

\[\text{134} \text{ Id. at 253, 644 P.2d at 386.}\]

\[\text{135} \text{ Id. at 254, 644 P.2d at 387. The Interlake court explained how the judicial extension came about: "It would, after all, be wholly illogical if protection were afforded to a materialman supplying a subcontractor but not to a materialman supplying a contractor. Mountain Iron represents basically a judicial correction of a statutory omission rather than an extension of the scope of the statute." Id.}\]

\[\text{136} \text{ Id. at 256, 644 P.2d at 389.}\]

\[\text{137} \text{ Id. at 256-57, 644 P.2d at 389.}\]
attitude of the courts in applying the lien statute. Both cases turn on the interpretation of single words contained in the statute. In Fender Pipe, the court denied a lien because the materials had not actually been "used" in the drilling operations; in Interlake, the party seeking a lien failed to establish that its orderer was either a "contractor" or a "subcontractor." The policy reflected in these decisions is not only strict interpretation of statutes for its own sake, but also the concern expressed by Judge Abbott that at some point the responsibility of lessees and pipeline owners to unpaid parties must be limited.

VI. MISCELLANEOUS CASES

Several other issues were addressed during the survey period in cases that warrant brief discussion. In general, these cases do not embody or represent new trends or deviations from established principles; they are examples of Kansas courts acting in accord with decisions of the majority of states as well as with Kansas precedent.

A. Geophysical Trespass

In Mustang Production Co. v. Texaco, Inc., the United States District Court of Kansas held that although a lessee's right to produce oil and gas is impliedly exclusive, the same is not true with the right to conduct geophysical exploration. The court concluded that different parties could be granted the right to conduct geophysical surveys. Production rights are impliedly exclusive; geophysical exploration rights are not. This assumes, of course, that the lease contains no express statement granting the exclusive right to conduct geophysical exploration.

B. Quitclaim Deeds

The effect of quitclaim deeds was briefly considered in Stratmann v. Stratmann. That case held that a quitclaim deed conveyed not only the conveyor's surface and mineral interests, but also all rights to royalties. This assumes that the quitclaim deed contains no express reservation of the royalty interest.

C. Division Orders

The effect of division orders was more thoroughly considered during the survey period. In Holmes v. Kewanee Oil Co., lessors sought to recover royalties based on market price in accordance with an express provision in their leases, rather than on gas purchase contract price, which for years had been the actual

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138 At one point the supreme court rejected Interlake's broad definition of "contractor": one who contracts to supply either labor or materials or both. Id. at 254, 644 P.2d at 387. Under this definition, Continental would have been either a contractor or subcontractor (under KPL), rather than a mere materialman as the court concluded. Interlake, as a supplier of Continental, would therefore have been entitled to a lien under the statute.
141 Id. at 425 (citing Northern Natural Gas v. Grounds, 292 F. Supp. 619, 668 (D. Kan. 1968)).
142 549 F. Supp. at 425; see also 1 H. WILLIAMS & C. MEYERS, supra note 2, § 230.
144 Id. at 406, 628 P.2d at 1085.
basis for royalties between the parties. The lessee argued that the lessors had signed a division order stipulating the royalty to be one-eighth of the gas purchase contract price and that this division order had altered the original leases. The court disagreed, because a division order is an instrument that is designed "primarily to protect the purchaser in the matter of payment for the oil and gas, and may be considered a contract between the sellers on the one hand and the purchaser on the other."\(^{146}\) The court held that although the division order bound the sellers (i.e., the lessors and the lessee) and the purchaser, it was not binding between the lessors and the lessee themselves and did not alter the terms of the leases.\(^{147}\)

In *Stratmann v. Stratmann*,\(^{148}\) a quitclaim deed had been executed by a royalty interest holder, thereby conveying his royalty interest. The royalty interest holder argued that he was nevertheless entitled to the royalty interest because the grantees were estopped from denying it. In discussing the extent to which a division order supported this estoppel argument, the court stated that "the mere signing of a division order which gives a right to the royalties has been held not to be enough to constitute estoppel."\(^{149}\) The court explained that a division order might estop the signers with regard to their buyer, but does not estop the signers as against each other.\(^{150}\)

**D. Partition**

In *Witt v. Sheffer*,\(^{151}\) the question was whether partition was appropriate when the interests held by the cotenants were substantially different in type and duration. Plaintiffs owned 220/320 of the mineral estate under a quarter section of land and the reversionary interest in the remaining 100/320 of the mineral estate; defendants owned a term interest in 100/320 of the mineral estate. Plaintiffs sought partition, and the court of appeals held that partition was appropriate, notwithstanding the different types of interests held by the cotenants.\(^{152}\) It is not essential for partition that the various interests be equal, but only that the party seeking partition be a cotenant of the interest being partitioned.\(^{153}\)

**E. Rights of the Non-Leasing Cotenant**

The case of *Krug v. Krug*\(^{154}\) involved questions regarding the rights of concurrent owners. Owners of a 9/11 interest in a mineral estate sued their lessee (Cities Service), the owner of the remaining 2/11 interest, and his lessee, for failure to develop.\(^{155}\) The defendant co-owner had refused to enter into any agreement


\(^{147}\) *Id.*


\(^{149}\) *Id.* at 409-10, 628 P.2d at 1086. The court ultimately allowed the estoppel claim, but for other reasons. See infra notes 196-98 and accompanying text.

\(^{150}\) 6 Kan. App. 2d at 410, 628 P.2d at 1086 (citing Wagner v. Sunray Mid-Continent Oil Co., 182 Kan. 81, 318 P.2d 1039 (1957)).


\(^{152}\) *Id.* at 872, 636 P.2d at 198.

\(^{153}\) *Id.* at 870, 636 P.2d at 197 (quoting 59 AM. JUR. 2d Partition § 31 (1971)).


\(^{155}\) *Id.* at 427, 618 P.2d at 324. Because the lessee of the 2/11 interest released his lease before the trial, that lessee was not a party at trial.
with Cities Service and claimed that he would be entitled to a full 2/11 of any production resulting from drilling by Cities Service.

The court of appeals essentially agreed with the defendant co-owner. It held that Cities Service had the right to drill without the consent of the defendant co-owner, but that Cities Service would have to account to him for 2/11 of any resulting production, less his proportionate share of costs for drilling, production, and marketing.\textsuperscript{156} His fractional share would be based on the entire production, not just on the lessee’s working interest.

\textbf{F. "Fraudulent Drainage" and the Reasonably Prudent Operator Standard}

A covenant to protect the leased premises from drainage by neighboring wells is implied in every oil and gas lease. This implied covenant imposes upon the lessee the obligation to drill offset wells to prevent undue drainage. This duty has one qualification. Generally, the lessee is required to drill an offset well only when the reasonably prudent operator would do so. This means that the lessee need not offset unless the offset well would return a reasonable profit.\textsuperscript{157}

If, however, the drainage is caused by the lessee himself, some courts will require the lessee to offset regardless of whether to do so is profitable and will hold the lessee absolutely liable for failure to do so.\textsuperscript{158} The plaintiffs-lessees in \textit{Secat v. Mesa Petroleum Co.}\textsuperscript{159} argued that Kansas law is the same, that a lessee in this situation should be held “strictly liable to prevent any drainage from plaintiffs’ land, regardless of the economic feasibility of drilling an offset well.”\textsuperscript{160} One rationale for such a position in cases from other jurisdictions is that the lessee has a duty to refrain from acts that are injurious to his lessor.\textsuperscript{161} The federal district court also noted the argument that a lessee with wells on two adjacent tracts will choose to produce more from one tract than from the other if the other is more heavily burdened by overriding royalties.\textsuperscript{162} In a case in which the royalty burden for two tracts is the same, the lessee still might choose to drill only from the neighboring land and not from both tracts, because the lessee would obtain the oil from under plaintiff’s tract without the cost of constructing and operating a second well. Because of this, some courts hold the lessor entitled to the protection of a strict liability rule.\textsuperscript{163}

After stating that Kansas cases failed to provide a clear answer on this, the court steered to a middle course between plaintiffs’ position and simple application of the reasonably prudent operator standard.\textsuperscript{164} Following the suggestion offered by a leading treatise, the court held that in a fraudulent drainage case the reasonably prudent operator standard should still apply, but that the burden of going forward with evidence and the ultimate burden of proof lie with the de-
fendant lessee to show that he acted with reasonable prudence in not drilling an offset well.\textsuperscript{165} The court noted that this position has been adopted by two jurisdictions.\textsuperscript{166} It failed to explain, however, how this position alleviates the potential for unfair dealing that exists when one party has leases on two adjacent tracts. It remains to be seen whether the Kansas Supreme Court will adopt this middle ground proffered by the \textit{Seacat} decision.

G. Abandonment

In \textit{Rook v. James E. Russell Petroleum, Inc.},\textsuperscript{167} the Kansas Court of Appeals held that if the basis for a claim of abandonment is the breach of an implied covenant, then demand of performance is a prerequisite to cancellation of the lease.\textsuperscript{168} In \textit{Rook}, neither the lessee nor his sublessee had performed any exploration or development for seventeen years. The trial court found that this constituted abandonment of production rights under the lease and ordered a forfeiture of these rights, although it held that the sublessee’s right under the lease to store gas on the premises remained in effect.\textsuperscript{169}

On appeal, the court of appeals held that the seventeen-year hiatus constituted a breach of the implied covenant of reasonable development, that forfeiture was an appropriate remedy, but that demand of performance was required before a court would order forfeiture.\textsuperscript{170} In the process, the court seemed to merge the notions of abandonment and breach of implied covenants: "Although we conclude that the evidence of defendant’s extended failure to resume production supports the inference of an intent to abandon, this is true because covenants to develop and explore the land are implied in the lease."\textsuperscript{171} The court concluded that when the intent to abandon is based on a breach of an implied covenant, notice is required for termination of the lease.\textsuperscript{172} Although there appears to be some support for this proposition,\textsuperscript{173} the court failed to explain why the intent to abandon in this case could only be based on the breach of an implied covenant. It would seem that abandonment was established by the lessee’s inaction regardless of whether that inaction also constituted a breach of an implied covenant.

H. Implied Easement Rights of a Mineral Rights Owner

In a 1981 case involving coal, \textit{Jensen v. Southwestern States Management Co.},\textsuperscript{174} the court of appeals held that while an option to purchase surface rights at some indefinite time generally does violate the Rule against Perpetuities, it does not do so if the option is created by lease or deed of the underlying minerals.\textsuperscript{175} The rationale for this position is that the conveyance of a mineral estate carries with it

\textsuperscript{165} Id. at 103-04. See 5 H. Williams & C. Meyers, supra note 2, § 824.2.
\textsuperscript{168} Id. at 415, 658 P.2d at 1062.
\textsuperscript{169} Id. at 412, 658 P.2d at 1059-60.
\textsuperscript{170} Id. at 415, 658 P.2d at 1062.
\textsuperscript{171} Id. at 414, 658 P.2d at 1062.
\textsuperscript{172} Id. at 415, 658 P.2d at 1062.
\textsuperscript{173} 3 W. Summers, \textit{Oil and Gas} § 469 (1958).
\textsuperscript{175} Id. at 441, 629 P.2d at 755.
the implied right to use the surface as is reasonably necessary to develop the minerals. This easement exists even if the deed or lease makes no mention of it.176

The supreme court expressed a similar view in Mai v. Youtsey.177 The dispute was between two assignees of separate portions of an oil and gas lease. Mai had two productive wells on his part of the assigned premises. His tank battery was located on the part of the premises retained by the lessee, Cities Service Oil Company. Mai could not reach the storage tank by simply traversing his and Cities Service’s land; he was prevented from doing so by a deep gully. He reached the storage tank by a road across defendant Kaiser-Francis’ part of the premises. Mai also piped salt water from his two wells to a salt water disposal well located on Kaiser-Francis’ land. Both the road and the disposal well had been used by Mai long before Kaiser-Francis acquired its assignment. Later, because of disagreements between the assignees concerning the price for use of the disposal well and Mai’s contributions for improvements of the road, Kaiser-Francis blocked access to the road. Mai sued for injunctive relief.

The court started with the proposition that when Cities Service, the original lessee, obtained its lease, it also received the implied rights to do all that was necessary for the production of oil and gas.178 This included the right of ingress and egress, for which the lease made no express provision. When Cities Service assigned part of its lease to Mai, it also assigned these same implied easement rights of ingress and egress. As subsequent assignee of Cities Service, Kaiser-Francis was on notice that Mai used the road for access purposes and took subject to this use. The court held that the barricade was wrongful and should be enjoined.179

I. Market Value Leases

Two supreme court cases from the period involved the application of “market value leases”—leases in which the royalty is set as a fractional share of the market value of the gas sold. In both cases, the royalties had been paid on the basis of the amounts actually received by producers for gas sold pursuant to gas purchase contracts with buyers. The market value of gas exceeded the contract prices, however, and the royalty owners argued that their royalties should be based on the higher figure represented by market value. In both cases, the court agreed.

In Holmes v. Kewannee Oil Co.180 and in Matzen v. Cities Service Oil Co.,181 the court stated that royalties could be based on a market value that was not only greater than the purchase contract price, but was also greater than the maximum price allowed by federal regulation.182 This is in accord with the 1977 Kansas case of Lightcap v. Mobil Oil Corp.183 This seems to be the firm position of Kansas

176 Id. at 441, 629 P.2d at 755-56.
178 Id. at 424, 646 P.2d at 479.
179 Id. at 425, 646 P.2d at 480.
and Texas, although, as the Matzen opinion stated, at least three other states disagree and hold that royalties from a market value lease are limited to a fraction of the gas purchase contract price. After considering evidence that the market value was affected by the highest regulated price in the area, the Matzen court found that the two were the same.

The Kansas-Texas view is preferable not only because it is a more literal interpretation of the market value lease, but also because it more accurately reflects the intent of the parties. As the Holmes opinion noted, the sale of gas usually involves the use of expensive pipelines, necessitating long-term contracts. The market value lease is a device that provides flexibility in calculating royalties over the long term. This purpose would be defeated by a view that tied these calculations to the price contained in the initial gas purchase contract.

J. Estoppel

In Holmes v. Kewanee Oil Co., the court also considered the lessee’s defense that the lessors had “kept less than was owed under the terms of the leases” and were therefore estopped from claiming more. The supreme court properly rejected that argument, although without much explanation. In a similar situation in Cosgrove v. Young, the court did supply some rationale for a similar result. In Cosgrove, the parties’ predecessors entered into an agreement whereby the mineral rights owner, the plaintiffs’ predecessor, conveyed a one-half royalty interest to the defendants’ predecessor. Later, the premises were unitized with a neighboring tract, and production occurred on the neighboring tract. After the interests came into the hands of the current parties, the plaintiffs claimed that the defendants were not entitled to the royalty interest because it was in violation of the Rule against Perpetuities. One of the defendants’ arguments was that the plaintiffs were estopped from denying the validity of the royalty interest. As in Holmes, the court properly rejected this argument of estoppel, but this time did so for express reasons. The court stated that the plaintiffs had not actively or intentionally misrepresented the validity of the royalty interest. There had also been no detriment to the defendants or to their predecessors; the unitization agreement had given them a benefit “to which they were not entitled as opposed to inducing reliance by the defendants to their detriment.” Thus, defendants failed to show either of the two essential elements of estoppel: misrepresentation and detrimental reliance. Similar reasoning, at least on the latter point, could have been employed in Holmes.

184 E.g., Texas Oil & Gas Corp. v. Vela, 429 S.W.2d 866 (Tex. 1968), cited in Holmes, 233 Kan. at 547, 664 P.2d at 1339.
186 233 Kan. at 857, 667 P.2d at 345.
189 Id. at 550, 664 P.2d at 1341.
190 Id. at 551, 664 P.2d at 1341.
192 See supra notes 75-83 and accompanying text.
193 230 Kan. at 718, 642 P.2d at 85.
194 Id. at 719, 642 P.2d at 86.
195 Id. at 718, 642 P.2d at 85.
A different result occurred in *Stratmann v. Stratmann*.\(^{196}\) Several co-owners persuaded another co-owner to quitclaim to them his one-fifth interest in certain land by telling him that the quitclaim would have no effect on his royalty interest. For some time, this co-owner continued to receive his royalty share. When his royalty share was threatened, he sued to quiet title to the royalty, claiming, among other things, that the defendants were estopped from denying his right to receive royalties. The court had no trouble in finding a misrepresentation. The statement that his royalty interest would not be affected by the quitclaim deed satisfied that requirement.\(^{197}\) Regarding detrimental reliance, the defendants argued that the plaintiff had suffered no detriment, but had enjoyed only benefit from receiving royalty payments in the past. The court disagreed, finding that by delaying their claim to the royalty interest, defendants caused the plaintiff to forego litigation on the matter until the evidence was stale and a key witness was dead. This was sufficient, said the court, to constitute detrimental reliance.\(^{198}\)

**K. Price Escalator Clauses**

Two cases from the period dealt with the effect of the Natural Gas Policy Act of 1978\(^{199}\) (NGPA) on indefinite government price escalator clauses contained in gas purchase contracts.\(^{200}\) Most gas purchase contracts are long-term arrangements, and therefore the seller will usually insist on some provision in the contract allowing for periodic adjustments of the initial price. This often takes the form of a price escalator clause that states that the price is to be adjusted if the maximum price permitted under government price control regulations increases. The question in cases involving these clauses is whether a given governmental action is sufficient to trigger a price increase under the gas purchase contract in accordance with the price escalator clause. The resolution of this question must necessarily depend upon interpretation of the language of the particular price escalator clause and application of the particular governmental action to that language.

*Energy Reserves Group, Inc. v. Kansas Power and Light Co.*\(^{201}\) illustrates the interpretation problems that these clauses present. The price escalator clause in that case stated that if any federal or Kansas governmental entity should fix a price for gas higher than that called for by the contract, then the contract price would be increased to the higher price. The clause also stated, however, that the increased price would be effective "as of the date of action of the governmental or regulatory authority establishing the regulated price, or its effective date, whichever is later . . . ."\(^{202}\) The producer, Energy Reserves Group (ERG), argued that the enactment of the NGPA in 1978 was sufficient to trigger a higher price and sought to terminate the contract because Kansas Power and Light refused to

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\(^{197}\) Id. at 409, 628 P.2d at 1086.

\(^{198}\) Id.


\(^{202}\) Id. at 177-78, 630 P.2d at 1145.
pay the higher price prescribed by section 105 of the NGPA. The United States Supreme Court affirmed the Kansas Supreme Court in holding that the escalation clause, by its own terms, was not a sufficient mechanism to trigger a higher price.

The Kansas court examined the price escalator clause and noted that any increased price would be effective either as of the date on which the government acted (here, November 9, 1978, the date of enactment of the NGPA), or the effective date of the action (here, December 1, 1978, the effective date of the NGPA), whichever is later. Under this clause, then, ERG could not increase its price in response to enactment of the NGPA until December 1, 1978. The court then examined the terms of section 105 of the NGPA, which ERG argued had triggered a price increase according to the contract. Section 105(b)(1) established the maximum lawful price as either the price set by the existing contract as of November 9, 1978 (which the court said was frozen in place by the contract itself until December 1, 1978), or the price established by section 102 of the Act, whichever is lower. Since the November 9 contract price was lower than the section 102 price, the terms of section 105 set the maximum price at the November 9 contract price level. The result is an escalator clause that is triggered by the adoption of a new statute but in a way that freezes the sales price at the old contract level. On appeal, the United States Supreme Court deferred to the state court on what it termed an “interpretation of state law.”

ERG also attempted to invoke the price redetermination provisions of the contracts, which called for a consideration of prices paid under other purchase contracts for gas produced in Kansas. Kansas Power and Light argued that the Kansas Natural Gas Price Protection Act prevented the provisions from escalating the contract price. KPL cited a provision of that Act, stating that intrastate gas prices “shall not be taken into account in applying any indefinite price escalator clause contained in any gas purchase contract subject to this act . . . .” The question then became whether the price redetermination provisions were “indefinite price escalator clauses.” The Kansas Supreme Court said that they were such clauses, according to the definition of “indefinite price escalator clause” set out in the Act, and that the statute therefore precluded price increases pursuant to such provisions. On appeal, the United States Supreme Court affirmed the decision and upheld the Kansas statute, holding that it did

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203 ERG invoked § 105 because it applies to intrastate gas. “The maximum lawful price computed under subsection (b) of this section shall apply to any first sale of natural gas delivered during any month in the case of natural gas, sold under any existing contract or any successor to an existing contract, which was not committed or dedicated to interstate commerce on November 8, 1978.” 15 U.S.C. § 3315(a) (1982).
204 103 S. Ct. at 709.
205 230 Kan. at 185, 630 P.2d at 1149.
207 103 S. Ct. at 710.
209 This state statute is not in conflict with the NGPA, such a state statute is specifically permitted under § 602(a) of the NGPA, 15 U.S.C. § 3432(a) (1982).
211 “‘Indefinite price escalator clause’ means any provision of a gas purchase contract which provides for the establishment or adjustment of the price of natural gas delivered under such contract by reference to other prices for natural gas, for crude oil, or for refined petroleum products.” KAN. STAT. ANN. § 55-1402(c) (1983).
212 230 Kan. at 185, 630 P.2d at 1150.
not violate the Contract Clause of the Constitution of the United States. 213

In an earlier case from the survey period, *Mesa Petroleum Co. v. Kansas Power and Light Co.* 214 the Kansas Supreme Court had also held a price escalator clause to be ineffective in triggering a higher price after enactment of the NGPA. 215 The clause in *Mesa* was similar to the one in *Energy Reserves*, and the rationale by the *Mesa* court was similar to that in *Energy Reserves*. The clause was effective to incorporate section 105 of the NGPA. Under section 105, however, the maximum lawful price was either the price called for by the existing contract as of November 9, 1978, or the maximum price under section 102 of the NGPA, whichever is lower. "Clearly," said the court, "the contract price on November 9, 1978, is the lower and remained the maximum lawful price under Section 105(b)(1)." 216 As in *Energy Reserves*, the result was a clause that incorporated section 105, but in a way that did not result in an escalated price.

VII. LEGISLATIVE DEVELOPMENTS

A. MINERAL SEVERANCE TAX ACT

Of the four major statutes enacted by the legislature during the survey period, the one receiving the most publicity was the Mineral Severance Tax Act. 217 Although a detailed exposition of the Act is beyond the scope of this article, a few notes about the Act are appropriate. Section 2(a) of the Act calls for a tax of eight percent of the gross value of all oil and gas "severed from the earth or water in this state." 218 Since "gross value" is defined as the "sale price of oil or gas at the time of removal of the oil or gas from the lease or production unit," 219 removal from the premises, rather than severance from the earth, is the key event. The tax is due on the twentieth day of the second month following the end of the month in which the actual removal from the lease occurred; 220 mere storage of the severed minerals on the premises apparently does not trigger tax liability. The director of taxation is authorized to determine the value of the removed minerals, but only in limited circumstances, such as if the minerals are exchanged for something other than cash, if there is no sale at the time of removal, or if the consideration, because of the relationship between buyer and seller, does not reflect market value. 221

Ultimate responsibility for payment of the tax rests with the producer; 222 not

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213 U.S. Const. art. I, § 10, cl. 1, construed in 103 S. Ct. at 709.
215 229 Kan. at 638, 627 P.2d at 195.
216 Id.
219 Id. § 79-4216(d).
220 Id. § 79-4220(a).
221 This determination is to be based on "the cash price paid to producers for like quality oil or gas in the vicinity of the lease or production unit at the time of the removal of the oil or gas from the lease or production unit." *Id.* § 79-4216(d).
222 "Producer" is defined as "any person owning, controlling, managing or leasing any coal, salt, oil or gas property or oil or gas well or coal or salt mine, and any person who severs in any manner any coal, salt, oil or gas in this state, and shall include any person owning any direct and beneficial interest in any coal, salt, oil or gas produced, whether severed by such person or some other person on their behalf, either by lease, contract or otherwise, including a royalty owner." *Id.* § 79-4216(h).
with the purchaser.\textsuperscript{223} If the lease operator\textsuperscript{224} does not give the purchaser and the director of taxation written notification that he elects to remit the tax, however, the first purchaser must withhold the tax from his payments to the operator or producer and remit it directly to the director of taxation.\textsuperscript{225} If the purchaser withholds but fails to remit to the director of taxation, the operator or producer has a cause of action against the purchaser for the amount of the tax, plus penalties, interest, attorney’s fees, and court costs.\textsuperscript{226} This cause of action would be small consolation, however, if the purchaser is insolvent, in which event the director of taxation would proceed against the producer. Thus, the producer would essentially be paying the tax twice. In view of this possibility, it would generally be beneficial to the producer if the operator gives the appropriate notice to the purchaser and the director and remits the tax himself, particularly if the purchaser appears to be financially unsound.

The purchaser, however, also has motivation to insist or remitting the tax himself. Section 5(b) of the Act provides for a government lien on the severed minerals in the possession of the operator, producer, first purchaser, or any subsequent purchaser, to secure the payment of the tax.\textsuperscript{227} To be certain that his purchase is lien-free, then, a purchaser may wish to pay the tax himself. A potential conflict exists, therefore, in that both the operator and the purchaser in a given case may wish to remit the tax to the director of taxation in order to assure that their respective interests are adequately protected. In such a case, although the statute does not give a clear answer, it appears that the operator would have priority to remit the tax.

The most interesting part of the Act, and the part most likely to become the subject of litigation, is section 2(b), which delineates the types of production that are exempt from the tax.\textsuperscript{228} Only some of these exemptions will be mentioned here.

Gas production is exempt if the gas is used in the production of other minerals ("for lifting oil, recycling, or repressuring"); if it is lawfully flared or vented; or if it is inadvertently lost through leaks or blowout.\textsuperscript{229} It is also exempt if it is severed from a well having an average daily production of eighty-one dollars or less per day and if the well "has not been significantly curtailed by reason of mechanical failure or other disruption of production."\textsuperscript{230}

Oil production is exempt if it is inadvertently lost by leaks or accident.\textsuperscript{231} It is also exempt if it is produced from a lease or unit on which the average daily production from all wells on the lease or unit is two barrels or less; this daily maximum is raised to three barrels if the completion depth of producing wells is 2,000 feet or more; the maximum is also three barrels if the oil is from a lease

\textsuperscript{223} Id. § 79-4220(a).
\textsuperscript{224} "Operator" is defined as "the person primarily responsible for the management and operation of coal, salt, oil or gas productions from a lease, production unit or mine." Id. § 79-4216(f).
\textsuperscript{225} Id. § 79-4220(a).
\textsuperscript{226} Id.
\textsuperscript{227} Id. § 79-4220(b).
\textsuperscript{228} Id. § 79-4217(b).
\textsuperscript{229} Id. § 79-4217(b)(1)(A),(C),(E).
\textsuperscript{230} Id. § 79-4217(b)(1)(D).
\textsuperscript{231} Id. § 79-4217(b)(2)(G).
under a water flood process and the wells are less than 2,000 feet. To encourage the development of tertiary recovery processes, the statute exempts oil that results from such a process. To encourage exploration and new drilling, the statute exempts oil or gas that is produced from a new pool from which production began or on after April 1, 1983. This exemption lasts for twenty-four months from the date of initial production from the new pool.

B. Kansas Natural Gas Price Control Act

The Kansas Natural Gas Price Control Act, also enacted in 1983, establishes as the maximum price for the sale of gas the contract price "actually paid" by the buyer to the seller as of May 5, 1983. Section 4 of the Act sets forth an exception to the ceiling price for "new wells," which are defined as either wells drilled after February 19, 1977, or wells increased in depth by at least 1,000 feet after February 19, 1977. For the latter, the maximum price is established by section 102 of the federal Natural Gas Policy Act as of May 5, 1983. Section 5 of the Kansas Natural Gas Price Control Act provides for an adjustment if the producer pays a severance tax, in which case the maximum price is increased by an amount equal to the producer’s share of the tax. Even then, however, the total price cannot exceed the price allowed by the federal Natural Gas Policy Act. Section 6 of the Kansas Natural Gas Price Control Act excludes contracts executed or "voluntarily renegotiated" after May 5, 1983.

C. Dormant Minerals Act

The Dormant Minerals Act provides that a mineral interest that is unused for twenty years lapses and reverts to the current surface owner. For purposes of the Act, the mineral interest is deemed to be used, and remains in effect, if: (a) there is production; (b) operations are conducted for injection, withdrawal, storage, or disposal of water, gas or other fluids; (c) rentals or royalties are paid; (d) the mineral interest is part of a unit; or (e) taxes are paid on the mineral interest. The interest lapses if none of these occurs for twenty years. The current surface owner is then authorized to publish notice in a local newspaper of the lapse to the mineral rights owner. If the mineral rights owner can be located

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232 In all three cases, the taxpayer must establish that the wells were not "significantly curtailed by reason of mechanical failure or other disruption of production." Id. § 79-4217(b)(2).
233 Id. § 79-4217(b)(2)(C).
234 Id. § 79-4217(b)(4).
235 Id.
237 Id. § 55-1419.
238 KAN. STAT. ANN. § 55-1418 (1983) adopts the definition of "new wells" found in KAN. STAT. ANN. § 55-1402(d) (1983).
239 Id. at § 55-1419; § 102 of the Natural Gas Policy Act is codified at 15 U.S.C. § 3312 (1982).
240 KAN. STAT. ANN. § 55-1420.
241 Id.
242 Id. § 55-1421.
244 KAN. STAT. ANN. § 55-1602.
245 Id. § 55-1603(a). In addition, a mineral interest in solid minerals such as coal is deemed to be used when "there is production from a common vein or seam by the owners of the mineral interest." Id. § 55-1603(a)(5).
by reasonable effort, he must also be sent notice by restricted mail.\textsuperscript{246} The interest owner is then allowed to file a statement of claim within sixty days either of this notice, or, if such notice is not given, within sixty days of “receiving actual knowledge that the mineral interest had lapsed.”\textsuperscript{247} Section 4(a) also allows the interest owner to file a statement of claim at any time before the twenty-year period has run or within three years of the enactment of the Act, whichever is later.\textsuperscript{248} This statement of claim, which is to be filed with the register of deeds in the county where the land is located, has the effect of preventing the lapse and reversion. Section 4(a) states that upon the filing of a statement of claim, “it shall be considered that the mineral interest was being used on the date the statement of claim was filed.”\textsuperscript{249}

The prudent surface owner who wishes to establish clear title to the mineral rights should give notice by publication rather than relying on “actual knowledge.” It would also be prudent to conduct a diligent search for the mineral interest owner in order to provide him with notice by restricted mail, if possible. Passage of sixty days would then be necessary before the surface owner could safely assume that he had clear title to the mineral estate. In any event, a quiet title action might also be advisable for maximum assurance.

\textbf{D. Deep Horizons Act}

The Deep Horizons Act,\textsuperscript{250} also enacted in 1983, states that all oil and gas leases are presumed to contain “an implied covenant to reasonably explore and to develop the minerals which are the subject of such lease.”\textsuperscript{251} Although this initial provision sounds like a simple restatement of the reasonably prudent operator standard, the statute is more specific. Section 2 states that if the lessor proves lack of production from a particular “subsurface part” (i.e., zone or formation), and if initial production from the lease commenced at least fifteen years prior, then a presumption arises that the lessee has breached the covenant of reasonable exploration or development as to that subsurface part.\textsuperscript{252} The lessee can rebut this presumption by evidence that he “has fully complied with such covenant.”\textsuperscript{253} Section 4 states that if the court finds a breach of the covenant of reasonable exploration or development, the court may either grant the lessee a reasonable time within which to comply or order termination of the lease as to that particular subsurface part.\textsuperscript{254}

Despite its specific provisions, this statutory imposition of the implied covenants adds little to current law, since Kansas case law has held that every oil and gas lease contains an implied covenant to reasonably explore and develop.\textsuperscript{255} In determining whether the lessee acted reasonably, the court will essentially continue to employ the reasonably prudent operator standard and will relieve the

\begin{itemize}
\item \textsuperscript{246}Id. \S 55-1605.
\item \textsuperscript{247}Id. \S 55-1604.
\item \textsuperscript{248}Id. \S 55-1604(a).
\item \textsuperscript{249}Id.
\item \textsuperscript{252}Id. \S 55-224.
\item \textsuperscript{253}Id. \S 55-225.
\item \textsuperscript{254}Id. \S 55-226.
\item \textsuperscript{255}E.g., Myers v. Shell Petroleum Corp., 153 Kan. 287, 110 P.2d 810 (1941).
\end{itemize}
lessee of liability if the failure to develop a deeper horizon was reasonable under the circumstances.\textsuperscript{256} The lessee should still be able to escape liability if he can show that developing the particular subsurface part would not be profitable to him. Although the statute seems to create a covenant to explore deeper levels, this obligation will arise only if the exploration would be reasonable.

The statute does add some specificity to the law by providing that a fifteen-year period must pass before the presumption of breach arises.\textsuperscript{257} The statute also creates the procedural change of shifting the burden of proof to the lessee to show that the lack of production from the deeper horizon is reasonable.\textsuperscript{258} Other than these two items, however, the statute does not seem to alter significantly the current status of the law.

\section*{VIII. Conclusion}

The legislature and the courts dealt with a wide range of issues in oil and gas law during the last three years. While statutory enactments necessarily create change, the cases introduced only a few new wrinkles and surprises.\textsuperscript{259} The judicial opinions were, for the most part, consistent with prior Kansas decisions. This study, then, is not only a survey of the last three years, but to some degree it also serves as a more general exposition of Kansas oil and gas law.

\textsuperscript{256} "This act shall not alter or affect substantive rights or remedies under any such mineral leases under the common law or statutes of the state of Kansas." \textit{Kan. Stat. Ann.} § 55-229.

\textsuperscript{257} \textit{Id.} § 55-224.

\textsuperscript{258} \textit{Id.} § 55-223.

\textsuperscript{259} \textit{E.g.}, Classen v. Federal Land Bank of Wichita, 228 Kan. 426, 617 P.2d 1255 (1980); for discussion see supra notes 26-39 and accompanying text.