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WHEN IS A ROCK A ROCK? NEW MEXICO'S ABANDONMENT OF PROPERTY RULES IN MINERAL CONVEYANCING

Gabe Long*

I. INTRODUCTION

Courts have long struggled with ambiguity, whether in a deed, statute or rule. Ambiguity is largely due to the amorphous nature of language. As Justice Oliver Wendell Holmes stated, "[a] word is not a crystal, transparent and unchanged; it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used."[1]

The word 'mineral' is one such word. It is so ambiguous that it is continually defined and redefined in various ways depending on the context, and as a result it has "meant all things to all people"[2] at one point or another. A traditionalist might look to Carl Linnaeus' 1735 *Systema Naturae*,[3] which defined 'mineral' as anything that is neither animal nor vegetable. Geologists, on the other hand, define a 'mineral' as "a naturally occurring inorganic element or compound having an orderly internal structure and characteristic chemical composition, crystal form and physical properties."[4]

In the world of oil and gas law the distinction is of vital importance, the result of which could mean the difference between owning, or not owning, a substance worth many millions of dollars. The court's role in defining a substance as a 'mineral' thus becomes the subject of much litigation and scholarly thought. As such, this case note distills the various

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1. Towne v. Eisner, 245 U.S. 418, 425 (1918).

2. Millard F. Ingraham, *The Meaning of "Minerals" in Grants and Reservations*, 30 Rocky Mtn. L. Rev. 343, 343 (1957–58).

3. Carl Linnaeus, a Swedish botanist, is known as the "Father of Taxonomy" and is famed for his exhaustive classification of organisms and substances culminating in his publication of *Systema Naturae* in the early 18th Century. *See generally* Carl Linnaeus (1707 – 1778), University of California Museum of Paleontology, http://www.ucmp.berkeley.edu/history/linnaeus.html.

4. *Many Definitions of Minerals*, University of Kentucky: Kentucky Geological Survey, http://www.uky.edu/KGS/rocksmn/definition.htm.

arguments as they pertain to New Mexico case law with emphasis on the New Mexico Court of Appeal's decision in *Prather v. Lyons*.[5]

As is often the case in split estate conveyances, and in particular where the state is the initial title-holder, the mineral estate is usually reserved to the grantor with simple language designed to protect the grantor's mineral interests. "A reservation creates some new right in the grantor which is 're-served' or regranted to him."[6] As a result, a 'split estate' is created when the grantee is conveyed the surface estate, while the grantor retains his interests in the subsurface mineral estate. These reservations generally employ language that reserves a given substance, usually oil and gas, "and other minerals" or "other minerals of whatsoever kind." Technology however, does not wait for the law. As years pass and new substances are required to manufacture the latest cell phone or solar panel, courts continue to grapple with issues of title surrounding the meaning of the phrase "other minerals."[7]

In response, New Mexico courts have oscillated over the years between various approaches that have included the development of a bright-line rule of property, to the adoption of interpretive principles found strictly within the realm of contract law.[8] While oil and gas law can be thought of as an amalgamation of property law and contract law, mechanisms of interpretation may accordingly overlap, leaving courts to determine when to apply each body of law. On the one hand, since general mineral reservations are simply the "re-granting" of a property interest, property law naturally plays a pivotal role. On the other hand, since mineral reservations accompany written agreements, contract law also finds ready applicability. In its most recent decision, the New Mexico Supreme Court in *Bogle Farms*,[9] the source of binding authority for

5. 2011-NMCA-108, 267 P.3d 78.

6. Eugene Kuntz, LAW OF OIL AND GAS § 14.2 (1964).

7. The quest for determining ownership of title is further complicated when the parties to the original transaction have long since passed away and it is not as simple as asking them what the term "mineral" was designed to encompass.

8. The rule of property doctrine holds that "decisions long acquiesced in, which constitute rules of property or trade or upon which important rights are based, should not be disturbed, even though a different conclusion might have been reached if the question presented were an open one . . . .". Bogle Farms, Inc. v. Baca, 1996-NMSC-051, ¶ 29, 122 N.M. 422, 430 (quoting 14 AM. JUR. *Courts* § 65, at 286 (1941)). The State of Texas, among other jurisdictions, has created a number of property rules in response to mineral reservation litigation. *See, e.g.*, Moser v. United States Steel Corp., 676 S.W.2d 99, 101 (Tex.1984) (citing Texas case law where reservation of "other minerals" held not to include: fresh water, limestone, building stone, caliche and near surface coal and lignite).

9. 1996-NMSC-051.

Prather,[10] once again departs from its earlier holdings and adopts a contract law specific manner of interpreting property conveyances. As a result, the decision in *Prather*[11] marks the lower courts' first step down the path of strict application of contract law and the abandonment of property law.

The implications raised by extending *Prather*[12] would be to continue to exalt contract law over property law, which wholly eviscerates long-established tenets of property law and renders a written instrument largely worthless. By turning first to the parties' intent, before ever reaching rules of property or similar canons of construction, the written instrument on conveyance has no purpose. Looking to extrinsic evidence first, and not the plain meaning of the written instrument presumes no confidence in the instrument itself or the parties responsible for drafting the instrument.

This case note analyzes the court of appeals' decision in *Prather*[13] to affirm the district court's holding that pre-Cambrian, metamorphic rock was intended to be included within the state's general mineral reservation and, thus, title belonged to the state and not the surface owner.

Part II of this case note briefly discusses the factual and procedural history of *Prather*.[14] Part III presents a focused backdrop to the relevant history of mineral and contract law in New Mexico, providing a more developed explanation of source of precedent for *Prather*,[15] namely the New Mexico Supreme Court's holding in *Bogle Farms*.[16] Part IV then turns to the court of appeals' rationale in affirming the district court's decision in *Prather*[17] focusing on the court of appeals' interpretation and application of the rule developed under *Bogle Farms*.[18]

Finally, Part V analyzes both the court of appeals' decision in *Prather*[19] and its implications. Specifically, Part V examines: 1) the application of principles derived from contract law to the interpretation of conveyances of mineral interests, 2) the scope of the court's use of extrinsic evidence in determining intent, and 3) the dissent's promotion of an alternative canon of construction. Part V also analyzes the immediate and

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10. 2011-NMCA-108.
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. Bogle Farms, Inc. v. Baca, 1996-NMSC-051, 122 N.M. 422.
17. 2011-NMCA-108.
18. 1996-NMSC-051.
19. 2011-NMCA-108.

potential future implications of the intent-based approach as applied by the *Prather* court,[20] and provides a hypothetical walkthrough of the interpretive process a court might employ in the future in light of this most recent case.

II. STATEMENT OF THE CASE

The legal action to quiet title in *Prather v. Lyons*[21] followed from the New Mexico State Land Commissioner's[22] ("Commissioner") assertion of ownership of mineral rights in the "common rock"[23] being mined on land owned by Plaintiff-Appellant, Delma E. Prather ("Mrs. Prather"). Mrs. Prather brought a declaratory judgment action against the Commissioner seeking to quiet title to the surface and subsurface metamorphic rock on Mrs. Prather's land east of Moriarty, New Mexico. The Commissioner claimed royalties based on a general mineral reservation in a land patent[24] originally received and purchased from the state by the land's previous owner, J.C. Shelton ("Shelton").

20. *Id.*

21. *Id.*

22. As *Prather* involves deeds over a number of decades, so too does it involve the existence of many different State Land Commissioners, with Commissioner Lyons being only the most recent of many. In 1930 the Commissioner was James F. Hinkle, a former Governor of New Mexico. OFFICE OF N.M. SEC'Y OF STATE, NEW MEXICO CENTENNIAL BLUE BOOK 204, 234 (2011–2012), http://www.sos.state.nm.us/Public_Records_And_Publications/NMCentennialBlueBook.pdf. *See generally* JAMES FIELDING HINKLE, EARLY DAYS OF A COWBOY ON THE PECOS (1965) (autobiographical); DON BULLIS, NEW MEXICO: A BIOGRAPHICAL DICTIONARY 1540 – 1980 (2008) (noting that among many accomplishments, James Hinkle is also known for sponsoring the bill that created the New Mexico Military Institute at Roswell in 1893).

23. "Common rock," was defined by plaintiffs as "rock with no particular or valuable mineral content and rock that is just 'hard and heavy.'" *Prather*, 2011-NMCA-108, ¶ 12.

24. *See* BLACK'S LAW DICTIONARY 1234 (9th ed. 2009) (defining a land patent as "[a]n instrument by which the government conveys a grant of public land to a private person.").

In August 1930, Shelton applied to purchase Section 16,[25] the land in question, from the state for cattle grazing purposes.[26] In his application, Shelton stated "there was no minerals or oil and gas known to be on the land" and signed a section of the application form which provided "the land applied for herein is essentially non-mineral land, and that this application is not made for the purpose of obtaining title to mineral, coal, oil or gas lands fraudulently, but with the sole object of obtaining title to the land applied for grazing and agricultural purposes."[27] As state law required,[28] Section 16 was appraised and in his final report,

> [T]he appraiser answered 'no' to the question: 'Is there mineral or coal on the land?' He stated that the land was 'all grazing land' and swore in a non-mineral affidavit that he was well acquainted with the land and that: there is not, to my knowledge . . . valuable mineral deposits . . . and said land is essentially non-mineral in character.[29]

Following the application, Shelton and the Commissioner entered into a purchase agreement wherein Shelton agreed that the land was "for the purpose of grazing and agriculture only" and "while the land herein contracted for is believed to be essentially non-mineral, should mineral be discovered therein . . . the mineral therein shall be and are reserved."[30]

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25. Prior to being transferred to the State of New Mexico for the public school trust pursuant to the Enabling Act of 1910, federal public lands were surveyed using the rectangular survey system, also known as the township-range system. When a public land was first surveyed a base line, running east to west, and a meridian line, running north to south, were set at right angles to each other and run through the territory. Townships, the first major subdivision of the public land, measured approximately 6 miles on a side, totaling thirty-six square miles. Townships were then numbered in relation to the base and meridian line. An example of Township 3 North, Range 9 West, 5th Principal Meridian "identifies a specific township that is 3 tiers north from the base line and 9 tiers west (Range) of the 5th Principal Meridian." Townships were further subdivided into thirty-six sections of 640 acres each (one square mile) and similarly numbered with reference to the base and meridian line. Kimberly Powell, *Section, Township & Range: Research in Public Land Records*, ABOUT.COM: GENEALOGY, (last visited Oct. 27, 2014), http://genealogy.about.com/cs/land/a/public_lands.htm.

26. *Prather*, 2011-NMCA-108, ¶ 6.

27. *Id.*

28. *See* NMSA 1978, § 19–7–9 (1981) (stating that all sales of state lands must comply with requirements of the constitution of New Mexico and the Enabling Act, which includes an "appraisal at true value").

29. *Prather*, 2011-NMCA-108, ¶ 6.

30. *Id.* ¶ 7.

Seventeen years later, following the death of Mr. Shelton, the Commissioner issued a land patent to Shelton's widow conveying the state's interests in Section 16, but reserved "all minerals of whatsoever kind, including oil and gas, in the lands so granted . . ."[31] In 1982, more than fifty years after the original application and thirty-five years after the issuance of the patent, Mrs. Prather purchased the land to raise cattle.

In 1998, Mrs. Prather contracted with Ralph Conway ("Conway") to explore Section 16 for quarry rock "that might be suitable for railroad ballast[32] and other construction aggregates."[33] Having found potentially suitable rock on Mrs. Prather's land, Mainline Rock and Ballast, Inc.[34] ("Mainline") "entered the picture in 2003 and collected surface rocks, had this rock tested to determine if Section 16 would be suitable for extracting rock and creating railroad ballast" and "sought to secure an exclusive contract with Burlington Northern Santa Fe Railroad (BNSF) to supply railroad ballast . . . ."[35] In 2004, an agreement was entered into between Mrs. Prather, Conway, and Mainline wherein Mainline would construct a quarry on Section 16 and begin mining and crushing rock for the primary purpose of creating railroad ballast for BNSF. "As of April 2009, when the [district] court's findings were entered, Mainline had sold over 2.5 million tons of ballast to BNSF and over 300,000 tons of byproduct."[36]

Mainline paid royalties to Mrs. Prather over the years until representatives of the Commissioner discovered the mining being conducted on Section 16 and sought to protect the state's mineral interests in the common rock.[37] Following a settlement agreement with Mainline and the issuance of a mining lease from the state, Mainline was directed to make royalty payments to the Commissioner.[38] As a result, Mainline significantly reduced its royalty payments to Mrs. Prather who subsequently

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31. *Id.* ¶ 8.

32. Railroad ballast, or track ballast, is comprised generally of hard, angular crushed stone which forms the foundation of the railroad line and "is there to support the [railroad] track, to drain water from the bottom of the sleepers and to distribute the imposed track load." CLIFFORD F. BONNETT, PRACTICAL RAILWAY ENGINEERING 59 (Tjan Kwan Wei ed., 2nd ed. 2005), available at http://193.140.122.139/rayli_sistemler_tem/rs_kaynak/Practical_Railway_Engineering.2nd_ed.2005.pdf.

33. *Prather*, 2011-NMCA-108, ¶ 8.

34. Mainline Rock and Ballast, Inc., a subsidiary of the Eucon Corporation, operates hard rock quarries in Washington State and New Mexico for the production of crushed rock products used primarily in the construction and railroad industries. *See* EUCON CORPORATION, http://www.euconcorp.com/subsidiary-companies (last visited Oct. 27, 2014).

35. *Prather*, 2011-NMCA-108, ¶ 9.

36. *Id.* ¶ 10.

37. *Id.*

38. *Id.*

filed a complaint against the Commissioner, joining Mainline as a party defendant in a later amendment.[39]

Following nearly twenty-two pages of findings of fact and conclusions of law, the district court entered a partial final judgment in which, through the analysis of extrinsic evidence of intent, "the court determined that the Commissioner was the 'owner of all crushed stone mined, produced[,] and sold from Section 16.'"[40] Mrs. Prather appealed, contending that: the court should apply the surface destruction doctrine[41] in order to determine the intent of the parties; and, that the district court's decision was based on "irrelevant and insubstantial evidence."[42]

III. A BRIEF HISTORY OF GENERAL MINERAL RESERVATIONS IN NEW MEXICO

Since the first land patent agreements were entered after the Enabling Act of 1910, New Mexico courts have struggled with classifying substances as minerals within general mineral reservation deeds. The Enabling Act, a product of the Organic Act of 1850[43] and the Ferguson Act of 1898,[44] was a Congressional act "enabl[ing] the people of New Mexico to form a constitution and state government and be admitted into

39. *Id.* ¶ 11.

40. *Id.*

41. The surface destruction doctrine provides that "in the absence of clear and contrary intent, where material alleged to be 'minerals' are plainly visible on the surface, and where the surface would have to be destroyed in order to 'mine' them, the parties could not have intended those materials to be 'minerals' because, if they were, the mineral reservation would swallow up the grant and render it worthless." *Id.* ¶ 25.

42. *Id.* ¶¶ 11–12.

43. The Organic Act for the Territory of New Mexico was a Congressional act passed in 1850 for the purpose of organizing New Mexico as a territory of the United States. This act elevated New Mexico to the level of national debate as it was one of several key pieces of legislation included in the Compromise of 1850 which defused a confrontation between the pro-slavery states of the South and the free-states of the North over land that had been acquired by the federal government during the Mexican-American War. Under this compromise, Texas surrendered its claim to New Mexico, over which Texas had previously established its control despite the military in Santa Fe's exhortations that in New Mexico "[t]here is not a citizen, either American or Mexican, that will ever acknowledge themselves as citizens of Texas . . . . New Mexico does not belong, nor has Texas ever had a right to claim her as a part of Texas . . . Texas should show some little sense, and drop this question." WARREN A. BECK, NEW MEXICO: A HISTORY OF FOUR CENTURIES, 142 (6th ed. 1975). *See generally* JOHN H. VAUGHAN, HISTORY AND GOVERNMENT OF NEW MEXICO (1923).

44. The Ferguson Act of 1898 designated certain federal lands within the territory of New Mexico for the express purpose of creating a trust for the financial support of New Mexico's public schools, universities and hospitals. Ferguson Act of 1898, ch.

the Union on an equal footing with the original states" and granted federal lands to the newly minted State of New Mexico for the support of public schools but excluded any lands that were mineral in nature.[45] As prospectors and settlers alike rushed to obtain leases from the state for oil and gas exploration, the Commissioner issued Administrative Rule No.1 on April 4, 1919, which designated all lands held by the State of New Mexico as mineral lands.[46] The purpose of doing so was to provide the "maximum protection" of the state's interests in said lands in the event that lands sold as non-mineral were later found to contain deposits of valuable minerals.[47] As a result, the Commissioner issued a regulation requiring the state to include language that reserved all mineral rights to the state when selling trust land to private parties,[48] the purpose of which was to provide the greatest amount of protection of the state's financial assets. Although language varied from deed to deed, generally the state would sell land wherein "all mineral of whatsoever kind, including oil and gas" or, the more ambiguous "oil and gas, and other minerals," would be reserved exclusively to the state. This general mineral reservation would prove difficult to interpret in its application.

A. A Bright-Line Property Rule Versus Contract Law of Intent

The inherently ambiguous nature of general mineral reservations in state-to-private party land deeds has led the New Mexico Supreme Court to oscillate between developing a bright-line property rule and determining the intent of the contracting parties. A property rule, employed to a large extent by neighboring jurisdictions,[49] is a substance specific manner of interpreting general mineral reservations. Substances that are commonly considered valuable resources are usually considered part of the mineral estate, whereas substances that are largely without value and cannot be distinguished from the surface are considered part of the surface estate.[50] A determination of intent on the other hand, follows largely from

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489, 30 Stat. 484; *See Trust Beneficiaries*, NEW MEXICO STATE LAND OFFICE, http://www.nmstatelands.org/trust-beneficiaries.aspx.

45. New Mexico-Arizona Enabling Act of 1910, ch. 310, 36 Stat. 557.

46. *Prather*, 2011-NMCA-108, ¶ 5.

47. *Id.*

48. *Id.*

49. Most notably Texas. *See supra*, note 8.

50. *See e.g.*, State ex rel. State Highway Commission v. Trujillo, 1971-NMSC-069, ¶ 17, 82 N.M. 694 (stating that "materials which possess no exceptional characteristics or value which distinguish them from the surrounding soil are not likely to be recognized as 'minerals' . . . materials which form part of the surface are also not legally recognizable as minerals."). In *Trujillo*, the court interpreted a mineral reservation under the Stock-Raising Homestead Act (SRHA) which excepted "coal and other

the realm of contract law wherein the court determines the intent of the original parties to the contract, or deed, in regards to the specific substance and its inclusion or exclusion from that specific mineral reservation.[51]

In *Burris v. State ex rel. State Highway Commission*,[52] the New Mexico Supreme Court "first addressed whether an owner of land purchased from the state pursuant to contract was entitled to inverse condemnation damages after the State Highway Department entered the land and removed sand and gravel."[53] In *Burris*, the court refused to follow property rules developed under its previous holding, asking instead whether the parties to this specific contract "intended that sand and gravel are, or are not, to be so classified [as minerals]."[54] The court determined that intent "is normally resolved by the pertinent documents and the actions of the parties thereunder."[55] Further, the court distinguished the current case from its previous holding, noting that "[i]n contrast with *State ex rel. State Highway Commission v. Trujillo*, . . . a great deal more documentation, casting light on the intention of the parties, is before us here."[56] Specifically, the court noted that the application to purchase explicitly stated "this application is not made for the purpose of obtaining title to mineral, including but not limited to . . . *sand and gravel* . . . ."[57] The court in *Burris* appeared to suggest that where intent can be easily discerned, then a contractual intent based approach should govern the interpretation of a general mineral reservation, as opposed to the creation of a bright-line property rule.[58]

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minerals" to the United States. The supreme court ultimately reasoned that in enacting the SRHA Congress had not intended to reserve rock and gravel and thus ownership was held entirely by the landowners. *Trujillo*, 1971-NMSC-069, ¶¶ 3–4. Although the court based its decision largely on the intent of Congress in drafting the general mineral reservation, the result of *Trujillo* was to wholly exclude rock and gravel from all SRHA mineral reservations. *See also* 17 WILLISTON ON CONTRACTS § 50:61 (4th ed.) (stating that "materials which are not rare and exceptional in character and are so closely related to the surface itself that they are reasonably and ordinarily considered a part of the soil belonging to the surface estate are not minerals within the ordinary meaning of the word.").

51. *See Prather*, 2011-NMCA-108, ¶ 35.

52. 1975-NMSC-038, 88. N.M. 146.

53. Bogle Farms, Inc. v. Baca, 1996-NMSC-051, ¶ 13, 122 N.M. 422.

54. *Burris*, 1975-NMSC-038, ¶ 9.

55. *Id.*

56. *Id.* ¶ 11.

57. *Id.* ¶ 7.

58. This proposition is supported by another sand and gravel case that came before the supreme court three years later in *Rickelton v. Universal Constructors, Inc.* 1978-NMSC-015, 91 N.M. 479. *Rickelton* combined much of the rationale developed

A decade later, the supreme court once again departed from its previous holding by creating a strict property rule in regard to sand and gravel litigation in a general mineral reservation pursuant to a state-to-private party land conveyance.[59] The Court in *Roe* explicitly held, "[f]or the State to reserve sand and gravel, a provision so specifying must be included" and that, although the plaintiffs and surface owners "did not apply for title to sand and gravel, such title nevertheless passed with the surface since sand and gravel were not specifically reserved by the purchase contract and patent."[60] Although the court here limited its holding to the "instant case,"[61] it is distinguished from previous cases on the same issue because it never mentioned intent, contractual interpretation, or the inherent value of sand and gravel. Rather, the only rationale for its holding relies on the state's failure to specifically include the substance in its mineral reservation.[62] As such, the holding in *Roe* could be seen as, at a minimum, a bright-line rule wherein sand and gravel are not included in a state's *general* mineral reservation, and at a maximum, a guideline for subsequent courts wherein if a substance is not specifically included in the reserving language, then title passes to the surface owner.

Decided in 1996, *Bogle Farms*[63] represents the New Mexico Supreme Court's most recent ruling on the issue and serves as the binding precedent in the holding of *Prather v. Lyons*.[64] Once again addressing the issue of sand and gravel classification within the state's general mineral reservation, the court in *Bogle Farms* focused on a dispute that arose between successive owners of land patents issued by the state, and the Commissioner for Public Lands.[65] Specifically, the disputes arose following the state's issuance of land patents that expressly reserved sand and gravel despite the fact that the initial purchase contract had no such express reservation.[66] As a result, several landowners jointly moved against the

under *Trujillo* with that of *Burris* in the creation of a quasi-property rule. Namely, the *Rickelton* opinion seems to hold that: 1) where a mineral reservation does not explicitly mention the substance in question, 2) no clear evidence of the contracting parties' intent exists, and 3) the substance was of no exceptional mineral character or value at the time of contract — then the substance was not intended to be included within the confines of the general mineral reservation and ownership passes to the purchaser.

59. Roe v. State ex rel. State Highway Department, 1985-NMSC-109, 103 N.M. 517.

60. *Id.* ¶¶ 20–21.

61. *Id.* ¶ 21.

62. *Id.*

63. Bogle Farms, Inc. v. Baca, 1996-NMSC-051, 122 N.M. 422.

64. Prather v. Lyons, 2011-NMCA-108, 267 P.3d 78.

65. 1996-NMSC-051, ¶¶ 3–7.

66. *Id.*

Commissioner arguing, *inter alia*, that the Commissioner was collaterally estopped from specifically including sand and gravel in its mineral reservation to purchase contracts for state lands.[67] The trial court agreed based on the reasoning in *Roe*.[68] On certiorari before the New Mexico Supreme Court, the court in *Bogle Farms* held that collateral estoppel did not apply because of certain countervailing equities; specifically, protection of the state's interests, and because the classification of "minerals" within a general mineral reservation is to be determined "on a case-by-case basis."[69] Furthermore, citing the importance of the parties' intent in deed construction,[70] the court concluded:

> [W]e now retreat from the statement in *Roe* which suggests that we will disregard the mutual intent of the contracting parties and instead look for certain required language . . . . We will not allow parties to a contract to gain something for which they did not bargain and for which they did not pay. Nor will we take away the right of the parties to agree mutually to the meaning of the terms of a contract . . . . If there is not a specific reservation, the trial court must look to evidence outside the face of the contract to determine the meaning intended for the term "mineral" when that term has been shown under the circumstances to be ambiguous.[71]

In rendering its conclusion, it should be noted, however, that the court in *Bogle Farms* did not entirely overrule the effect of *Roe*. Rather, the court held that in "those cases involving successors in interest to original purchasers, the relevant inquiry will be the extent to which the purchase was made in reliance on *Roe*. Absent such reliance, the issue is whether the parties to the original contract intended that the State reserve sand and gravel."[72] Unfortunately, the court in *Bogle Farms* did not entirely explain how lower courts should determine the intent of the original parties.[73] Given the *Bogle Farms* court's reliance on principles of contract law, a brief discussion of the current state of contract interpretation law in New Mexico and in particular, *Mark V, Inc. v. Mellekas*,[74] is useful.

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67. *Id.*

68. Roe v. State ex rel. State Highway Dept., 1985-NMSC-109, 103 N.M. 517.

69. *Bogle Farms*, 1996-NMSC-051, ¶¶ 19–25.

70. *Id.* ¶ 34 (stating that "[t]he polestar of deed construction is the parties' intent").

71. *Id.* ¶¶ 34–36.

72. *Id.* ¶ 36.

73. The issue in *Bogle Farms* involved the trial court's granting of summary judgment thus the court did not fully enter into the discussion of the parties' intent.

74. 1993-NMSC-001, 114 N.M. 778.

Just three years before its holding in *Bogle Farms*, the New Mexico Supreme Court in *Mark V* reiterated its earlier holding in the seminal case of *C.R. Anthony Co. v. Loretto Mall Partners*.[75] The court's decision in *C.R. Anthony* abandoned New Mexico's long history of contract interpretation by overruling the four corners doctrine, wherein a court would first determine whether a contract was ambiguous "without consideration of any evidence outside the contract itself."[76] The *C.R. Anthony* court ultimately concluded that even when the contract is clear and unambiguous, courts are "no longer restricted to the bare words of the agreement in interpreting the intent of the parties to a contract" and may consider extrinsic evidence of intent.[77] Thus the current state of contract law, and by extension mineral law as posited by this case note, allows courts to contemplate extrinsic evidence of intent *at any point* in the interpretation of a written instrument.

IV. RATIONALE

In a two-thirds split decision, the New Mexico Court of Appeals in *Prather v. Lyons* affirmed the district court's finding that, in light of the surrounding circumstances, "country rock" was intended to be a 'mineral' within the definition of the general mineral reservation by the state.[78] The majority's reasoning was based primarily on addressing: 1) *Bogle Farms*' intent based analysis for determining the classification of a substance within a general mineral reservation, 2) a strong public policy interest in protecting the state's mineral rights, and 3) the court's refusal to adopt the surface destruction doctrine[79] in New Mexico, despite Mrs. Prather's arguments in favor of adoption.[80]

A. Bogle Farms' Intent-Test

In determining whether or not a certain substance constitutes a 'mineral' in a general mineral reservation, *Bogle Farms* required New Mexico courts "to determine the intent of the parties to the original sale transaction between the [state] and the purchaser of state trust land."[81]

75. C.R. Anthony Co. v. Loretto Mall Partners, 1991-NMSC-070, 112 N.M. 504. The *Loretto* opinion was written, incidentally, by the same Justice as that in *Bogle Farms*.

76. *Id.* ¶ 15; *Mellekas*, 1993-NMSC-001, ¶ 10.

77. *Mellekas*, 1993-NMSC-001, ¶ 11.

78. Prather v. Lyons, 2011-NMCA-108, ¶ 47, 267 P.3d 78.

79. *Id.* ¶ 25.

80. *Id.*

81. *Id.* ¶ 35.

Following a short recap on the history of mineral reservation litigation to-date, the *Prather* court concluded that *Bogle Farms* overruled *Roe*'s creation of a bright-line property rule and "returned to *Burris*' case-by-case approach 'based on the principle that in contract cases the role of the court is to give effect to the intention of the contracting parties.'"[82] Furthermore, the court noted that several statements made in *Bogle Farms* are directly applicable to the present case, namely: 1) the determination of whether a material or substance is included within the state's general mineral reservation is to be done on a case-by-case basis, 2) the fundamental issue is "whether the parties to the original sale transaction intended that the State reserve the material or substance at issue," 3) there is a strong public policy interest in protecting the state's assets and rights in public lands and, 4) title to state land cannot be conveyed by presumption.[83]

Turning to the conclusions of fact and law developed by the district court, the court of appeals initially cautioned that, unlike prior cases, "[i]n the present case, rock that might fit the description of the rock in question was not specifically mentioned in any part of the 1930 transaction related documents or in the 1947 patent. Further, there exists no testimony of the original contracting parties."[84] The court's note of such a lack of evidence of intent is significant given its ready affirmance of the district court's finding of clear intent of the original contracting parties to include common, metamorphic rock in the state's general mineral reservation.

In reviewing the district court's findings, the court of appeals noted a laundry list of facts and conclusions of law "that appear to relate to the issue of intent."[85] The court's list reiterated approximately thirty-eight findings of fact and law from among the nearly twenty-two pages created by the district court that ranged in date from the early 1900's to well into the 2000's.[86] Some of these findings of fact included a number of findings related to the character of the rock; the largely non-existent status of crushed stone sales in New Mexico in 1932; a report issued by the United States Bureau of Mines' in 1932–33 listing crushed stone as an industrial mineral; a USGS Survey Bulletin from 1993 listing crushed stone and sand and gravel as the two main sources of natural aggregates; and, a 2003 report that crushed stone was one of the top nonfuel minerals in

82. *Id.* ¶ 18.
83. *Id.* ¶ 19.
84. *Id.* ¶ 20.
85. *Id.* ¶ 21.
86. *Id.* ¶¶ 21–24.

New Mexico.[87] Noting the range of dates and the potential inconsistency of their admissibility with *Bogle Farms*' charge of determining then intent of the parties to the original contract, Mrs. Prather argued that the district court relied upon evidence "'developed long after the original parties entered into the contracts at issue'" and also "'relied upon other information generally deemed by the courts in similar cases to be immaterial[.]'"[88] The court of appeals then claimed to "dispose of this limited point easily" asserting "[n]one of the findings of fact to which the Plaintiff refers relating to circumstances after issuance of the patent are findings on which we rely to affirm the district court's conclusions of law and ultimate decision."[89] However, as noted by the dissent, the majority "then fails to specifically identify what those findings are."[90]

With a purportedly strong record of findings of fact and law, the court of appeals then noted that the district court was "obviously guided by UJI 13-825" in rendering it's decision.[91] Uniform Jury Instruction 13-825 provides that where the parties disagree on the meaning of an ambiguous term in a contract, it is the jury's duty (or the judge's in a bench trial) to give:

> [T]hat meaning which you find to be most reasonable, taking into consideration all the circumstances, including the following: the intention of the parties; the words that the parties used; the purpose the parties sought to achieve; custom in trade; the parties' course of dealing; the parties' course of performance, and; whether a party, at the time the contract was entered into, knew or should have known that the party interpreted the term[s] differently.[92]

Thus, given the findings of fact and the inherent ambiguity of the terms of the mineral reservation, the court of appeals agreed with the district court's assessment that "the most reasonable meaning was that the rock was intended to be included in the mineral reservation based on all surrounding circumstances."[93]

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87. *Id.* ¶¶ 21–23.
88. *Id.* ¶ 36.
89. *Id.*
90. *Id.* ¶ 64 (Vigil, J., dissenting).
91. *Prather*, 2011-NMCA-108, ¶ 39; UJI 13-825 NMRA (current with amendments through 2014).
92. UJI 13-825 NMRA (current with amendments through 2013).
93. *Prather*, 2011-NMCA-108, ¶ 40.

B. Public Policy Interest

Noting both the history of state trust lands in New Mexico as well as their "status of 'great public importance,'" per the discussion in *Bogle Farms*, the court of appeals in *Prather* stated, "there exists 'a strong public interest in the protection of state land and its products,' a status and interest that we cannot ignore."[94] Further, the court noted this public interest is especially relevant given Congress' intent when it initially granted federal land to the states, namely to provide revenue to the state for the operation of its public schools.[95] While the court does not fully explain the role that this public policy concern raises, it is important to note that it plays some part in the courts determination of intent.

C. Rejection of the Surface Destruction Test

The New Mexico Court of Appeals rejected Mrs. Prather's argument that the surface destruction doctrine, a mainstay of many mineral rich jurisdictions, should be adopted by the Court as an aid in determining the intent of the parties.[96] The surface destruction doctrine provides:

> in the absence of clear and contrary intent, where material alleged to be "minerals" are plainly visible on the surface, and where the surface would have to be destroyed in order to "mine" them, the parties could not have intended those materials to be "minerals" because, if they were, the mineral reservation would swallow up the grant and render it worthless.[97]

The court of appeals stated in its view "the doctrine essentially espouses an intent to convey minerals by presumption" and "the doctrine presumes that the parties cannot have intended and did not, therefore, intend a conveyance of surface rights without rights to the rock."[98] As such, the court concluded that the surface destruction doctrine mirrored the bright-line property rule created in *Roe*, which *Bogle Farms* rejected, and as a result the court "will not import the doctrine into the intent analysis."[99] Moreover, the court posited that over the years there "may in fact" have been countless purchasers of state trust land who subjectively understood that the state could have entered into the property and destroyed the surface estate for purposes of mining and mineral removal.[100]

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94. *Id.* ¶ 43.
95. *Id.*
96. *Id.* ¶ 45.
97. *Id.* ¶ 25.
98. *Id.* ¶ 44.
99. *Id.*
100. *Id.*

Although the court does not mention how and why it arrived at such a presumption. Of final note on the issue of the surface destruction doctrine, the court noted that none of the cases provided in support of the doctrine concern the involvement of New Mexico State trust lands, and as such they provide little relevant authority to the present circumstances of the case.[101] In holding against the adoption of the surface destruction doctrine the court did not entirely foreclose the possibility of its use in the future however, rather it left it "up to our Supreme Court to consider whether *Bogle Farms*' clear rule requiring a determination of the intent of the parties to the original sale transaction can permit application of the surface destruction doctrine."[102]

D. Judge Vigil's Dissenting Opinion

Judge Vigil's dissenting opinion argued that the district court "erred in two respects: (1) it failed to take into consideration the surface destruction doctrine as bearing on the parties' intent . . . ; and (2) it considered irrelevant evidence and without this evidence, its conclusion that the parties intended to include the rock in the mineral reservation is not supported . . . ."[103] Beginning with the majority's rejection of the surface destruction doctrine, the dissent made particular note of the fact that the *Bogle Farms* court never considered the doctrine and, thus, the majority's reliance on *Bogle Farms* in rejecting the doctrine is "unconvincing."[104] Rather, given the majority's use of "surrounding circumstances" in determining the intent of the parties to the original contract, the dissent argued that a key surrounding circumstance is the condition of the land at the time of sale, which in turn is the key focus of the doctrine itself.[105] The dissent even drew attention to the district court's specific finding of Section 16 as being largely composed of Pre-Cambrian metamorphic rock.[106] Finding it clear that the rock was ubiquitous to the region in the 1930's, as it still is now, the dissent concluded that it would "adopt the surface destruction doctrine as an evidentiary tool to facilitate the intent inquiry required by *Bogle Farms*."[107] Turning next to the majority's consideration of irrelevant evidence, the dissent argued that the district court failed to determine *which* mineral reservation applied, considering that the mineral reservation language in the 1930 purchase contract differed substan-

101. *Id.*
102. *Id.* ¶ 45.
103. *Id.* ¶ 50 (Vigil J., dissenting).
104. *Id.* ¶ 57.
105. *Id.* ¶¶ 53–54.
106. *Id.* ¶ 55.
107. *Id.* ¶ 58.

tially from that contained in the 1947 issuance of the land patent.[108] Concluding that the 1930 purchase contract represented a fairer and more accurate portrayal of the original agreement struck by the parties, the dissent argued that the district court's holding was not supported by substantial evidence because of the dearth of evidence relating *specifically* to the 1930 agreement.[109]

V. ANALYSIS

While *Bogle Farms* marks New Mexico's abandonment of the rule of property, *Prather* in turn, marks the confident stride towards strict application of contract law. This becomes clear upon analysis of the means employed by the *Prather* court in determining intent. However, what is less clear is the manner in which the court of appeals determines intent. It appears that the decision in *Prather* expands *Bogle Farms*' finding of specific intent by requiring a finding of general intent only. In developing a general intent test, the court borrows from New Mexico contract law jurisprudence. Furthermore, because general intent involves the admission of extrinsic evidence in order to ascertain a presumption of intent, the surface destruction doctrine, and similar doctrines of statutory construction, can be helpful aids to the court.

A. Strict contract interpretation in Prather v. Lyons

The court of appeals in *Prather v. Lyons* lacked the clear evidence of intent that was apparent in *Bogle Farms*. In *Bogle Farms* it was clear from the application for purchase that sand and gravel was *specifically* intended to be reserved to the state. Accordingly, the precedent in *Bogle Farms* seems one of specific intent; the question that results for courts to determine then is, through the careful analysis of extrinsic evidence, whether the parties had specific intent in reserving or conveying a given substance. The greater difficulty in interpreting an ambiguous mineral reservation results not when mention of the substance in question is absent from the deeding instrument, yet nevertheless specifically addressed in corollary documents, but rather when it is clear from the evidence that neither party ever contemplated the substance's place within a mineral reservation *at all*. Put another way by the eminent Eugene Kuntz:

> The difficulty inherent in determining whether or not oil or gas or any other substance is included within the terms of a grant or reservation of "minerals" lies in the traditional approach of attempt-

108. *Id.* ¶¶ 61–63.
109. *Id.* ¶ 65.

> ing to find and give effect to an intention to include or to exclude specific substances, when, as a matter of fact, the parties had nothing specific in mind on the matter at all.[110]

This is all the more complicated in light of circumstances where the original parties have long since passed away, as no oral evidence may be submitted that might provide any greater insight as to the specific intent of the parties. As such, it is not specific intent that must be the focus of judicial inquiry, but rather "[t]he intention sought should be the general intention from the standpoint of enjoyment of the respective interests created."[111] Within this context, "[s]pecific intent looks to whether the parties intended to include the disputed mineral, while general intent evaluates the purpose of the grant or reservation and whether that purpose lends itself to inclusion of the disputed mineral."[112]

Other jurisdictions have been clearer on the differentiation between specific and general intent in the interpretation of minerals. In Wyoming, when the specific intent of the parties to the original document cannot be ascertained, courts focus only on general intent.[113] Accordingly, evidence of any unexpressed specific intent is not admitted, a policy reiterated by New Mexico courts as well.[114] Instead, evidence of general intent should be sought and arrived at "not by defining and re-defining the terms used, but by considering the *purposes* of the grant or reservation in terms of manner of enjoyment intended in the ensuing interests."[115] In determining the general intent of the parties, Wyoming has adopted both the "ordinary and natural meaning test," and a correlative rule allowing the admission of limited extrinsic evidence of the parties' intent at the time of conveyance.[116] Specifically, the Wyoming Supreme Court has held that "circumstances known to the parties at the time they entered into contract, such as what that industry considered to be the norm, or reasonable

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110. EUGENE KUNTZ, LAW OF OIL AND GAS § 13.3 (1964).

111. *Id.*

112. Mikal C. Watts & Emily C. Jeffcott, *Does He Who Owns the "Minerals" Own the Shale Gas? A Guide to Shale Mineral Classification*, 8 TEX. J. OIL GAS & ENERGY L. 27, 58 (2012).

113. *Id.*

114. *See* Ponder v. State Farm Mut. Auto. Ins. Co., 2000-NMSC-033, ¶ 14, 129 N.M. 698 (noting "that in examining extrinsic evidence we will not give effect to a party's undisclosed intentions").

115. Watts & Jeffcott, *supra* note 112, at 58.

116. *Id.* at 58–59 (stating that sand and gravel are not minerals within the ordinary and natural meaning because they are neither rare, "exceptional in character" nor do they "possess a peculiar property giving them special value") (quoting Heinatz v. Allen, 217 S.W.2d 994, 997 (Tex. 1949)).

or prudent, should be considered in construing a contract."[117] As noted further in this analysis, the admission of this evidence is strikingly similar to the language used by the court in *Prather*.

Although absent a clear indication of specific intent from the original contracting parties, the court of appeals in *Prather* was nonetheless required to determine whether the parties intended that "country rock" be included in the State's general mineral reservation. Unfortunately, the court in *Bogle Farms* did not establish an explicit approach to determine intent in situations where evidence of specific intent was largely absent. As such, it appears that the *Prather* court, and district court from which the case arose, determined that given the supreme court's reliance on contract law in rendering *Bogle Farms*, the correct approach would naturally be found along the same lines.

Evidence of the court's use of contract law as a 'gap-filling' measure, given the absence of strict guidelines from the supreme court, is found throughout the majority's opinion. First, the court of appeals paid particular attention to the district court's use of Uniform Jury Instruction 13-825 when no such instruction was ever employed, or even mentioned, in *Bogle Farms*. Specifically, UJI 13-825 is listed under the New Mexico Rules as a civil jury instruction in the matter of contract interpretation.[118] Furthermore, the court in *Bogle Farms* never mentioned the need to employ a "reasonable test" when determining the intent of the parties where evidence of intent is largely ambiguous in and of itself. However, we do find ready use of such a "reasonable test" in UJI 13-825 and in New Mexico's contract law history. As noted in the supreme court's decision in *Mark V*, if the court, after examining extrinsic evidence as to the terms of a contract, still finds that the "contract is reasonably and fairly susceptible of different constructions, an ambiguity exists."[119] While the initial question of ambiguity of contract is a question of law, "[o]nce the agreement is found to be ambiguous, the meaning to be assigned the unclear terms is a question of fact."[120] "The factual issues, if any, presented by an ambiguity must be resolved by the jury (or by the judge as fact finder in the case of a bench trial) with the benefit of a full evidentiary hearing . . . ."[121] The fact finder may then "consider extrinsic evidence of the language and conduct of the parties and the circumstances surrounding the agreement, as well as oral evidence of the parties' intent."[122] However, "[i]t is impor-

117. *Id.* at 59.
118. *See* UJI 13-825 NMRA.
119. Mark V, Inc. v. Mellekas, 1993-NMSC-001, ¶ 12, 114 N.M. 778.
120. *Id.* ¶ 13.
121. *Id.*
122. *Id.*

tant to bear in mind that the meaning the court seeks to determine is the meaning one party (or both parties, as the circumstances may require) attached to a particular term or expression *at the time* the parties agreed to those provisions."[123] Furthermore, as the United States Supreme Court has often noted, "'[t]he very essence of [the jury's], function is to select from among conflicting inferences and conclusions that which it considers *most reasonable*."[124]

Second, the court of appeals in *Prather*, reiterating the district court's conclusions of law, states that the scope of the "most reasonable" test includes extrinsic evidence that has a bearing on "the words that the parties used, the purposes the parties sought to achieve, custom in the trade, the parties' course of dealing . . . " and "the parties' course of performance."[125]Again, none of this language appears in the decision issued by the supreme court in *Bogle Farms*. Instead, the *very same* language is present in *Mark V*, where the court stated, "'a court may hear evidence of the circumstances surrounding the making of the contract and of any relevant usage of trade, course of dealing, and course of performance.'"[126]

Given the likelihood that the court of appeals in *Prather* was applying New Mexico's contract law to the determination of intent in a facially ambiguous mineral reservation the next question is whether this is consistent with *Bogle Farms*. The dissenting opinion in *Prather* merely *assumed*

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123. C.R. Anthony v. Loretto Mall Partners, 1991-NMSC-070, ¶ 15, 112 N.M. 504 (emphasis added).

124. Schulz v. Pennsylvania Railroad Co., 350 U.S. 523, 526 (1956) (emphasis added).

125. Prather v. Lyons, 2011-NMCA-108, ¶ 24, 267 P.3d 78. *See*, *e.g.*, UJI 13-826 NMRA (defining "custom in the trade" as "any manner of dealing that is commonly followed in a place or trade so as to create a reasonable expectation that it will be followed with respect to the transaction between the parties."); UJI 13-827 NMRA (defining "course of dealing" as "a manner of dealing between the parties in previous transactions which it is reasonable to regard as establishing a common understanding with respect to the meaning of the term[s] in dispute."); UJI 13-828 NMRA (defining "course of performance" as "the way the parties have conducted themselves in the performance of this contract, reflecting a common understanding of the meaning of the term[s] in dispute.").

126. Mark V, Inc. v. Mellekas, 1993-NMSC-001, ¶ 11, 114 N.M. 778 (quoting *C.R. Anthony*, 1991-NMSC-070.). New Mexico case law has previously cited the importance of contract law in the interpretation of oil and gas leases. *See e.g.*, Cont'l Potash, Inc. v. Freeport–McMoran, Inc., 1993-NMSC-039, ¶ 54, 115 N.M. 690 ("[i]n interpreting mining agreements, courts generally have applied the rules for interpreting contracts and leases . . . 'The primary objective in construing a contract is to ascertain the intention of the parties.'"); Elliott Indus. Ltd. P'ship v. BP Am. Prod. Co., 407 F.3d 1091, 1112 (10th Cir. 2005) (stating that "[i]n New Mexico, oil and gas leases are interpreted like any other contract.").

that "the district court could, consistent with *Bogle Farms*, determine the most reasonable meaning of the general mineral reservation . . . ."[127] Further, *Bogle Farms* reached much of its holding by referencing principles of contract law. Moreover, given that the Supreme Court of New Mexico initially granted certiorari in the matter of *Prather* and subsequently quashed it, one can assume the supreme court viewed the court of appeals' decision with some favor.

If the reasoning adopted by the court in *Prather v. Lyons* accurately reflects the current state of interpretation of ambiguous property conveyances in New Mexico, then some thought must be paid to the potential implications. Primarily, there is some concern regarding the court's abandonment of the "four corners" doctrine and the admission of extrinsic evidence for both the purposes of establishing and resolving ambiguity. Namely, that considering evidence outside the confines of the written instrument erodes one of the fundamental underpinnings of our society, certainty of title. Admission of extrinsic evidence, either limited to the time of contract or broadened to surrounding circumstances, creates uncertainty for both current and future title owners. The net effect of which results in a situation where "[t]itle examiners would no longer be able to rely on the written word. Individual adjudication of deeds would lead to disparate results depending on factors extraneous to the instrument."[128]

B. Consideration of Irrelevant Evidence

Apart from the question of whether or not the application of contract cases, such as *Mark V* and *C.R. Anthony*, is consistent with the Supreme Court's holding in *Bogle Farms* is the issue of whether or not the court of appeals in *Prather* went outside of the scope of relevant inquiry of extrinsic evidence by considering the district court's findings of fact that post-dated the initial agreement between the original parties. As argued by both Ms. Prather and the dissent, the district court erred in considering evidence that post-dated the initial agreement. Furthermore, as noted by the committee commentary to a companion instruction of UJI 13-825, "[t]he jury should focus on the parties' intentions *up to the time* the parties formed their purported contract."[129] Among the evidence admitted by the district court in its bench trial, and mentioned in detail by the court of appeals in affirming the lower court's decision, included find-

127. *Prather*, 2011-NMCA-108, ¶ 63 (Vigil J., dissenting).

128. Bruce M. Kramer, *The Sisyphean Task of Interpreting Mineral Deeds and Leases: An Encyclopedia of Canons of Construction*, 24 TEX. TECH L. REV. 1, 19 (1993).

129. UJI 13-804 NMRA (citing Shaeffer v. Kelton, 1980-NMSC-117, 95 N.M. 182) (emphasis added).

ings that "in 1980 railroad ballast and other construction aggregates . . . accounted for twenty-seven percent of the total crushed stone used in construction in the United States" and that in a 1993 United States Geological Survey Bulletin it was reported that "crushed stone and sand and gravel . . . amount to about one-half the mining volume in the United States." Although the court of appeals ultimately maintained that "[n]one of the findings of fact to which [Prather] refers . . . are findings on which we rely,"[130] nevertheless consideration of evidence falling well outside the scope may have inevitably influenced the court's determination.

Of further concern is the wording of Uniform Jury Instruction 13-825. Namely, UJI 13-825 lists "intent of the parties" as merely one of six other factors in resolving ambiguity. Usage of trade, course of dealing and course of performance are listed not as elements *within* the test of intent, but rather as *other disjunctive factors* to be weighed independently. Thus, this raises the question of whether or not the court of appeals was correct in affirming the district court's use of UJI 13-825. If *Bogle Farms* holds for the proposition that intent, and only intent, should be the guiding light in the interpretation of an ambiguous mineral reservation, then is the weighing of these factors as corollaries to intent really consistent with *Bogle Farms*?

C. Rejection of the Surface Destruction Doctrine

In its wholesale rejection of the surface destruction doctrine the court of appeals in *Prather* noted that our supreme court in *Bogle Farms* rejected any notion of conveyance of state trust land by presumption.[131] As further support, the majority held it was not convinced that "even a preponderance" of state purchasers would not have purchased land if they knew that the state might subject the surface estate to mineral exploitation, and that; no cases supplied by Prather involved New Mexico state trust lands.[132] As the dissent noted however, *Bogle Farms* never directly contemplated the use of the surface destruction doctrine, thus any arguments to the contrary are unconvincing.[133] As such the primary question is whether, given the supreme court's holding, the surface destruction doctrine could find a place within New Mexico jurisprudence.

Contemplation of the core tenets of the surface destruction doctrine is not entirely alien to New Mexico's history of case law. One of the pri-

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130. *Prather*, 2011-NMCA-108, ¶ 36.
131. *Id.* ¶ 45.
132. *Id.* ¶ 44.
133. *Id.* ¶ 57 (Vigil J., dissenting).

mary cases to mention this doctrine, although not formally, was *State ex rel. State Highway Commission v. Trujillo*.[134] *Trujillo* is one of New Mexico's earliest opinions rendered by the supreme court on the interpretation of general mineral reservations. Although *Trujillo* was ultimately overruled in *Champlin Petroleum Co. v. Lyman*[135] based on an interim decision from the U.S. Supreme Court, much of the rationale is applicable in the present instance. Specifically, the fundamental concern is that the term 'mineral' may be construed so broadly as to include *anything* that is neither animal nor vegetable. As such, an overly broad interpretation of the term 'mineral' within a general mineral reservation could include such things as rock, gravel, or even "all material substances of the earth, its waters and even the air we breathe."[136] Thus in order to give true consideration to the meaning of a mineral within a general mineral reservation, it is necessary to look to the context, and in the context of cattle ranching, "materials which form part of the surface are also not legally recognizable as minerals, nor are those which cannot be obtained without the *destruction of the surface* . . . ."[137] Accordingly, it seems clear that there is a relevant concern that an overbroad interpretation of the term 'mineral' would include substances that are largely indistinguishable from the surface estate, and the removal of which would destroy the cattle ranchers ability to graze his herd and earn his living.[138]

Of further note is the court of appeals' particular concern with any purported conveyance by "presumption" or "necessary implication."[139] However, given that the general intent of the parties is to be sought by the court absent any evidence of specific intent, is not evidence of general intent entirely one of presumption or inference by its very nature? If the original parties never mentioned at any point the specific substance, or even contemplated it at the time of contract, then isn't the extrinsic evidence used by the court an inference of intent based on a reasonable implication? *Black's Law Dictionary* defines presumption generally as

134. 1971-NMSC-069, 82 N.M. 694, 487 P.2d 122.

135. Champlin Petroleum Co. v. Lyman, 1985-NMSC-093, ¶ 10, 103 N.M. 407, 708 P.2d 319.

136. *Trujillo*, 1971-NMSC-069, ¶ 14, 82 N.M. 694.

137. *Id.* ¶ 17 (emphasis added).

138. This concern is similarly expressed in *N.M. & Ariz. Land Co. v. Elkins* wherein a dispute arose before the U.S. District Court for New Mexico in regard to the finding of uranium and whether said substance fell into the general mineral reservation category in a land conveyance clause that reserved "all oil, gas and minerals." 137 F. Supp. 767, 773 (D.N.M. 1956) (stating that proffered case law "deal with such materials as sand, gravel and stone, the taking of which would be the taking of materials on which the grantees' surface rights would, of necessity, be predicated").

139. Prather v. Lyons, 2011-NMCA-108, ¶ 44, 267 P.3d 78.

"[a] legal inference or assumption that a fact exists, based on the known or proven existence of some other fact or group of facts."[140] The district court in *Prather v. Lyons* made findings of fact based on the evidence of surrounding circumstances to the contract and accordingly made a reasonable inference that "country rock" was intended by the original parties to be included in the state's general mineral reservation.[141]

As discussed earlier, the intention thus sought by inference should be one of general intent "from the standpoint of enjoyment of the respective interests created."[142] Coupled with the aforementioned concern expressed by similar courts in preserving the integrity of the surface owner's rights to enjoy the surface estate, it is posited that the surface destruction doctrine is neither in conflict with *Bogle Farms*' charge of determining intent nor in *Prather*'s use of extrinsic evidence of circumstances at the time of the original contract. Just as the district court made an inference of intent, based on the extrinsic evidence under the circumstance of *Prather*, so too is a similar inference of intent created when considering the enjoyment of the respective interests.

> The manner of the enjoyment of the mineral estate is through extraction and removal of substances from the earth, whereas enjoyment of the surface is through retention of such substances as are necessary for the use of the surface, and these respective modes of enjoyment should be taken into account in arriving at the proper subject matter of each estate.[143]

Given, that extrinsic evidence is used to ascertain the parties' intent where it is clear that specific evidence of intent is unavailable, either as a result of the insufficiency of direct evidence or in the case where the substance was not even considered, it seems evident that doctrines relating to an inference of the state of minds of the parties would help, rather than hinder, the determination of intent. Consideration of the surface destruction doctrine, then, does no violence to the determination of intent.[144] The

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140. BLACK'S LAW DICTIONARY 1304 (9th ed. 2009).

141. *Prather*, 2011-NMCA-108, ¶ 24.

142. *See* Kuntz, *supra*, note 110.

143. *Id.*

144. Although the surface destruction doctrine may have enjoyed only minor contemplation by New Mexico courts, there are similar canons of construction that have been used with much greater frequency and have even been used in recent cases postdating the Court's decisions in *Bogle Farms* and *Mark V*. One of such commonly used canons is the *ejusdem generis* rule. The *ejusdem generis* rule is applied to cases where a term, or set of terms, within a contract or statute is ambiguous and therefore "requir[es] that where general words follow an enumeration of persons or things of a particular and specific meaning, the general words are not construed in their widest

inference that a purchaser of a surface estate did not intend a substance's inclusion within a mineral reservation for fear that removal of said substance would destroy the purchaser's enjoyment of his surface interest is a reasonable inference. Just as evidence of the intent of the parties using surrounding circumstances is also based on a reasonable inference. As such, it is suggested that the surface destruction doctrine, like other valid canons of construction, is compatible with *Bogle Farms* and *Prather*.

D. Public Policy Concerns

Finally, it should be noted that virtually all of the New Mexico cases cited in Part III, and in particular the opinions of *Prather* and *Bogle Farms*, emphasize the public policy concern related to the protection of the state's interests in its solemn duty as a trustee with respect to its public school fund. The *Prather* court read *Bogle Farms* as "establish[ing] a general principle that New Mexico's state trust lands have a status of 'great public importance' and that there exists 'a strong public interest in the protection of state land and its products,' a status and interest that we cannot ignore."[145] Given the court's explicit inclusion of this policy concern in rendering its decision, one may reasonably conclude that some measure of deference to the state exists in the case where the court is charged with resolving an ambiguous term in a state to private party contract. The level of this deference however is unclear. Nor is it clear whether this creates a presumption in favor of the state in the case where, as in *Prather v. Lyons*, no evidence of specific intent exists. If a presumption does in fact exist in favor of the state under these circumstances, then it seems likely that the burden of proof to rebut the presumption is on the private party. The results of which reflects the "double-edged" nature of a strong policy interest in favor of the state. Namely, if it becomes increasingly clear in New Mexico that the government has the upper hand, then private parties may be less likely to enter into contract with the state for the purchase of state trust land.

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extent but are instead construed as applying to persons or things of the same kind or class as those specifically mentioned." *State v. Foulenfont,* 1995–NMCA–028, ¶ 9, 119 N.M. 788, 895 P.2d 1329 (cert. granted). The use of certain canons of contract interpretation does however pose the potential of burdening courts and delaying resolution, which has caused other jurisdictions to limit, or even prohibit, the use of canons of construction. "Canons when used as a tool in the interpretational process are useful. Canons when used as a substitute for the interpretational process are counterproductive." Kramer, *supra* note 128, at 129.

145. *Prather*, 2011-NMCA-108, ¶ 43 (quoting Bogle Farms, Inc. v. Baca, 1996-NMSC-051, ¶¶ 23, 26, 122 N.M. 422).

E. Hypothetical Walkthrough

Considering the various issues and implications raised as a result of the court of appeals' holding in *Prather v. Lyons*, it is helpful to provide a walkthrough of what a court would need to consider if a dispute were to arise over a hypothetical substance. First, the court would need to consider the parties to the disputed conveyance. If the conveyance involved the state and a private party, then some weight would need to be given to the public policy concern of the state's interest in preserving the public school trust fund. If the conveyance merely involves two private parties then the presumption is that no such deference exists. Furthermore, as stated in Justice McKinnon's special concurrence in *Bogle Farms*, because no special deference exists, "for a private grantor to reserve land and gravel, a provision so specifying must continue to be included in the purchase contract."[146] Accordingly, this concurrence suggests that the same intent based approach only applies to conveyances between the state and a private party. Second, assuming that the dispute has arisen over the ambiguity of a general term like "mineral," the court would solicit extrinsic evidence of intent of the *original* conveyance from the parties involved. This might include corollary documents, usage of trade and courses of dealing and performance.[147] Combined with a jury instruction like that of UJI 13-825, the jury (or judge in the case of a bench trial) would then determine the scope of the disputed term according to the most reasonable interpretation of what the original parties' general intent might have been. The resolution of such a dispute would then *only* apply to that *specific* term in that *specific* conveyance.

VI. CONCLUSION

Given the lack of guidelines in the actual determination of intent, the court of appeals in *Prather v. Lyons* resorted to strict contract interpretation to examine extrinsic evidence of the original parties' intent to include common rock in a general mineral reservation to the state. As-

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146. *Bogle Farms*, 1996-NMSC-051, ¶ 39 (McKinnon J., concurring).

147. *See*, *e.g.*, UJI 13-826 NMRA (defining "custom in the trade" as "any manner of dealing that is commonly followed in a place or trade so as to create a reasonable expectation that it will be followed with respect to the transaction between the parties."); UJI 13-827 NMRA (defining "course of dealing" as "a manner of dealing between the parties in previous transactions which it is reasonable to regard as establishing a common understanding with respect to the meaning of the term[s] in dispute."); UJI 13-828 NMRA (defining "course of performance" as "the way the parties have conducted themselves in the performance of this contract, reflecting a common understanding of the meaning of the term[s] in dispute.").

suming that this approach is consistent with the supreme court's holding in *Bogle Farms*, courts should be particularly careful in ensuring that the scope of the extrinsic evidence considered is limited to the circumstances surrounding the *original* agreement, lest bias or error creep into the court's deliberations. Furthermore, courts should not wholly exclude the use of canons of contract interpretation in the event that extrinsic evidence of intent is, in and of itself, ambiguous so long as the use of canons is carefully limited. Moreover, while there exists a strong public interest in preserving the resources of the state in its solemn duty to support its public schools, there is also a strong public policy argument in favor of maintaining certainty of title and promoting the economic development of New Mexico.