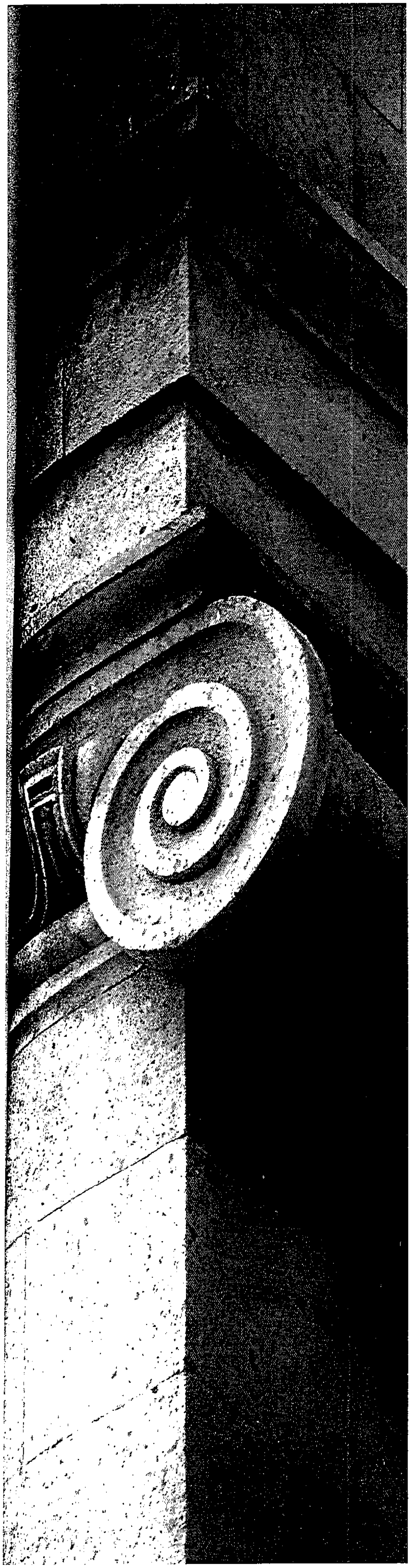

Oil & Gas Law
Nationwide Comparison of Laws on Leasing, Exploration and Production

KANSAS

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I. CHARACTERISTICS OF THE MINERAL AND ROYALTY ESTATE

A. Definition of Oil, Gas and Casinghead Gas

Oil is defined by K.S.A. 79-4216(f) to mean petroleum or other crude oil, condensate, casinghead gasoline or other mineral oil which is severed or withdrawn from below the surface of the oil or water in this state. The definition of oil has been held to include basic sediment and water (BS&W). The value of the BS&W is determined by the amount of recoverable oil which reflects the amount of recoverable oil contained in the BS&W. *Director of Taxation, Dept. of Revenue v. Kansas Krude Oil Reclaiming Company*, 236 Kan 450, 691, P.2d 1303 (1984).

Gas means natural gas taken from below the surface of the earth or water in this state, regardless of whether from a gas well or from a well productive of oil or any product. K.S.A. 79-4216(c). Gas has been held to include that condensate or distillate produced as a constituent element of produced gas are considered part of the gas. An excellent discussion of the gas/oil distinction is contained in *Skelly Oil Co. v. Savage*, 202 Kan. 239, 447, P.2d 395 (1968).

Generally in Kansas, casinghead gas will be considered as part of the oil production while distillate or condensate is considered part of the gas production stream. As such, distillate or condensate may be pooled as part of the pooling authority in many leases for the pooling of gas. Casinghead gas is gas which is produced from an oil well, whereas natural gas and its constituent wet elements, distillate, are produced from a gas well. *Skelly Oil v. Savage*, 202 Kan. 239, 447 P.2d 395 (1968).

B. Elements of a Mineral Interest

The ownership of a mineral estate, unless otherwise limited by the terms of the grant, includes:

1. The implied right to enter and make reasonable use of the underlying surface estate to the extent necessary to explore and develop the mineral estate. *Thurner v. Kaufman*, 237 Kan. 184, 699 P.2d 435 (1984).
2. To enter the land encompassed by the mineral interest to explore for and develop the minerals. *Corbin v. Moser*, 195 Kan. 252, 403 P.2d 800 (1965).
3. The executive or a leasing right (the right to execute an oil and gas lease). *Shepard v. John Hancock Mut. Life Ins. Co.*, 189 Kan. 125, 368 P.2d 19 (1962).
4. The right to receive any rights or benefits created pursuant to an oil and gas lease including rentals, bonuses and royalty. *Shaffer v. Kansas Farmers Union Royalty Co.*, 146 Kan. 84, 69 P.2d 4 (1937).
5. The right to sell or otherwise convey all or part of the mineral estate. *Central Natural Res. Inc. v. Davis Operating Co.*, 288 Kan. 234, 201 P.3d 680 (2009).

The executive rights, related rights to bonus, delay rental and royalty are referred to as the interest owners right to "participate." These rights may be separated from the mineral interests in whole or in part, creating a "non-participating mineral interest." These interests may be owned, conveyed, reserved or inherited separately from the other interests. *See Drach v. Central Natural Res., supra.*

A mineral estate is classified as real property in Kansas. *Froelich v. United Royalty Co.*, 178 Kan. 503, 290 P.2d 93 (1955), *modified* at 179 Kan. 652, 297 P.2d 1106 (1956). Non-mineral interests are considered personal property. Therefore, a royalty interest will be held to be personal property, a mere right to share in oil and gas when it is actually produced. *Magnusson v. Colo. Oil & Gas Corp.*, 183 Kan. 568, 331 P.2d 577 (1958). However, where the right to receive royalty is associated with a mineral interest, that right will be classified as a real property interest. *In re Estate of Sellens*, 7 Kan. App. 2d 48, 637 P.2d 483 (1981).

Kansas has adopted the ownership in place theory. The landowner presently owns, in addition to surface rights, any oil, gas or other minerals which may be located beneath the land. *Zinc Co. v. Freeman*, 68 Kan. 691, 75 P. 995 (1904). However, the landowner's interest is subject to the rule of capture. *Zinc Co. v. Freeman, supra; Anderson v. Beech Aircraft Corp.*, 237 Kan. 336, 699 P.2d 1023 (1985).

There are several cases which discuss the "other mineral" question in Kansas. The leading case that is closest to the instant facts is the case of *Wulf v. Shultz*, 211 Kan. 724, 508 P.2d 896 (1973). That case was a declaratory judgment action between the Wulfs who alleged that there were owners of an entire tract of land in fee simple located in Allen County, Kan. The defendant, Shultz, was the owner of an oil and gas lease covering the property. The defendant claimed that the oil and gas lease covered not only oil, gas and related minerals but also all other mineral substances.

The issue presented to the Supreme Court was whether the lease in question granted to the lessee the right to extract coal, clay, gypsum, limestone, gravel, rock, dirt and argillaceous materials from the leasehold as well as oil and gas and their derivatives. The oil and gas lease granted:

> full and exclusive authority to enter upon said premises and to dig, drill, operate for and procure natural gas, petroleum and *other mineral substances*, together with the right of taking upon said premises and removing therefrom at pleasure, any machinery, tools, lumber, pipe, casing and other things necessary in said work; . . .

The Kansas Supreme Court noted:

> The record reveals the existence of a strata of limestone 30 to 35 feet thick located approximately three feet below the surface of much of the tract. There are also limestone outcroppings on the tract. This limestone would be relatively easy to quarry and is of considerable value in the manufacture of cement. At the time the lease was executed, the limestone was being quarried a short distance away.

The Supreme Court, in an express adoption of the "surface destruction test," found that the quarrying of limestone was not within the contemplation of the original parties to the lease. The Court stated,

> The presence of limestone near the surface was known to the parties and would have to be mined by open pit or strip-mining method, such operations necessarily destroying the surface for agricultural or grazing purposes. It is apparent from the whole lease, that the parties, in using the words 'natural gas, petroleum and other mineral substances,' did not intend that the mineral estate should be allowed to destroy the surface estate. Had they so intended, provision would have been made in the lease.

The Court goes on to hold,

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

The Court cites *Guinn v. Acker*, 451 S.W. 2d 549 (Tex. 1970) as support. The *Guinn* case is a Texas surface destruction case which was affirmed in *Acker v. Grimm*, 464 S.W. 2d 348 (Tex. 1971). The Court goes on to discuss the *ejusdem generis* rule which is,

> a well-known maxim of construction to aid in ascertaining the meaning of a statute or other instrument, the doctrine being that where an enumeration of specific things is followed by some more general word or phrase, such general word or phrase is to be held to refer to things of the same kind with respect to the classification which immediately precedes it — that is to say, where general words follow more particular words in an enumeration describing the subject matter, general words are construed to embrace only objects similar in nature to those enumerated by antecedent specific words.

The case of *Keller v. Ely*, 192 Kan. 698, 391 P.2d 132 (1964) involved the construction of two instruments, one contained an exception and reservation as follows,

> Except all gas, oil and mineral rights which parties of the first part reserve and the right to enter upon said premises for the sole and only purpose of mining and operating for oil and gas, laying pipelines, building tanks, power stations and structures thereon to produce, save and take care of said products.

The second deed likewise contained a reservation reading,

> As a most important part of the consideration for the purchase of this land, party of the first part hereby reserves all of the oil, gas, casing-head gas and other liquid semi-solid and solid minerals in and under and that may be produced from the above described lands, together with the rights of ingress, egress and regress to and from the said premises for the purpose of mining, exploring, operating, producing, storing and removing therefrom, all of the oil, gas, casing-head gas and other liquids semi-solid and solid minerals including all of the lease interests and future rentals on said lands for said minerals. And all of the mineral rights and all other rights hereinbefore set out are hereby as fully retained by first party and are to be as full and free as though this deed had not been executed.

The issue before the Court was whether the reservations in question include gypsum. As to the first instrument, the trial court applied the doctrine of *ejusdem generis* and held that the phrase "all gas, oil and mineral rights" applied only to the oil and gas in and under the land, but did not include gypsum. The second instrument the trial court again adopted the analysis of *ejusdem generis* but also noted that the trial court had found

> . . . From the meager evidence I can only assume that the gypsum might be taken either through mining or quarrying. If the latter, could either of the parties have intended that little or much of the surface of the land in question under the reservation was subject to being laid waste by the taking of gypsum and/or sand and gravel? If the grantee acquired this property for a song, perhaps 'yes'; if for a valuable consideration, certainly 'no'.

The Supreme Court affirmed the trial court's interpretation of both instruments and noted that gypsum had been produced in the area as early as 1912 and that was being produced at the time the deeds in question were executed. The Court found that had the grantor intended to reserve gypsum, it would have been very easy to have specifically said so.

Further support for the proposition that the surface owner owns limestone or other substances at or near the surface is found in the case of *Audo v. Mining Co.*, 99 Kan. 454 (1917). That case involved interpretation of deeds for property which previously had the mineral rights severed for coal mining purposes. Following the conveyances in question, coal mining was conducted under the plaintiff's property which resulted in subsidence of that property. Plaintiff sued for damages from the subsidence. Defendant argued that the mineral estate was dominant, and it could exploit the mineral estate without liability to the plaintiff. The Court held that owners of the surface are entitled to "subjacent support." Subjacent support is defined as,

> where different *strata* of earth or soil, one beneath the other, are owned by different persons, and there is no contract nor statute which affects their interests; the owner of the upper *stratum* has an absolute right to have his land supported in its natural condition by the *stratum* below.

The Court held that the right to take from the surface subjacent support may not be taken away without liability unless that right has been distinctly waived or reserved.

The case of *In re Estate of Trester*, 172 Kan. 478, 241 P.2d 475 (1952) revolved around the Great Bend Brick & Tile plant in Barton County, Kan. In that case, a landowner of an 80-acre tract executed a document to the defendant entitled "Sale of Oil and Gas Royalty" which conveyed an undivided one-half interest in and to all of the oil, gas and other minerals in and under and that may be produced from the following described land situated in Barton County, Kan. Later, Trester executed a lease covering about 16 acres of land in the corner of the 80-tract:

> . . . for the sole and only purpose of mining, quarrying and operating for clays, shales and other surface, or near the surface minerals, for ceramic and building purposes; for building purposes, for building roads, laying gas lines for power and heat, building power stations and structures thereon to produce,

remove, save, treat and take care of said products; . . .

The issue before the Court was whether the parties to the instrument titled "Sale of Oil and Gas Royalty" had title to certain clay deposits on the land which had been granted to the Great Bend Brick & Tile Company. The Court found,

> Here the parties were dealing, primarily at least, with oil and gas. The grantor of the instrument in question previously had executed to another party an oil and gas lease in the usual form.

The Court held,

> While the wording of that instrument is not shown by the record, we think we are justified in assuming that it gave the lessee therein, or his assigns, the exclusive right to go upon the premises to explore for oil and gas and to produce those substances, if found. . . . It is not contended that the lessee under the oil and gas lease would have had any right to dig and carry away from one small area of the leased premises the earth, clay and other substances as embodied in the overall meaning of minerals, as above mentioned, to a depth of 25 or more feet. We think a holding that could be done would be startling to the owners of land and to holders of oil and gas leases thereon throughout the state.

Of recent concern due to the development of coalbed methane, the Kansas Supreme Court in *Central Nat. Resourses, Inc. V. Davis Operating Co.*, 288 Kan. 234, 201 P.3d 680 (2009), essentially following the United States Supreme Court in *Amoco Production Co. v. Southern Ute Tribe*, 526 U.S. 865, 119 S.Ct. 1719 (1999), held that acquisition of "all coal" by deed did not grant the rights to coalbed methane. The court refused to adopt the "container theory" used by several other jurisdictions in which the conveyance of coal effects a transfer of everything that may be contained within the strata where coal is found. Instead, the Court followed the logic of the U.S. Supreme Court decision.

Royalty estate. Royalty in Kansas refers to a cost-free share of production from a well credited to the royalty interest owner. Royalty interests are usually created by the terms of an oil and gas lease. *See Bellport v. Harrison*, 123 Kan. 310, 255 P.2d 52 (1927); *Rathbun v. Williams*, 154 Kan. 601, 604, 121 P.2d 243 (1942). However, royalty interests may be created by mineral interest owners without the necessity of a lease. A royalty interest is a personal property interest which is a right to share in the minerals actually produced. *Lathrop v. Eyestone*, 170 Kan. 419, 227 P.2d 136 (1951). A royalty interest does not create any interest in the minerals under the land or cause a severance of the fee. *Hickey v. Dirks*, 156 Kan. 326, 133 P.2d 167 (1943). Transfers of royalty are not subject to K.S.A. 79-420. *Hickey*, 156 Kan. at 328. A royalty interest is subject to the rule against perpetuities. A royalty interest vests only when there is actual production of oil or gas.

The term "royalty" is loosely and inaccurately used by the petroleum industry. Therefore, the true nature of an instrument is not to be determined by its label but rather by the contents of the instrument. *Magnusson v. Colorado Oil & Gas Corp.*, 183 Kan. 568, 331 P.2d 577 (1958); *Froelich v. United Royalty Co.*, 178 Kan. 503, 290 P.2d 93 (1959).

Although a perpetual royalty interest is valid in most states, in Kansas it has been held to violate the rule against perpetuities. *Cosgrove v. Young*, 230 Kan. 705, 642 P.2d 75 (1982). Kansas has adopted the Uniform Statutory Rule Against Perpetuities. This rule allows a 90-year wait and see period on transfers that would not vest or fail to vest within a life in being plus 21 years. In addition, the rule does not apply to nondonative transfers with a few statutory exceptions. K.S.A. 59-3401 *et seq*.

To avoid a problem with the rule against perpetuities, royalty interests are generally conveyed for a definite term of years subject to extension during such time as there is production in paying quantities or limited to the right to receive royalty under an existing lease.

Rucker v. Delay demonstrates the consequence of failing to limit a royalty interest to a term of years. Here, in a 1924 conveyance, the grantor reserved,

> "60 percent of the land owner's one-eighth interest to the oil, gas or other minerals that may hereafter be developed under any oil and gas lease made by the grantee or by his subsequent grantees."

The appellate court held that reservation to the grantor in the 1924 deed was of a royalty interest which was in violation of the rule against perpetuities and, therefore, null and void. *Rucker v. Delay*, No. 101,766, 2010 Kan. App. LEXIS 83 (Kan. Ct. App., July 23, 2010). Notably, the appellate court strongly encouraged the Supreme Court to overturn the application of the rule against perpetuities to royalty interests.

C. Conveyability

Ownership of the mineral estate can be "severed" from the surface estate. *Zarkey v. Farron*, 159 Kan. 347, 154 P.2d 1013 (1945). A mineral interest is deemed to vest immediately upon creation of the interest. *Lathrop v. Eyestone*, 170 Kan. 419, 227 P.2d 136 (1951). Severed mineral conveyances must be recorded within 90 days of execution, or they are void. K.S.A. 79-420. However, where a mineral conveyance is held in escrow, it may be considered valid if recorded within 90 days of delivery because a conveyance is not valid until delivery. Thus, in such limited circumstances, the date of conveyance is the date of release from escrow, not the date of execution of the instrument. *Ochs v. Blankenship*, 192 Kan. 423, 388 P.2d 626 (1964). A severed mineral interest must be recorded within 90 days of execution whether the minerals are severed by a conveyance of minerals or a reservation. *Johnson v. Johnson*, 150 Kan. 541, 95 P.2d 329 (Kan. 1939). A grant or conveyance of minerals "in and under, or lying under certain lands," or words of similar import, is a grant and conveyance of present title of minerals in place, without regard to when, or by whom they may be produced and severed to become personal property. *Magnusson v. Colorado Oil & Gas Corp.*, 183 Kan. 568, 331 P.2d 577 (Kan. 1958).

The mineral estate can be severed either by conveying the mineral estate to the grantee, or by excepting or reserving the mineral estate from a conveyance of land and thereby retaining the mineral estate in the grantor. *Shaffer v. Kansas Farmers Union Royalty Co.*, 146 Kan. 84, 69 P.2d 4 (1937). Severance of the mineral estate may also be accomplished by means of a "mineral deed." *Hickey v. Dirks*, 156 Kan. 326, 133 P.2d 107 (1943). The mineral estate can also be divided "horizontally." A landowner can convey separate depths or identifiable formation. *Shaffer v. Kansas Farmers Union Royalty Co.*, 146 Kan. 84, 69 P.2d 4 (1937); *Gas Co. v. Oil Co.*, 83 Kan. 136, 109 P. 1002 (1910). The mineral estate can be divided on the basis of type of substance conveyed (i.e. rights to gas only may be conveyed retaining other minerals). *Skelly Oil Co. v. Savage,* 202 Kan. 239, 447 P.2d 395 (1968); *Central Natural Res. Inc. v. Davis Operating Co.*, 288 Kan. 234, 201 P.3d 680 (2009) (coal).

In Kansas, an oil and gas lease is a personal property interest. *Burden v. Gypsy Oil Co.*, 141 Kan. 147, 40 P.2d 463 (1935). An oil and gas lease is a mere license allowing the lessee to enter the land to explore for and extract oil and gas. Therefore, it is personal property, an *incorporeal hereditament* and a *profit a prendre*. *Reese Enterprises, Inc. v. Lawson*, 220 Kan. 300, 553 P.2d 885 (1976). However, several statutes dealing with real property either specifically include oil and gas leases or change the classification of an oil and gas lease to real property for a particular purpose. *See* K.S.A. 55-210 (mortgage and lien foreclosures). K.S.A. 58-2221 (recording requirements); K.S.A. 60-601 (venue).

Note that in Kansas, K.S.A. 60-601 prescribes that many actions regarding an interest in land, including an oil and gas lease, must be brought in the county where the land is situated. This venue provision is jurisdictional; such venue may not be changed by agreement because the venue provisions are jurisdictional, and subject matter jurisdiction may not be changed by the parties. *Nelson Energy Program, Inc. v. Oil & Gas Tech Fund, Inc.*, 36 Kan. App. 2d 462, 143 P.3d 50 (32006); *Raynolds v. Row*, 184 Kan. 791, 795, 339, P.2d 358 (1959). For the purposes of the judgment lien statute, the term "real estate" does not include oil and gas leases. *Utica National Bank & Trust Co. v. Marney*, 233 Kan. 432, 661 P.2d 1246 (1983).

In addition, oil and gas leases are taxed as personal property, including all leasehold equipment used in operation of the lease. K.S.A. 79-329.

The further difference between mineral interests and a lease granted by a mineral interest owner is based on the right of possession. A mineral interest is a possessory interest in land; however, the development rights, which are transferred under an oil and gas lease, do not grant a possessory interest. *In re Estate of Sellens*, 7 Kan. App. 2d 48, 637 P.2d 483 (1981).

The classification of the property as possessory or non-possessory can affect the rights and remedies available to a party depending upon his or her type of interest. Until changed by statute, an action for ejectment or a quiet title was not available to an oil and gas lessee. *See Brinkman v. Empire Gas and Fuel Co.*, 120 Kan. 602, 245 P. 107 (1926); K.S.A. 60-1001; K.S.A. 60-1002. Oil and gas lessees are given a specific statutory right to partition of the leasehold estate. K.S.A. 60-1003.

D. Mineral or Royalty Interest for a Term of Years

The mineral estate may be limited to a specific period of time or until the occurrence of a specific event. The most common limitation requires production of oil or gas in paying quantities after a specified period of time (i.e., A grants to B all of the oil, gas and other minerals in black acre for a period of 20 years from and after April 25, 1941, and so long thereafter as oil, gas, and/or other minerals or any of them are produced therefrom.). *Classen v. Federal Land Bank of Wichita*, 228 Kan. 426, 617 P.2d 1255 (1980). This grant creates a fee simple determinable with title vesting immediately in the grantee subject to the grantor's possibility of reverter upon the failure of production. *Wilson v. Holm*, 164 Kan. 229, 188 P.2d 899 (1948).

A contingency requiring production of oil, gas or other minerals requires continuous production from a well located on the granted land. A "temporary" cessation of production will not terminate a term mineral interest; however, should the termination become "permanent" the term mineral interest terminates. The Kansas Supreme Court has adopted similar rules in this regard to those applied to oil and gas leases. *See Wilson v. Holm*, 164 Kan. 229, 188 P.2d 899 (1948). However, production must be in "paying quantities" to satisfy the production requirement of a standard term mineral interest. *See Texaco, Inc. v. Fox*, 228 Kan. 589, 618 P.2d 844 (1980). In addition, payment of shut in royalties under a lease of land covered by a term mineral interest is not "production" so as to perpetuate the defeasible term mineral interest. *Dewell v. Federal Land Bank*, 191 Kan. 258, 280 P.2d 379 (1963).

Where the primary term of term mineral interests has expired, the term mineral interests revert to the reversionary owners upon a permanent cessation of production. *Wagner v. Sunray Mid Continent Oil Co.*, 182 Kan. 81, 318 P.2d 1039 (1957).

A deed or other instrument conveying oil and gas in place for a fixed term of years and so long thereafter as oil and/or gas is being produced from the property or the property is being developed or operated creates a base or determinable fee. *Wilson v. Holm*, 164 Kan. 229, 188 P.2d 899 (1948).

The event which perpetuates the term of the mineral interest must be found in the instrument creating it. *Stratman v. Stratman*, 204 Kan. 658, 465 P.2d 938 (1970).

It is the general rule, absent agreement to the contrary, that a term mineral interest cannot be changed or altered by the terms of an oil and gas lease or a unitization agreement entered into between the term mineral owner and a third party lessee or by the holder of the reversionary interest and a third party lessee. However, whenever a defeasible term mineral interest is voluntarily placed in a unit for the production of gas or oil and production is obtained on other land within the unit during the primary term, such production will extend the term mineral interest to the extent of the land and mineral interests included within the producing unit. Where two or more tracts of land are subject to a defeasible term mineral interest created by a single instrument for a specific primary term and so long thereafter as oil and/or gas is being produced from the property or the property is being developed or operated, and one of the tracts is unitized with other property to form a production unit and production is obtained from such other property during the primary term, such production will extend the term mineral interest as to the tract within the unit but not as to the tract outside the unit. *Classen v. Federal Land Bank of Wichita*, 228 Kan. 426, 617 P.2d 255 (1980).

E. Leasehold and Overriding Royalty

An overriding royalty interest in Kansas is defined as a royalty carved out of the working interest created by an oil and gas lease. Most frequently it is created subsequent to a lease by outright grant or by a reservation in the assignment of the operating rights. It is an interest in oil and gas produced at the surface, free of the expense of production, and its outstanding characteristic is that its duration is limited by the duration of the lease under which it is created. *Cambell v. Nako Corporation*, 195 Kan. 66, 402 P.2d 771 (1965).

Reynolds-Rexwinkle Oil, Inc. v. Petex, Inc., 268 Kan. 840, 1 P.3d 909 (2000) considered modification of the durational limitations when the override is assigned based on certain provisions in the assignment. This case involved the original lessee assigning the lease and retaining an overriding royalty interest. The assignee-lessee then obtained a new lease on the same property while the original lease was in effect but made no reference to the overriding royalty interest. The court held that the original lessee retained the overriding royalty interest in the new lease based upon the language of the assignment, which stated that the original lessee retained an override interest "under the provisions of the aforesaid lease, or any extension or *renewal thereof*." To prevent a "washout" of the original lessee, the court considered the new lease an extension or renewal of the old lease.

F. Dormant Mineral Act, Marketable Title Act or Title Standards

A severed mineral interest can not be lost through abandonment. However, the Kansas legislature has established a statutory procedure by which a mineral interest can be lost if it is unused for a period of 20 years. K.S.A. 55-1601 *et seq*. The statute applies to any mineral interest which is defined to include any interest,

> created by an instrument transferring, by grant, assignment, or reservation or otherwise an interest of any kind in coal, oil, gas or other minerals. K.S.A. 55-1601.

Should the mineral interest not be "used" as defined in the statute for an uninterrupted period of 20 years, the mineral interest can lapse to the current surface owner. The following methods of "using" of mineral interests, are provided in the statute:

1. If there are any minerals produced under the interest;
2. Operations are being conducted on the interest for the injection, withdrawal, storage or disposal of water, gas or other fluid substances;
3. Rentals or royalties are being paid by the owner of the interest for the purpose of delaying or enjoying the use or exercise of the mineral rights;
4. The use or exercise of the mineral rights as being carried out on a tract with which the mineral interests may be unitized or approved for production purposes;
5. In the case of coal or other solid minerals, there is production from a common vein or seam by the owners of the mineral interests; or
6. Taxes are paid on the mineral interests by its owner. K.S.A. 55-1603.

Even though the mineral interest is said to lapse unless used, the interest is not extinguished unless the surface owner complies with procedures outlined in K.S.A. 55-1605 by filing a notice of lapse, and the mineral interest owner fails to file a statement of claim within 60 days after publication or after receiving actual notice. The provisions of the Mineral Lapse Act may not be waived at any time prior to the expiration of a 20-year period provided in K.S.A. 55-1602. K.S.A. 55-1607.

The statement of claim filed by the mineral interest owner must contain the mineral interest owner's name and address, a description of the land effected by the interest and be filed with the register of deeds in the county where the land is located. The statement of claim is not effective until filed with the register of deeds. K.S.A. 55-1604(a). *See Scully v. Overall*, 17 Kan. App. 2d 582, 840 P.2d 1211 (1992).

Kansas has passed a marketable record title act which should be consulted when determining record title to real estate in Kansas. *See* K.S.A. 58-3401 *et seq*. However, the act does not apply to bar or extinguish the right to possession of any lessor or any lessor's successor as a reversioner on the expiration of any lease; the rights in and to any lease of any lessee or any lessee's successor; or any mineral interest which has been severed from the fee simple title of the land. K.S.A. 58-3408.

A marketable record title under the Marketable Title Act exists only where: (1) an owner has an unbroken chain of title of record extending back at least 25 years; and (2) nothing appears of record purporting to divest such owner of title. K.S.A. 58-3403. An unbroken chain of title of record within the meaning of the Marketable Record Title Act may consist of either: (1) a single conveyance or other title transaction which purports to create an interest and which has been of record for at least 25 years, or (2) a connected series of conveyances or other title transactions which have been of record for at least 25 years. K.S.A. 58-3403. Matters "purporting to divest" are those matters appearing of record which, if taken at face value, warrant an inference that title has been divested. K.S.A. 58-3403.

II. WHO CAN LEASE?

A. Marital Property

Jointly owned — Community property

The Kansas Constitution in Article 15, Section 9, provides that homestead property "shall not be alienated without the joint consent of husband and wife." An oil and gas lease covering homestead property is an "alienation" of the homestead which requires joint consent of the husband and wife. *Land Co. v. Gas Co.*, 43 Kan. 518, 23 P. 630 (1890). In instances where consent of the spouses is not obtained concurrently, courts may look to other evidence surrounding the transaction to ensure that each party knowingly consented to alienation of the homestead interest. *See Ott v. Sprague*, 27 Kan. 620 (1882). In 1944, the Kansas Constitution was amended to allow a court to authorize the conservator of an incapacitated spouse to execute a lease for oil and gas and other minerals. *See* Article 15, Section 9 of the Kansas Constitution; K.S.A. 59-2314 *et seq*. This statutory procedure authorized by the Constitution is probably the best method by which an incapacitated spouse's interest in homestead property can be leased. An attorney-in-fact can also lease the incapacitated spouse's interest in homestead property by complying with the Kansas Power of Attorney Act. Compliance with the Act requires:

1. The principal's spouse, personally or through such spouse's attorney-in-fact, has also consented to such alienation;
2. The power of attorney specifically describes the homestead by reference to a legal description and the street address of the property; and
3. The principal's spouse, in a written document duly acknowledged by the spouse, has stated such spouse's consent that the attorney-in-fact may alienate the interests, in whole or in

part, of the principal in the described homestead, and further, the spouse agrees that the consent of the attorney-in-fact will constitute the consent of the principal required by Article 15, Section 9, of the Kansas Constitution. K.S.A. 58-654(f)(10).

Because of this provision of the Kansas Constitution, the marital status of all mineral owners to a lease must be determined. K.S.A. 59-505 gives a spouse who was a resident of Kansas during the marriage an inchoate right to one-half of all real estate which was owned by the conveying spouse at any time during the marriage. Any disposition of the real estate must be consented to in writing. *See Jackson v. Lee*, 193 Kan. 43, 92 P.2d 92 (1964). Because the inchoate rights of a spouse applies to both homestead and non-homestead property, all leases by individual mineral owners must be joined by their respective spouses. If an individual mineral owner is not married, his/her status as a single person should be stated in the lease.

Individual Acknowledgment

The following is a Kansas short form acknowledgment for an individual.

ACKNOWLEDGMENT

State of Kansas)
) ss:
County of _________)

The foregoing instrument was duly acknowledged before me this ___ day of ________, 20__, by __________________ (individual's name) a __________ (marital status) person.

____

Notary Public
My appointment expires:

B. Homestead

Definition of homestead rights

The Kansas Constitution in Article 15, Section 9, provides that homestead property "shall not be alienated without the joint consent of husband and wife." An oil and gas lease covering homestead property is an "alienation" of the homestead which requires joint consent of the husband and wife. *Land Co. v. Gas Co.*, 43 Kan. 518, 23 P. 630 (1890). In instances where consent of the spouses is not obtained concurrently, courts may look to other evidence surrounding the transaction to ensure that each party knowingly consented to alienation of the homestead interest. *See Ott v. Sprague*, 27 Kan. 620 (1882). In 1944, the Kansas Constitution was amended to allow a court to authorize the conservator of an incapacitated spouse to execute a lease for oil and gas and other minerals. *See* Article 15, Section 9 of the Kansas Constitution; K.S.A. 59-2314 *et seq*. This statutory procedure authorized by the Constitution is the sole method by which an incapacitated spouse's interest in homestead property can be leased. Even a power of attorney complying with the Kansas Power of Attorney Act is not sufficient authority to lease an incapacitated spouse's homestead property. *See* K.S.A. 58-650 *et seq*.

Because of this provision of the Kansas Constitution, the marital status of all mineral owners to a lease must be determined. K.S.A. 59-505 gives a spouse who was a resident of Kansas during the marriage an inchoate right to one-half of all real estate which was owned by the conveying spouse at any time during the marriage. Any disposition of the real estate must be consented to in writing. See *Jackson v. Lee*, 193 Kan. 43, 92 P.2d 92 (1964). Because the inchoate rights of a spouse apply to both homestead and non-homestead property, all leases by individual mineral owners must be joined by their respective spouses. If an individual mineral owner is not married, their status as a single person should be stated in the lease.

C. Business Entities

Corporations

A Kansas corporation may purchase, receive, take by grant, gift, devise, bequest, or otherwise, lease, or otherwise acquire, own, hold, improve, employ, use and otherwise deal, in real or personal property, or any interest therein, wherever situated, and to sell, convey, lease, exchange, transfer, or otherwise dispose of, or mortgage or pledge, all or any of its property and assets or any interest therein, wherever situated. K.S.A. 17-6102(4).

The authority to sell, lease or exchange property by a Kansas corporation is vested in the board of directors which may act pursuant to a resolution adopted by the shareholders of a majority of the outstanding stock of the corporation. K.S.A. 17-6003(g).

The following is a suitable corporate acknowledgment in the state of Kansas:

ACKNOWLEDGMENT

State of Kansas)
) ss:
County of _________)

The foregoing document was acknowledged before me this ___ day of __________, 20__, by ________________ (name and position), who acknowledged the execution of the same for himself/herself and for ______________(corporate name) corporation for the uses and purposes therein set forth.

____

Notary Public
My appointment expires:

General partnership

In Kansas, any general partner has power to convey property held in the partnership name. K.S.A. 56a-302; K.S.A. 56a-303. Leases may be executed in the partnership name or the partner's own name.

The following is an acknowledgment suitable for use by a partnership:

ACKNOWLEDGMENT

State of Kansas)
) ss:
County of _________)

This instrument was acknowledged before me on the ___ day of __________, 20__, by (name of acknowledging partner or partners), on behalf of (name of partnership), a partnership.

____

Notary Public
My appointment expires:

Limited partnerships

K.S.A. 56-1a107 provides that a limited partnership may conduct or promote any lawful business or purposes, except as otherwise provided by the law of this state, which a partnership without limited partners may conduct or promote.

An examiner should require that the certificate of partnership is recorded in accordance with K.S.A. 56-1a151. A conveyance from the partnership executed by a general partner should be accepted unless an examination of the partnership certificate of the public records clearly indicates that the general partner is exceeding his authority or unless the examiner has actual knowledge that he is exceeding his authority. Kansas Title Standard 4.3.

Limited liability companies and limited liability partnerships (LLCs and LLPs)

The Kansas Limited Liability Company Act grants broad powers and privileges, subject to the operating agreement and other law, "to the conduct, promotion or attainment of the business, purposes or activities of the limited liability company." K.S.A. § 17-7668(b). Accordingly, limited liability companies in Kansas have the power to purchase, take, receive, lease, or otherwise acquire, own, hold, improve, or use, or otherwise deal in or with, real or personal property or an interest in real or personal property whenever situated, and sell, convey, mortgage, pledge, create a security interest in, lease, exchange, or transfer or otherwise dispose of all or any part of its property or assets.

A conveyance in the ordinary course of business must be in the name of the limited liability company and must be signed by one or more of the managers if the LLC has managers or one or more of the members if the members have retained management duties. K.S.A. 17-7693.

The following is an acknowledgment suitable for a limited liability company:

ACKNOWLEDGMENT

State of Kansas)
) ss:
County of _________)

This instrument was acknowledged before me on this ___ day of _____________, 20___, by (name of acknowledging manager, officer, director, agent or member), (title of executing person), of (name of LLC acknowledging) a (state of residence) limited liability company, on behalf of said limited liability company.

____

Notary Public
My appointment expires:

D. Attorney-in-Fact

General rules

The Kansas Power of Attorney Act grants the attorney-in-fact broad power to deal with the property of the principal. K.S.A. § 58-654(d). Only a few actions are expressly forbidden, including: making or amending the principal's will, health care directive and health care power of attorney; requiring the principal, against the principal's will, to take or refrain from taking action; and carrying out actions expressly forbidden by the principal while the principal is not under disability or incapacity. K.S.A. § 58-654(g). Several powers must be expressly enumerated in the power of attorney for the attorney-in-fact to have the power. One such power is the ability to alienate homestead rights of the other spouse. *See* K.S.A. § 58-654(f)(10) (stating a three-part test for consenting to the alienation of homestead property).

The trustee's power to lease property is defined within the following terms:

> Notwithstanding the breadth of discretion granted to a trustee in the terms of the trust, including the use of such terms as "absolute," "sole" or "uncontrolled," the trustee shall exercise a discretionary power in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries. K.S.A. § 58a-814.
>
> [To] enter into a lease for any purpose as lessor or lessee, including a lease or other arrangement for exploration and removal of natural resources, with or without the option to purchase or renew, for a period within or extending beyond the duration of the trust. K.S.A. § 58a-816(9).

POWER OF ATTORNEY FOR HOMESTEAD PROPERTY

KNOW ALL PERSONS BY THESE PRESENTS:

That the undersigned, ________________ and________________, husband and wife, and residents of ____________________ County, Kansas, do hereby appoint ____________________ of ____________________ County, Kansas, as their attorney-in-fact, to act for the undersigned in their names and stead, to grant, bargain, sell, lease and convey their homestead, legally described as follows:

[insert legal description]

or any part thereof, for such price and on such terms as to him shall seem acceptable and for them in their names to make, execute, acknowledge and deliver a good and sufficient deed of conveyance for the same, with or without covenants of warranty, as fully and to all intends and purposes as the undersigned might or could do it personally present. It is the intention of the grantors that the execution of this Power of Attorney shall constitute the joint consent of the grantors required by Article 15, Section 9, of the Kansas Constitution to alienate and convey their homestead property.

The undersigned do hereby ratify and confirm all that the said attorney-in-fact shall lawfully do, or cause to be done hereunder.

The undersigned declare that this Power of Attorney shall not be affected by the subsequent disability or incapacity of the principals and shall remain in full force and effect until revoked in writing by either of the undersigned, and such revocation is filed in the office of the Register of Deeds.

____

____

STATE OF KANSAS)
) ss:
COUNTY OF _______)

BE IT REMEMBERED that on this ___ day of ____________, 20__, before me, the undersigned, a notary public in and for the county and state aforesaid came ________________ and ____________________, husband and wife, who are personally known to me to be the same person who executed the within

instrument of writing, and such person duly acknowledged the execution of the same.
IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed my seal the day and year last above written.

____
Notary Public
My appointment expires:

Durable power of attorney

The Kansas Power of Attorney Act K.S.A. 58-650 *et seq.*, allows the designation of an attorney in fact to enter into oil and gas leases even though the mineral owner is incapacitated. Note that this durable power of attorney is not sufficient to lease the homestead property of the incapacitated person. If a conservator, guardian of the estate or other fiduciary is court appointed following the execution of a durable power of attorney, then the attorney in fact is accountable to the fiduciary as well as to the principal, and the fiduciary has the same power to revoke or amend the durable power of attorney that the principal would have had if the principal were not disabled or incapacitated. K.S.A. 58-656.

An attorney in fact retains the ability to bind the principal's successors in interest as to any action taken in good faith under the power of attorney without actual knowledge of the death of the principal. Likewise, any action taken by a power of attorney that is not a durable power, and binds both the principal and the successors as to all actions undertaken in good faith under the power without actual knowledge of the disability or incapacity of the principal. K.S.A. 58-657.

E. Estate of Resident Decedent

Rules of descent and distribution (intestate succession)

The applicable rules of descent and distribution in Kansas are summarized as follows:

1. Intestate, surviving spouse, no children or issue – All property of decedent passes to surviving spouse. K.S.A. 59-504. Note: Kansas has adopted a modified version of the Uniform Probate Code provision concerning spousal elective shares. *See* K.S.A. 59-6a201 *et seq.*
2. Intestate, surviving spouse and children or issue – Half to surviving spouse of realty and personally, half to children or issue per stirpes and not per capita. K.S.A. 59-504; K.S.A. 59-505; K.S.A. 59-506.
3. Intestate, no surviving spouse or issue – Property passes in equal shares to surviving parents. Adopted childrens' property passes to adoptive parents. K.S.A. 59-507.
4. Intestate, no surviving spouse issue or parents – Property passes to heirs of parents as if parents owned it in equal shares at death and died intestate. If one parent leaves no legal heirs, then property passes to heirs of other parent. K.S.A. 59-508.
5. No property shall pass beyond the sixth degree of kinship with each ascending or descending generation counted as one degree. K.S.A. 59-509. If there are no living heirs under the above rules, the property shall escheat to the State of Kansas.
6. All aliens who are eligible for citizenship can transmit and inherit real estate to the same extent as a citizen. Other aliens may transmit and inherit real estate as allowed by any treaty between the United States and the country of the alien's citizenship. K.S.A. 59-514.

Lapse doctrine

Kansas has adopted the common law lapse doctrine. When there is a lapse of a specific or general bequest or devise, the gift passes under the residuary clause of the decedent's will. *In Re Estate of Ricklefs*, 211 Kan 713, 508 P.2d 866 (1973). Kansas holds that a lapsed residuary devise or bequest passes to the other residuary legatees or devisees rather than under the law of intestate succession. *In Re Estate of Coleman*, 2 Kan. App.2d 567, 584 P.2d 1255 (1978).

K.S.A. 59-615. The "anti lapse" statute provides that if a devise or bequest is made to a spouse or to any relative by lineal descent or within the sixth degree of kinship, whether by blood or adoption, and such spouse or relative dies before the testator leaving issue who survives the testator, the issue takes the same estate which the devisee or legatee would have taken unless a different disposition is made by the will. *See In Re Estate of Ricklefs*, 211 Kan. 713, 508 P.2d 866 (1973); *In Re Estate of Stroble*, 6 Kan. App.2d 955, 636 P.2d 236 (1981).

Administration of estate of intestate decedent

A personal representative may lease property for oil and gas for a term of not more than one year. K.S.A. 59-1409. A lease for more than one year must be joined by the heirs or devisees having an interest in the real estate. Any lease for more than one year and less than three years must be approved by court order. K.S.A. 59-2302. Any lease for more than three years must follow the procedures for sale of real estate. See K.S.A. 59-1410(a); K.S.A. 59-1413(c).

Administration of estate of testate decedent

Powers to lease without court order may be given in a will. K.S.A. 59-1409; K.S.A. 59-1410; K.S.A. 59-1413.

Rules relative to closing estate

Determination of heirs and devisees of a decedent is confirmed in an order issued by a probate court usually called an Order of Final Settlement. *See* K.S.A. 59-1503. An estate may be reopened for the purpose of distributing property which was not included in the inventory of the estate and which is discovered after the estate is closed, or executing or delivering a deed to real property which was transferred or sold prior to or during probate of the estate, or was distributed prior to closing of the estate, but the deed to which was not executed or was not delivered prior to the closing of the estate. K.S.A. 59-1501a.

Forced heirship statute

Elective share of spouse. A surviving spouse has the right of election to take an amount equal to the elective share amount of the augmented estate determined by the length of time the spouse and the decedent were married to each other. K.S.A. 59-6a 201 *et seq.* Also a surviving spouse shall be entitled to one-half of all real estate of which the decedent at any time during the marriage was seized or possessed and to the disposition of which the survivor shall not have consented in writing or by a will or by an election to take under a will, except if such real estate has been sold on execution or judicial sale or taken by other legal proceeding. The spouse is not entitled to any interest in real estate of which the decedent made a conveyance when the spouse was not a resident of the state at the time of the conveyance or at any time during the existence of the marriage. K.S.A. 59-505.

F. Estate of Non-Resident Decedent

If ancillary probate of foreign will is not necessary

Where Kansas minerals are owned by a non-resident decedent, the decedent estate will need to go through a probate proceeding in Kansas to enable heirs or devisees to obtain clear title. K.S.A. 59-803 *et seq.*

If ancillary probate of foreign will is necessary

Kansas courts have jurisdiction over all real estate and personal property, both tangible and intangible, of a non-resident decedent located in the state. Real estate and personal property in Kansas owned by an intestate non-resident decedent shall pass by intestate succession as if the decedent were a resident. Testate decedent property will pass by any will valid in Kansas, the state where it was executed or the state of decedent's residence. See K.S.A. 59-803, *et seq.*

Conflict of law rules

Where the estate of an individual has not been probated, any party with an interest in the estate may petition the district court for a decree of descent and heirship to property located in the state including real property. K.S.A. 59-2250 *et seq.*

Use of affidavit of death and heirship

The Kansas Simplified Estate Act may be used where a court determines that the size of the estate, the degree of kinship of the heirs, devisees and persons seeking appointment; the solvency of the estate; the nature of the estate; the wishes of the heirs and devisees and the probable cost of administration and settlement make it advisable to do so. K.S.A. 59-3201 *et seq.*

G. Trustee

Power of trustee derived from the trust instrument

If the real property sought to be leased is held in a trust and the trust instrument does not otherwise limit the trustee's authority, the Kansas Uniform Trust Code grants trustees authority to lease property for oil and gas purposes. See, K.S.A. 58-816 *et seq.*

Powers of trustee derived from the trust statute

K.S.A. 58-1203 provides:

a. From time of creation of the trust until final distribution of the assets of the trust, a trustee has the power to perform, without court authorization every act which a prudent man would perform for the purposes of a trust including, but not limited to, the powers specified in (c).
b. A trustee has the power . . . (11) to enter into a lease or arrangement for exploration and removal of minerals or other natural resources or enter into a pooling or unitization agreement.
c. Kansas law does not recognize an entity which is intended to create a trust but that does not have a trustee. *See* K.S.A. 58-1201 *et seq.*

Title in trust but no trustee named; "blind" trust

Kansas law does not recognize an entity which is intended to create a trust but that does not have a trustee. *See* K.S.A. 58-1201 *et seq.*

H. Life Tenant/Remainderman And Open Mine Doctrine

General rules

A life tenant may only lease real property to the extent of his interest. Therefore, if the life estate does not confer the power to lease upon the life tenant either by express grant or pursuant to the open mine doctrine, consent of the remaindermen is required for a valid lease. *See Heffelfinger v. Scott*, 142 Kan. 395, 47 P.2d 66 (1935).

Open mine doctrine

If the grantor of a life estate leased or operated the property for mineral development prior to creating the life estate, the life tenant may lease and develop the property unless the granting document expressly forbids mineral leasing or development. *Kimbark Exploration Company v. VonLintel*, 192 Kan. 791, 391 P.2d 55 (1964).

I. Minors And Mental Incompetents

Minors

In the case of real property which is owned by either a minor or a person who has been adjudged a disabled person pursuant to K.S.A. 59-3050, *et seq.*, the conservator must follow the procedures established by K.S.A. 59-2314, *et seq.*, to obtain court approval of an oil and gas lease. This is the same procedure which must be used for leasing the homestead property of any incapacitated person.

Mental incompetents

The procedure which must be used for leasing the homestead property of any incapacitated person is the same as in the case of real property which is owned by either a minor or a person who has been adjudged a disabled person pursuant to K.S.A. 59-3050, *et seq.* The conservator must follow the procedures established by K.S.A. 59-2314, *et seq.*, to obtain court approval of an oil and gas lease.

J. Mineral Owners Who Cannot be Located

Receivership for mineral owner who cannot be located

If a mineral interest owner cannot be located after a diligent search and the absentee owner holds a "minority interest" in the affected minerals, a receiver may be appointed to negotiate an oil and gas lease on behalf of the absent owner. K.S.A. 55-219 *et seq.* Pursuant to this procedure, the lease can be for a primary term,

> not to exceed five years from the date thereof and as long after as oil and gas or either of them is produced in paying quantities from said land. K.S.A. 55-221.

The court appointing the receiver is required to specify the minimum bonus, rental and royalty for the lease. K.S.A. 55-220. After the lease is approved by the court and the receiver delivers the initial lease proceeds, the receiver is discharged. All future lease payments are made directly to the court. If the mineral owner is not a minority interest owner, a developer can petition the court to appoint a trustee for the absentee owner's property. The court is required to appoint a trustee if it is satisfied that,

> there is property of the absentee within the state subject to being lost or dissipated unless a trustee is appointed to manage and conserve the same. K.S.A. 59-2702.

Following appointment, the trustee has only the power of a conservator and must comply with the procedure established by K.S.A. 59-2314 to obtain the authority necessary to enter into an oil and gas lease.

Receivership for contingent future interest

K.S.A. 59-2702 sets forth the procedure for the appointment of a trustee to lease property of an absentee landowner.

K. Public Entities

Cities, towns or other political subdivisions

The governing body of any municipal corporation, board of park commissioners of any municipal corporation, trustees or directors of any cemetery association or improvement district, directors of any cemetery district, township board of any township or any other public agency or quasi-municipal corporation, owning of having the management and control of any tract of land within the state of Kansas, is,

> authorized and empowered to lease such lands, or any part thereof, for drilling for oil or gas upon such terms as may be agreed upon except that any such lease shall contain provisions for spacing of producing wells in accordance with rules and regulations of the state corporation commission as provided by law, and no oil or gas well shall be drilled or located within 100 feet of that portion of any such lands actually used for burial purposes. K.S.A. 55-211a.

Any moneys arising from such lease or the production of oil or gas may be credited to a special reserve or trust fund and invested in the manner prescribed by K.S.A. 12-1675 *et seq.*, and amendments thereto. All interest received from the investment of moneys in special reserve or trust funds and any moneys received from such lease or the production of oil or gas which is not credited to a special reserve or trust fund shall become a part of the general fund of any such municipality, board of park commissioners, association, improvement district, cemetery district, township, public agency or quasi-municipal corporation.

County and other unincorporated public entities

The Board of County Commissioners is authorized to lease county owned lands for the production of oil and gas for a term not to exceed five years and so long thereafter as oil, gas or other minerals may be produced therefrom in paying quantities.

> Each such lease shall be upon the usual standard form of mineral lease customarily used in the vicinity of said land, and shall contain the usual provisions of such standard form of lease, including the delay rental paragraph found in all standard mineral, oil and gas lease forms provided; however, that there shall be reserved to the county a royalty of not less than one-eight part of the oil, gas or other minerals produced from the leased premises, or in lieu thereof payment to the county of the market value of such royalty interest as provided in said lease. K.S.A. 19-110.

With regard to leases by counties, the statutes refer to "standard" oil and gas leases. There is no such thing as a "standard" oil and gas lease. The term is meaningless. *Vererka Davies & Co., Inc.*, 10 Kan. App.2d 578, 705 P.2d 558 (1985). This problem has not been resolved by the legislature.

Minerals owned by the state

State of Kansas. Public lands owned by the state of Kansas may be leased by the Department of Administration upon terms agreeable to the Department. K.S.A. 76-112 *et seq*.

School grounds. The school district board of any school district in this state is:

> authorized and empowered to lease its grounds, or any part thereof, for drilling for oil and gas, upon such terms as may be agreed upon. Any moneys arising from such lease or the production of oil or gas shall become a part of the funds of such school district; *provided*, that no oil or gas wells shall be drilled or located within 100 feet of any schoolhouse upon any such school ground. K.S.A. 55-211.

Board of regents. The Kansas Board of Regents may lease lands under its control for the production of oil, gas or other minerals or the terms and conditions that the board may prescribe. However, no lease may be for longer than 10 years and as long thereafter as oil, gas or other minerals are produced in paying quantities, and the state may not receive less than a one-eighth royalty in all oil, gas or other minerals produced. K.S.A. 76-164. However,

> before entering into any such oil, gas or other mineral lease upon such land, the Board of Regents shall give not less than 30 days public notice of its intention to lease said lands by a publication in the Kansas Register. Leases shall be made only upon competitive bids and shall be awarded to the highest responsible bidder. The right to reject any and all bids for leases shall be reserved by the Board of Regents.
>
> [All leases] shall be executed by the chairperson of the Board of Regents and attested by the secretary of the board. K.S.A. 76-165.
>
> The lessee, under any oil, gas or other mineral lease executed by the board, shall be liable in damages to any surface lessee and to the state for any and all injury, damage or loss which may be caused by any act or omission of the lessee to any property of the surface lessee or to any property of the state located upon or used in connection with said lands. K.S.A. 76-166.

All oil and gas leases and the uses or occupancy thereunder shall not interfere materially with the purposes for which said lands were granted to the state of Kansas. K.S.A. 76-167.

Fort Hays Military Reservation. The State Board of Regents in Kansas is,

> authorized to lease any of the lands of the abandoned Fort Hays military reservation for the production of oil, gas or other minerals which the board may deem valuable for that purpose. All such leases shall be on such terms and conditions as the Board of Regents may prescribe, provided however, that such leases shall not be for a period of more than 5 years, and so long as oil, gas or other minerals are produced in paying quantities thereon; and provided further, such leases shall retain to the

state a royalty interest of not less than one-eight part of all the oil, gas or other minerals produced. K.S.A. 76-514.

Before entering into any such oil, gas or other mineral lease upon such land, the Board of Regents shall give not less than 30 days' public notice of its intention to lease said lands by a publication in the Kansas Register. Leases shall be made only upon competitive bids and shall be awarded to the highest responsible bidder. The right to reject any and all bids for leases shall be reserved by the Board of Regents.

All leases shall be executed by the chairperson of the Board of Regents and attested by the secretary of the board. K.S.A. 76-515.

The lessee, under any oil, gas or other mineral lease executed by the board, shall be liable in damages to any surface lessee and to the state for any and all injury, damage or loss which may be caused by any act or omission of the lessee to any property of the surface lessee or to any property of the state located upon or used in connection with said lands. K.S.A. 76-516.

Department of Corrections. The Secretary of Corrections is authorized to lease any of the lands under the Secretary's control, the title of which is vested in the state of Kansas for the production of oil, gas or other minerals which the secretary may deem valuable for that purpose. All such leases shall be on such terms and conditions as the secretary may prescribe, except that such leases shall not be for a period of more than 5 years, and so long thereafter as oil, gas or other minerals are produced in paying quantities thereon.

Before entering into any lease, the Secretary of Corrections shall give not less than 30 days public notice, by publication in the Kansas Register, of the Secretary's intention to enter such lease. Any such lease shall be awarded in accordance with the competitive bid laws of this state. The right to reject any and all bids for leases shall be reserved by the Secretary of Corrections. Any lease shall be executed by the Secretary of Corrections and shall contain a recital of all proceedings in compliance with K.S.A. 75-52, 136, and shall be approved as to the form by the attorney general.

The lessee under any oil and gas lease shall be liable in damages to any surface lessee and to the state for any and all injury, damage or loss caused by any act or omission of the lessee, to any property of the surface lessee or to any property of the state located upon or used in connection with such lands.

No oil and gas lease, nor the uses or occupancy thereunder, shall interfere materially with the purposes for which the lands were granted to the state of Kansas.

All proceeds of any oil and gas lease pursuant to this section shall be paid into the state treasury and credited to the state general fund. K.S.A. 75-52, 136.

Quasi-public land — Cemeteries, churches and other unincorporated associations

The governing body of any municipal corporation, board of park commissioners of any municipal corporation, trustees or directors of any cemetery district, township, board of any township or any other public agency or quasi-municipal corporation owning or having management or control of any tract of land within the state is authorized to enter into an oil and gas lease upon agreeable terms except that the lease must contain provisions for spacing of producing oil and gas wells in accordance with the rules and regulations of the Kansas Corporation Commission. K.S.A. 55-211a. Leases should be obtained as described in K.S.A. 55-211a.

No oil or gas well may be drilled or located within 100 feet of that portion of lands used for burial purposes. K.S.A. 55-211a.

L. Riverbeds And Streams

Navigable streams or rivers

In Kansas, if a stream is navigable, then the riparian landowners' title extends only to the banks of the stream. *See Siler v. Dreyer*, 183 Kan. 419, 327 P.2d 1031 (1958); *State ex rel. Meek v. Hays*, 246 Kan. 99, 785 P.2d 1356 (1990).

This principle is called into question by a United States Supreme Court case which noted that "[s]tates have sought to retain title to the beds of streams by recognizing them as navigable when they are actually not so." *Brewer-Elliot Oil & Gas Company v. United States*, 260 U.S. 77 (1922). In this case the court stated that the portion of the Arkansas River extending south from the Kansas border to the area around Tulsa is a non-navigable stream.

Only three rivers in Kansas have been declared navigable by the State: the Kansas, the Arkansas and the Missouri. *State ex rel. v. Akers*, 92 Kan. 169, 140 P. 637 (1914); *Dana v. Hurst*, 86 Kan 947, 122 P. 1041 (1912). The state of Kansas owns the riverbed of all navigable rivers in Kansas. *See Murray v. State*, 226 Kan. 26, 596 P.2d 805 (1979). River beds may be leased pursuant to the provisions for the lease of public lands.

Non-navigable streams or rivers

If the stream is non-navigable, then the riparian owner owns the bed of the stream to the middle of the stream. If the riparian owner owns both sides of the stream, then the title extends over the entire bed. *Dougal v. Shawnee County Commissioners*, 141 Kan. 554, 43 P.2d 223 (1935).

III. INTERPRETATION OF PROVISIONS OF THE OIL AND GAS LEASE

A. Habendum Clause – Generally

General nature of the oil and gas lease

In Kansas, an oil and gas lease is a personal property interest. *Burden v. Gypsy Oil Co.*, 141 Kan. 147, 40 P.2d 463 (1935). An oil and gas lease is a mere license allowing the lessee to enter the land to explore for and extract oil and gas. Therefore, it is personal property, an *incorporeal hereditament* and a *profit a prendre*. *Reese Enterprises, Inc. v. Lawson*, 220 Kan. 300, 553 P.2d 885 (1976). However, several statutes dealing with real property either specifically include oil and gas leases or change the classification of an oil and gas lease to real property for a particular purpose. *See* K.S.A. 55-210 (mortgage and lien foreclosures); K.S.A. 58-2221 (recording requirements); K.S.A. 60-601 (venue). For the purposes of the judgment lien statute, however, the term "real estate" does not include oil and gas leases. *Utica National Bank & Trust Company v. Marney*, 233 Kan. 432, 661 P.2d 1246 (1983). In addition, oil and gas leases are taxed as personal property, including all leasehold equipment used in operation of the lease. K.S.A. 79-329.

In Kansas, a conventional oil and gas lease generally does not create any present vested estate in the nature of title to the land which it covers but merely creates a license to enter on the land

and explore for such minerals. Once the lease expires by its terms, the right to enter and explore expires.

A "habendum clause" is the provision of an oil and gas lease defining how long the interest granted to the lessee will extend. *Levin v. Maw Oil & Gas LLC*, 2010 Kan. LEXIS 549, 234, P.3d 805 (2010).

A habendum clause is an expressed condition of precedent fact upon which the lease may continue. *Reese Enterprises Inc. v. Larson*, 220 Kan. 300, 553 P. 2d 885 (1976).

In *Hunthauser Holdings, LLC v. Loesch*, CIVIL ACTION No. 00-1154-MLB, 2003 U.S. Dist. LEXIS 14423 (D. Kan. 2003), the specific language of the habendum clause that extended the lease beyond is "for as long thereafter as oil, gas or any of the products covered by this lease is or can be produced." The court appeared to rely on *Anadarko Petroleum Corp. v. Thompson*, 94 S.W.3d 550, (Tex. 2002) by holding that the specific language of this habendum clause could extend the lease by actual production or the capability to produce from the leased land.

A writ of equity has no power to extend a lease beyond the term which the parties themselves have fixed by their written contract. *Kahm v. Arkansas River Gas Co.* 122 Kan. 786, 253 Pac. 563 (1927).

B. Production in "Paying Quantities"

General rule

Although the phrase "in paying quantities" does not appear in the lease document, it is included by legal implication. *Texaco, Inc. v. Fox*, 228 Kan. 589, 618 P.2d 844 (1980). The legal standards for determining whether an oil and gas lease is "producing in paying quantities" is an objective legal test as follows: Will the lease produce a profit, however small over operating expenses, after eliminating the initial cost of drilling and equipping the well or wells on the lease which are required to prepare the lease for production?

"Paying quantities" refers to operations of the lease after drilling has been accomplished during the primary term and production has been established. *Pray v. Premier Petroleum*, 233 Kan. 351 662 P.2d 255 (1983).

In re Sternberger v. Marathon Oil Co., 257 Kan. 315, 894 P.2d 788 (1995), the relevant portion of the lease provision governing provided that Marathon would pay royalties of one-eighth of the market price at the well for gas sold or used. The lease provision was silent as to deductions. The court noted that absent a contract providing to the contrary, a nonworking interest owner is not obligated to bear any share of production expense to make the gas marketable quality. In the case before the court, the gas was marketable quality at the well, and the lease language provided for royalties based on the market price "at the well." Accordingly, the lessor had to bear a proportionate share of the reasonable cost of transporting the marketable gas to its point of sale.

In arriving at the amount of income which has been realized, the lessee's share of production or his share of receipts from the sale of oil or gas is taken into account. More specifically, the income attributable to the working interest as it was originally created is taken into account, and only the lessor royalty or other share of production is excluded. Thus, the share of production attributable to an outstanding overriding royalty interest will not be excluded but will be taken into account in determining income.

Operating expenses

In determining whether an oil and gas lease is producing in paying quantities, the proper accounting period is to be a reasonable time depending upon the circumstances of each lease, taking into consideration sufficient time to reflect the current production status of the lease and thus provide the information which a prudent operator would take into account in whether to continue or abandon the operation. Depreciation on original oil and gas well equipment is not to be included as an item of expense in "paying quantities" calculation. *Texaco Inc. v. Fox*, 228 Kan. 589 Syl 3, 618 P.2d 844 (1980); *Pray v. Premier Petroleum, Inc.*, 223 Kan. 351, 662 P.2d 255 (1983).

By recording an oil and gas lease in the office of the Register of Deeds in which the land is located, a lessee imparts notice to the public of the validity and continuance of said lease for the definite term therein expressed but no longer. If the lease contains the statement of any contingency upon the happening of which the term of any such lease may be extended (such as "and as much longer as oil and gas or either are produced in paying quantities"), the owner of said lease may at any time before the expiration of the definite term of said lease file with the Register of Deeds an affidavit setting forth the description of the lease that the affiant in the owner thereof and the facts showing that the required contingency has happened. This affidavit shall be due notice to the public of the existence and continuing validity of said lease until the same shall be forfeited, canceled, set aside or surrendered according to law. K.S.A. 55-205.

Where a portion of an oil and gas lease is contractually committed to a unit, production anywhere in the unit extends the terms of the entire lease. *Somer v. Harris Trust & Savings Bank*, 1 Kan. App. 2d 397, 566 P.2d 775 (1977).

C. Shut-In Gas Clause

General rules

Problems inherent in the production of gas impose additional burdens on the lessee. Frequently, the lessee discovers gas in paying quantities but, because of the lack of a pipeline in the vicinity, has no market and is unable to produce the gas. If no market is available by the end of the primary term, a strict application of the habendum clause would terminate the lease for lack of production. As a remedy, gas leases include a "shut-in" royalty clause. The reason that the shut-in royalty clause has come into growing use goes back to the inherent physical nature of natural gas. *Daniels v. Quest Cherokee LLC*, 2009 Kan. App. Unpub. LEXIS 1002, 220 P.3d 593 (2009).

Such clauses actually modify the lease's habendum clause to provide for a type of "constructive production," the payment of "shut-in royalty."

Levin v. Maw Oil & Gas, LLC, 234 P.3d 805 (Kan. 2010) attempts to synthesize the current body of shut-in royalty law to define when a well is shut in. The court states that generally, to be shut-in, a well must be physically completed and capable of producing in paying quantities even if it has not actually produced in paying quantities in the past. The court refused to adopt a rigid legal definition of shut-in entirely dependent upon whether de-watering has begun or whether equipment or repairs are still needed. From the facts of the case, the court held that a well need not be hooked into a pipeline to invoke the shut-in royalty clause.

The fact that the lease is held by payment of shut-in royalties does not relieve the lessee from his duty to diligently search for a market and to otherwise conduct himself as would a reasonable and prudent lessee under the same or similar circumstances. Although the shut-in royalty clause does not normally specify that the shut-in gas well must be capable of producing in paying quantities, such a requirement is implied. *Pray v. Premier Petroleum*, 233 Kan. 351, 662 P.2d 255 (1983).

Capital Expenditures for building a pipeline are improper considerations for determining whether a gas well will produce in paying quantities under a shut in royalty clause. *Pray v. Premier Petroleum*, 233 Kan. 351, 662 P.2d 255 (1983).

A lessee may not invoke the shut-in royalty provision of an oil and gas lease when even a limited market exists. *Tucker v. Hugoton Energy Corp.*, 253 Kan. 373, 855 P.2d 929 (1993). The Tucker case states that the existence of a limited market precludes invoking the shut-in royalty clause. Stated differently, a producing well with access to a market cannot be shut in. A lessee is therefore not allowed to turn off the wells and invoke the shut-in royalty clause in hope for a higher gas price at a later date.

In Kansas, because shut-in royalty is typically paid to extend the term of the habendum clause past the primary term, an argument can be made that failure to make payment correctly will cause the lease to terminate although there are no cases on this point. Leases should be drafted so that the lessee is obligated to pay as opposed to as a condition of continuing the lease period. Typically in Kansas payment of shut-in royalty is not due until one year after the well is shut-in. *Martin v. Kostner*, 231 Kan. 315, 644 P.2d 430 (1982).

Amount of shut-in gas royalty

Shut-in royalty is set at an amount agreed to by the parties to a lease, typically $1 per acre. Shut-in royalty is a "constructive production" and is paid to the royalty owner or as provided by the lease.

D. Temporary Cessation of Production

Common law rule

If production from an oil and gas lease ceases after the primary term has expired, the lease will terminate unless the cessation is merely temporary. *Kelwood Farms Inc. v. Ritchie* 1 Kan. App. 2d 472, 571 P.2d 338 (1977). The doctrine of Temporary Cessation of Production has been recognized in Kansas as dictating that a mere Temporary Cessation of Production because of necessary developments or operations do not result in termination of the oil and gas lease despite the requirement of production to satisfy the habendum clause. So long as the cessation is temporary, the doctrine allows a lessee a reasonable time to recommence production in paying quantities. However, the doctrine of temporary cessation cannot be applied where the parties have expressly contracted for a particular result in the event of production cessation. A producer can not invoke the doctrine of temporary cessation to avoid complying with a provision that requires it to recommence production within a specified period of time. *Welsch v. Trinestio Energy Co.*, 43 Kan. App. 2d 16, 221 P.3d 609 (Kan. App. 2009).

Three kinds of evidence relevant to the question of temporary or permanent cessation of production are: (1) the period of time cessation has persisted; (2) the intent of the operator; (3) the cause of the cessation. *Wrestler v. Colt*, 7 Kan. App. 2d 553, 644 P.2d 1342 (1982).

E. Delay Rental Clause

General rule

Under the normal "unless" lease form with a drilling/delay rental clause, there is no legal obligation enforceable by the lessor against the lessee for payment of the delay rental, but if the payment is not properly made when due, the lease terminates automatically. *Rice v. Hillenburg*, 13 Kan. App. 2d 155, 766 P.2d 182 (Kan. App. 1988).

Whereas with an "or" form of oil and gas lease, the major characteristic which distinguishes it from an "unless" lease is that the lessee's non payment of delay rental under an "or" lease violates a covenant and allows the lessor to cancel the lease while nonpayment under an "unless" lease automatically terminates the lease.

Permitted excuses for faulty payment

Only a few excuses for nonpayment of delay rental have been accepted in Kansas to avoid termination of the lease:

> There appears to be no room for honest mistakes; inadvertent error concerning the time, place, manner or amount of payment can terminate the lease. Unless there are exceptional circumstances, equity will not intervene. The general rule governing payment of delay rentals requires strict adherence to the terms of the drilling delay rental clause. A lessee who is "a day late or a dollar short" will, in most instances, lose their lease. *Morton v. Sutcliffe*, 175 Kan. 699, 266 P.2d 734 (1954).

The first acceptable category of excuse is where the lessee attempted to make payment, but the payment failed for some reason. In the case of *Browning v. Weaver*, 158 Kan. 255, 146 P.2d 390 (1944) payment was made to the wrong depository but was to the lessor's account. The lessor knew about the payment and had access to the money but objected only after the lessee spent $16,000 to drill a producing well on an adjoining lease. Payment of the delay rental was deemed timely made, and the lease was not forfeited.

In addition, where the delay rental payment has been timely mailed but was lost in the mail, relief was granted from lease forfeiture. *Young v. Arkansas Fuel Co.*, 117 Kan. 698, 232 Pac. 871 (1925). Likewise, where the payment was timely mailed but was delayed in the mail and arrived three days after the due date, the payment was held to be timely by the court. *Kays v. Little*, 103 Kan. 461, 175 P. 149 (1918).

The second category of cases where the Kansas Supreme Court has allowed an excuse for nonpayment of delay rental is where the lessor attacked the lessee's title before the payment became due, and the dispute had not been resolved at the time payment should have been made. The lessee was at all times ready, willing and able to drill or pay delay rentals during the pendency of the suit. *Thurner v. Kaufman*, 237 Kan 184, 699 P.2d 435 (1985). This excuse is not available where the lessee's title is challenged by a third party. *Rice v. Hillenburg*, 13 Kan. App. 2d 155, 766 P.2d 182 (1988).

F. Definition of Operations

General rule

Kansas has adopted a bright line rule with regard to "commencement of operation." In general, the Kansas courts have been strict in their construction of oil and gas leases and have refused to apply equity in cases involving commencement under an oil and gas lease. *Shoup v. First National Bank*, 145 Kan. 971, 67 P.2d 569 (1987).

The general rule was announced in the case of *Hall v. JFW Inc.*, 20 Kan. App.. 2d 845, 893 P.2d 837 (1995). In that case the court held,

> The lease provides that the lessee must 'commence to *drill* a well within the terms of this lease.' (Emphasis added) Under the plain terms of the lease actual drilling was required prior to the termination date.

An irrevocable commitment to conduct operations to completion will not satisfy a lease requiring the commencement of drilling and not merely operations for drilling.

An issue of current importance in the age of horizontal drilling is whether it is necessary for the well bore to have penetrated the property line of the lessor's property before the end of the primary term. In the case of *A & M Oil, Inc. v. Miller*, 11 Kan. App. 2d 152, 715 P. 2d 1295 (1986), the court held that where the lessee had obtained authorization to slant drill from a drilling unit adjacent to lessors property, erected a rig on the adjacent unit and commenced drilling, all within the primary term of the lease, even though the well bore did not penetrate the lessors property until after the end of the primary term, the lessee's action was sufficient to extend the leases under the drilling and operations clause.

Obstruction doctrine or lockout rule

If the lessor obstructs the lessee's operations, the courts will estop lessors from asserting lessee's failure to comply with the lease terms. *Blodgett v. Lanyon Zinc Co.*, 120 F. 893 (8th Cir. 1903); Ray v. Brush, 112 Kan. 110, 210 P. 660 (1922).

For a lessee under an unless form of oil and gas lease who is ready, able and willing either to develop the premises or pay rentals, an attack upon lessee's title by the lessor will relieve the lessee of the duty to either proceed with drilling operations or to pay the delay rental during the continuation of the challenge to his title. *Thurner v. Kaufman*, 237 Kan. 184, 699 P.2d 435 (1981).

G. Pooling

Reasons for pooling

Kansas is one of the few major producing states which does not have a compulsory pooling system. Therefore, no mechanism is available to force landowners in Kansas to develop their property for oil and gas. Obviously this can present obstacles to development of other landowners who do not possess enough acreage to form a minimum drilling unit.

However, the Kansas Corporation Commission may compel unitization pursuant to the state's compulsory unitization in the event it finds either: (1) primary production has reached a low economic level and, without the introduction of artificial energy, abandonment of oil or gas wells is imminent; or (2) that the unitized management, operation and further development of the pool is economically feasible and reasonably necessary to prevent waste within the reservoir and thereby increase substantially the ultimate recovery of oil and gas. *See* K.S.A. 55-1301, *et seq.*; *Parkin v. Kansas Corporation Commission*, 234 Kan. 994, 677 P.2d 991 (1984). The Commission must find that three conditions exist: (1) the primary production from a pool, or a part thereof, sought to be unitized has reached a low economic level and, without the introduction of artificial energy, abandonment of oil or gas wells is imminent, or the unitized management, operation and further development of the pool or the part thereof sought to be unitized is economically feasible and reasonably necessary to prevent waste within the reservoir and thereby increase substantially the ultimate recovery of oil or gas; (2) that the value of the estimated additional recovery of oil or gas substantially exceeds the estimated additional cost incident to conducting such operations; and (3) that the proposed operation is fair and equitable to all interest owners. *Parkin v. State Corp. Comm.*, 234 Kan. 994, 677 P.2d 991 (1984).

The Kansas Corporation Commission has the authority to establish drilling and spacing units. *Ramsey v. City of Oxford*, 200 U.S. 563 (1929). See K.A.R. 82-1-109.

The standard drilling unit is 10 acres. No well may be drilled closer than 330 feet from a lease or unit boundary unless an exception is granted by the Commission. However, an operator may be granted a location exception to prevent waste or protect correlative rights. K.A.R. 82-3-108. Spacing rules may be established separately for oil and gas on the same reservoir. Spacing orders do not protect the operator from the obligation to protect against drainage. *Reaner v. Monsanto*, 187 Kan. 158, 354 P.2d 326 (1960). In addition, proration laws do not interfere with an operators obligation to drill additional wells. *Rush v. King Oil*, 220 Kan. 616, 556 P.2d 431 (1976).

Voluntary, compulsory or both

Voluntary pooling is accomplished by the voluntary agreement of both the lessors and lessees and filing a pooling agreement or declaration with the register of deeds of the subject county.

Kansas also provides for forced pooling and unitization to develop minerals located within certain cities in the state. Minerals are defined as "oil and gas" only. Special pooling and unitization is granted to the "governing body of the city." In addition, the act only applies to oil and gas located within the incorporated boundaries of the city. *See* K.S.A. 55-1610, *et seq.*

Kansas law does not allow compulsory pooling of interests for oil and gas purposes. Kansas does allow compulsory unitization under a few very limited circumstances. K.S.A. 55-1301 *et seq.*

H. Calculation and Payment of Royalties

Meaning of a "market value" gas royalty clause

A royalty clause which calls for gas royalties to be calculated on the basis of market value or market price at the well, refers to value or price at the current rate prevailing when the gas is delivered rather than the proceeds or the amount realized under a gas purchase contract. *Lightcap v. Mobil Oil Corporation*, 221 Kan. 448, 562 P.2d 1 *cert. denied* 434 U.S. 876 (1977); *Holmes v. Kenwanee Oil Co.*, 233 Kan. 544, 664 P.2d 1335 (1983).

Market value or price could exceed the amount fixed by federal regulation for the purpose of computing royalties. The market value of gas is the price which would be paid by a willing buyer to a willing seller in a free market. Such price may be proven by any competent evidence. *Holmes v. Kenwanee Oil Co.*, 233 Kan. 551, 664 P.2d 1335 (1983).

A royalty clause which requires gas royalties to be paid based on the "proceeds" entitles the royal owner only to a share of the actual monies received by the producers from the sale of the gas. *Waechter v. Amoco Production Co.*, 217 Kan 489, 537 P.2d 228 (1975).

Items of expense deducted from royalty payment/post-production costs (PPCs)

When an oil and gas lease provides that royalties are to be paid based on "market price at the well" and there is no market at the wells, the market price at the well is determined by deducting from the market price received at an available point of sale off of the lease the reasonable expense of transporting the gas to the point of sale. The lessee has the burden of proving the reasonableness of the costs. However, absent a contract to the contrary, a non-working interest owner is not obligated to bear any share of production expense such as compressing, transporting and processing undertaken to transform gas into a marketable product. *Sternberger v. Maration Oil Co.*, 257 Kan. 315, 894 P.2d 788 (1995); *Wallace B. Roderick Revocable Living Trust v. XTO Energy Inc.*, 679 F.Supp. 2d 1287 (D. Kan. 2010). *See Davis v. Key Gas Corp.*, 34 Kan. App. 2d 728, 124 P.3d 96 (2005).

Implied covenant to market

In Kansas, the lessee has the obligation to market production in paying quantities in order to maintain the terms of the lease. *Howerton v. Kansas Natural Gas Co.*, 82 Kan. 367, 108 P. 813 (1910).

When royalties are due and penalties for late payment

A first purchaser of oil or gas must pay to both royalty and working interest owners or others who have a contract right to receive the payment within 60 days of the sale or will owe interest at the rate of one and one half percentage points above the rate charged on loans to depository institutions by the New York Federal Reserve Bank at the start of business on the first day of each month. K.S.A. 55-1614 *et seq.*

IV. OTHER TOPICS

A. Seismic Activity

Who has the right to conduct or authorize seismic tests?

In Kansas, the mineral owner or his lessee owns as a part of the mineral estate the right to enter the overlying surface and make reasonable use of it to explore and develop the mineral estate. *Brooks v. Mull*, 147 Kan. 740, 78 P.2d 879 (1938).

Does the lease grant the exclusive right to conduct seismic tests?

The lessee is generally granted the exclusive rights to explore for and develop the property covered by the lessee for oil and gas. However, in the case of *Mustang Production Co. v. Texaco, Inc.*, 549 F. Supp. 424 (D. Kan. 1982), the court interpreted a grant in the context of geographical rights. The court held that while the rights to drill and produce are impliedly exclusive, geophysical exploration may be conducted so as not to interfere with the lessees interests. Therefore, since the lease did not grant to the lessee the "exclusive" right to explore or conduct geophysical operation, the lessor could grant such geophysical rights to others. It is not clear whether the Kansas courts would follow this decision.

B. Surface Issues

General rule as to payment; Surface Damage Act

A lessee is required at the termination of the lease to remove "any rig, derrick or other operating structure and return the land to its original grade unless the landowner agrees otherwise." K.S.A. 55-177. Violation of this provision is a misdemeanor.

Lessee's right to use the surface, water, etc.

In Kansas, the mineral estate is not the "dominant" estate. Under an oil and gas lease, the lessee has the implied right to make reasonable use of the surface in order to develop the land for oil and gas. *Thurner v. Kaufman*, 237 Kan. 184, 699 P.2d 435 (1984); *Brooks v. Mull*, 147 Kan. 740, 78 P.2d 879 (1938). Unless provided for in the lease, there is no statutory or common law duty to pay surface damages unless the lessee has made unreasonable use of the surface. *See Fast v. Kahan*, 206 Kan. 682, 481 P.2d 958 (1971).

In *S. Star Cent. Gas Pipeline, Inc. v. Cunning*, 37 Kan. App. 2d 807, 157 P.3d 1120 (2007), Southern Start acquired a blanket easement across the property to construct a pipeline. Subsequent to Southern Star's acquisition of the easement, the landowner built a garage within 41 inches of the pipeline. After learning of the garage, Southern Star sought to have the garage removed by filing an ejectment action. The court held that a blanket easement was "not as readily enforceable" as an easement with defined dimensions. Consequently, the court required Southern Star to prove that the garage was a material encroachment on Southern Star's reasonable enjoyment of the easement. The appellate court upheld the trial court's determination that the easement's goal could be achieved with the garage in place.

C. Severance of Title from the State (Patents)

Generally, all lands in Kansas may be traced to federal ownership. Title to lands should be traced to a patent issued by the United States or the state of Kansas. In rare instances, minerals may have been reserved by the United States or the state of Kansas. Many times title to land was granted to railroads as inducement to construct railway lines across the country or specifically reserved as school lands. Many times these grants may have been intended to merely be for a right of way; however, because of the language of the grants, it may also encompass minerals. It is advisable to review the language of the grant carefully to make certain title to the minerals is not held by the railroad or its successor or that the property is not held by a local school board or the state Board of Regents.

D. Recording Acts

Nature of the oil and gas lease for recording purposes

Kansas classifies oil and gas leases and royalty interests as personal property although they are treated for conveyancing purposes as interests in land.

Effect of not recording

Conveyances must be recorded to provide constructive notice of the grantee's rights in the property. K.S.A. 58-2222. An unrecorded conveyance is valid only between the parties to the instrument and those having actual knowledge of the conveyance. K.S.A. 58-2223. An unrecorded grant may be defeated by subsequent purchasers or lenders who have no notice of the conveyance.

Luthi v. Evans, 223 Kan. 622, 576 P.2d 1064 (1978). Possession of the property has been held to impart notice of a grantees interest in land. *Luthi v. Evans, supra.*

Doctrine of bona fide purchaser

In Kansas, an oil and gas lease is only effective to bind the parties to the instrument and those with actual notice unless it is recorded. *Derby Oil Co. v. Bell*, 134 Kan. 489, 7 P.2d 40 (1932). K.S.A. 58-2221 provides that:

> every instrument in writing that conveys real estate, any estate or interest created by an oil and gas lease, or whereby any real estate may be affected...may be recorded. Any oil and gas lease, executed prior to January 1, 1925, but not recorded prior to January 1, 1952, is void. K.S.A. 55-216.

K.S.A. 55-205 requires the owner of an oil and gas lease to file with the register of deeds, prior to the expiration of the definite lease term, an affidavit describing the leases, stating the lessees' ownership of the lease and stating the facts which indicate the contingency has occurred to extend the lease term. This affidavit constitutes notice to third parties of the existence and continued validity of the lease.

Instruments that are void or voidable even if recorded

Kansas law does not protect grantees from defects that undermine all conveyances such as forgery, mistaken identity, agents without authority and minority of grantors.

Priority of recording

Instruments can be made effective at, before or subsequent to execution; however, that effective date will have no effect on the operation of K.S.A. 58-2222 and 58-2223 if the instrument is unrecorded in the event of an intervening bona fide purchaser.

E. Important Conveyancing Rules

Duhig Rule (Overconveyance)

Kansas has not explicitly adopted the *Duhig* doctrine. If a landowner conveys one-sixteenth royalty when his interest is under lease providing one-eighth landowners' royalty, the landowner will be deemed to have conveyed a one-sixteenth royalty. *Bellport v. Harrison*, 123 Kan. 310, 255 P.52 (1927). If a landowner conveys one-sixteenth of his one-eighth royalty, the landowner will be deemed to have conveyed a 1/128 royalty. *Hickey v. Dirks*, 156 Kan. 326, 133 P.2d 107 (1943). K.S.A. 58-2202 states that a conveyance passes all of grantor's estate in the property unless the intent to pass a lessee's estate expressly appears or is necessarily implied in the terms of the grant.

In Kansas the decisive factor is to determine if the conveyance designates the interest from which the fraction of royalty is to be calculated. *Corbin v. Moses*, 195 Kan. 252, 403 P.2d 800 (1965).

Some commentators have argued for adoption of the Duhig rule in Kansas. *See Pierce, Kansas Oil and Gas Handbook*, §6.23.

Unique conveyancing issues

Requirements for an effective lease. Kansas courts treat an oil and gas lease as a contract. *Brinkman v. Empire Gas and Fuel Co.*, 120 Kan. 602, 245 P. 107 (1926). However, oil and gas leases are treated as interests in land for some purposes. K.S.A. 58-2221. The general rules for an effective oil and gas lease in Kansas are:

1. An identity of all parties to a conveyance.
2. Appropriate words of conveyance.
3. A description of the property being conveyed.
4. Consideration.
5. A written instrument signed, dated, acknowledged by the lessors and filed of record.

K.S.A. 58-2203. *See also Ruthven and Co. v. Pan American Petroleum Corp.*, 206 Kan. 639, 482 P.2d 28 (1971). The parties to the conveyance and related requirements are discussed in Section II. The remainder are discussed below.

Mineral interest or royalty conveyed. In determining whether a deed conveys a mineral interest or a royalty, courts look to the following principles:

1. All language used in the instrument will be considered. *Shepard v. John Hancock Mutual Life Ins.* Co., 189 Kan. 125, 368 P.2d 19 (1962).
2. The title given to the instrument is not determinative. *Magnusson v. Colorado Oil & Gas Corp.*, 183 Kan. 568, 331 P.2d 577 (1958).
3. Although all parts of the instrument will be considered, the terms of the granting clause will be given special weight. *Lathrop v. Eyestone*, 170 Kan. 419, 227 P.2d 136 (1951).
4. Other factors considered are whether the instrument conveys an ownership interest prior to its actual production, a right to enter the property to conduct development operations, or the right to lease the property, and receive bonus, delay rental and royalty.

Description of Property and Consideration. For the purposes of describing land subject to an oil and gas lease, the rules are generally the same as conveyances of land. The lease must adequately identify the real property it affects. *See Cushenberry v. Waite-Phillips Co.*, 119 Kan. 478, 240 P. 400 (1925). In Kansas, consideration is generally not required for a conveyance of real property. *See Briscoe v. Reschke*, 170 Kan. 367, 226 P.2d 255 (1951). However, because oil and gas leases are considered to be more in the nature of a contract as opposed to a conveyance, they must be supported by consideration to the same extent as other contracts. Nominal consideration, however, has been held to be sufficient to support option contracts and oil and gas leases. *Brinkman v. Empire Gas and Fuel Co.*, 120 Kan. 602, 245 P. 107 (1926). But, *see Berryman v. Kmoch*, 221 Kan. 304, 559 P.2d 790 (1977) (failure to pay recited consideration for an option to buy land made the offer to sell revokable in the absence of evidence sufficient consideration).

The Kansas Supreme Court in *Dailey v. Joslin*, 172 Kan. 199, 240 P.2d 471 (1952) held that mutual covenants between a lessor and a lessee constituted sufficient consideration for an oil and gas lease even though the recited consideration of $1.00 was not actually paid. Caveat: the lease agreement in *Daily* included the lessee's promise to pay the costs necessary to quiet the lessor's title. This is not a standard provision in oil and gas leases.

In addition, K.S.A. 16-107 provides that "all contracts in writing signed by the party bound thereby or his authorized agent or attorney shall import a consideration." This statute has been interpreted to mean that if a contract is written, the existence of consideration is presumed unless the lack of consideration is raised as an affirmative defense and proven by substantial competent evidence. *State ex rel. Ludwick v. Bryant*, 237 Kan. 47, 697 P.2d 858 (1985). When leasing homestead property, an oil and gas lease must be supported by "adequate consideration." *Palmer v. Parish*, 61 Kan. 311, 59 P. 640 (1900); *Schloss v. Unsell*, 114 Kan. 69, 216 P. 1091 (1923).

The usual lease transaction in Kansas follows an inquiry by the potential lessee. Once the parties agree upon the terms of the lease, the lessee tenders the bonus or first year's rental. The lessor then signs the lease and delivers it to the lessee. Generally, the lessor's execution and delivery of the lease will also be a manifestation of assent of the lessee's offer to lease.

In situations where the lease is undated, the actual delivery of the lease can be more critical. In those situations, an oil and gas lease takes effect upon its execution and delivery. *See Ray v. Brush*, 112 Kan. 110, 210 P. 660 (1922). In the normal oil and gas situation, a lessee does not sign the lease. Therefore, Kansas courts use an acceptance and delivery analysis to find a binding contract, and acceptance is presumed when the conveyance is beneficial to the grantee. *See In re Estate of Sellens*, 7 Kan. App..2d 48, 637 P.2d 483 (1981); *Hansen v. Walker*, 175 Kan. 121, 259 P.2d 242 (1953).

In situations where the parties have made a contract to enter into an oil and gas lease, the Kansas statute of frauds applies. K.S.A. 33-101 *et seq*. That statute states for,

> any contract for the sale of lands, tenements or hereditaments, or any interest in or concerning them, there must be some writing evidencing the agreement which is signed by the party to be charged. K.S.A. 33-106.

Therefore, both the lessor and the lessee must sign the contract. *See White v. Green*, 103 Kan. 405, 173 P. 974 (1918).

In situations where the oil and gas lease transaction is a conveyance, the statute of frauds requires only the signature of the lessor.

> No leases, estates or interests of, in or out of lands, exceeding one year in duration, shall at any time hereafter be assigned or granted, unless it be by deed or note, in writing, signed by the parties so assigning or granting the same. K.S.A. 33-105.

Delivery and acceptance. To be effective as a transfer of title, the conveyance instrument must be delivered. Recitations in the deed may indicate delivery. Recording is *prima facie* evidence of delivery. Where the instrument is in the grantee's possession or recorded, the party challenging delivery has the burden of proof. Lack of delivery must be established by clear and convincing evidence. *Hinchliffe v. Fischer*, 198 Kan. 365, 424 P.2d 581 (1967); *Libel v. Corcoran*, 203 Kan. 181, 452 P.2d 832 (1969).

To complete delivery, the grantee must "accept" delivery of the conveyance. When the conveyance is beneficial to the grantee, acceptance is presumed. The only way to overcome the presumption is through evidence establishing the grantee's rejection of the conveyance. *Weuster v. Folin*, 60 Kan. 334, 56 P. 490 (1899); *Hansen v. Walker*, 175 Kan. 121, 259 P.2d 242 (1953). Recording of an instrument raises a presumption of delivery. *Turner v. Close*, 125 Kan. 485, 264 P.2d 1047 (1928).

Acknowledgement of instruments. In general, all instruments affecting title to real estate in Kansas should be acknowledged for recording purposes. K.S.A. 58-2221. An acknowledgment is not necessary to create a valid conveyance in Kansas. An unacknowledged deed passes title just as an acknowledged deed. *Bryant v. Fordyce*, 147 Kan. 586, 78 P.2d 32 (1938). An unacknowledged deed may be recorded if it is proven as required by K.S.A. 58-2221.

Strict construction of conveyances. K.S.A. 58-2202 provides in part:

> Every conveyance of real estate shall pass all of the estate of the grantor therein, unless the intent to pass a less estate shall expressly appear or be necessarily implied in the terms of the grant.

This statute has been interpreted to require that instruments be strictly construed against the grantor "to confer upon the grantee the greatest estate that its terms will permit." *Keller v. Ely*, 192 Kan. 698, 391 P.2d 132 (1964).

Recording of mineral interests. K.S.A. 79-420 requires a mineral interest grantee to either record his conveyance within 90 days after delivery or otherwise list it for taxation. Failure to comply voids the conveyance, and the interest sought to be conveyed remains in the grantor. However, this statute does not affect a "lease" of minerals. Failure to record a lease does not void the grant.

F. How to Use County Records

Records in the county. Most records in the state of Kansas pertaining to real estate and oil and gas are maintained in the office of the **Register of Deeds** as opposed to the County Clerk's office. The Register of Deeds is required to maintain a **Grantor/Grantee Index** and, whenever deemed necessary by the Board of County Commissioners, the Register of Deeds *may maintain* a **tract/numerical index** containing:

1. The name of the instrument;
2. The name of the Grantor;
3. The name of the Grantee;
4. A brief description of the property; and
5. The volume and page where recorded.

The tract index usually describes the lands by sections, but each page reflects quarter of quarter or 40-acre tracts.

Kansas has 105 counties. **All counties maintain a tract/numerical index except for Sedgwick County and Butler County** (as to records prior to the early 1960's). Therefore, a standup examination from inception of title is not possible in these counties utilizing only the county records. The Register of Deeds makes no charge for use of the records except for copy expense.

Records not maintained by the Register of Deeds will be found in the office of the **Clerk of the District Court**. The Clerk of the District Court maintains at least the following records:

1. All lawsuits;
2. Probate proceedings;
3. Divorce proceedings;
4. All types of mechanic's liens;
5. Foreclosure actions;
6. Partition actions;
7. Quiet title actions and
8. Tax warrants and judgment liens issued by the Department of Revenue for the state of Kansas.

Records outside the county. In order to determine title for the purposes of drilling, it is normally unnecessary to examine records except for those maintained by the county. If production is obtained, records may be reviewed at the KCC relating to allowables, etc.

Other records topics. Since the counties maintain a numerical/tract index, the standup examination begins in the county.

Most abstracters in Kansas still abstract, that is they do not copy every page of every instrument but provide a summary of most instruments. The abstracter will provide complete copies of any instruments requested. The instruments usually requested to be copies in full are:

a. Oil and gas leases;

b. Assignments and other related instruments; and

c. Unitization Agreements.

Affidavits of production and of non-production. Kansas has the same requirements as Colorado, however, Kan. Stat. Ann. ' 55-205 has some teeth. *Cities Service v. Adair*, 273 F.2d 673 (10th Cir. - Kan. 1959) held that a lease partially expired in the following situation. In 1923, lessors executed an oil and gas lease covering 1,280 acres. The ownership of the lease became fragmented in that Sinclair owned 480 acres, Cities Service owned a separate 160 acres, with the remaining acreage owned by third parties. Sinclair drilled producing oil wells on its 480 acres and timely filed an Affidavit of production to extend the primary term as to its acreage. This affidavit only identified the 480 acres owned by Sinclair. In 1955, the defendants obtained an oil and gas lease from the mineral owners of the same 160 acres covered by Cities Service's portion of the 1923 lease. Defendants drilled producing oil wells and Cities Service sued claiming title. The court held for the defendants and stated that the defendants did not have actual notice of Cities' leasehold because Cities did not conduct any surface operations, and the defendants did not have constructive notice of Cities' leasehold because the Affidavit of Production was not in the chain of title for the 160-acre leasehold owned by Cities Service.