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Kentucky Mineral Law

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Book Review

KENTUCKY MINERAL LAW. Edited by David C. Short† and Rick L. Thomas††.
Cleveland, Ohio: Banks-Baldwin Law Publishing Co., 1986. Vol. 1-3. \$295.00.

REVIEWED BY PATRICK C. MCGINLEY*

Kentucky Mineral Law is a treatise of three volumes which is intended to “offer practical guidance in identifying, researching, and resolving the legal problems which commonly arise in the mineral industry.”¹ The focus of the work is on legal issues relating to the Commonwealth of Kentucky’s coal, oil, and gas industries.

KML is unique; unlike other more broadly conceived mineral law texts relating to the mineral producing states of the East, *KML* was intended to address the mineral law problems of a single state.² It is not the end product of a publisher’s market analysis, a law professor’s theory, or a state bar committee’s survey of the practicing bar, although its genesis surely contained elements of each. Rather, *KML* is a logical extension of a new endeavor of the University of Kentucky.

January 1983 saw the opening of the new Mineral Law Center of the University of Kentucky College of Law. The Mineral Law Center was formed with the strong support of the Kentucky mineral industries and the Commonwealth’s practicing bar. The charge of the Mineral Law Center was to develop continuing legal education programs relevant to mineral law issues and to provide the impetus for significant expansion of previously sparse mineral law scholarship through research and publications.

Thus, the concept of *KML* came from the Center’s appraisal of the needs of the Kentucky mineral industry and the state’s mineral law bar. In the preface

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¹ KENTUCKY MINERAL LAW at vii (D. Short & R. Thomas eds., 1986)(hereinafter referred to as “KML”).

² The only work even vaguely analogous to *KML* is now out of print. See R. DONLEY, THE LAW OF COAL, OIL AND GAS IN WEST VIRGINIA AND VIRGINIA (1951). This one volume book has been supplemented twice. See Donley, *Development of the Law of Coal, Oil and Gas from 1951 to 1971*, 74 W. VA. L. REV. 260 (1972); Bowles, Taylor, & Lane, *An Update of Donley’s The Law of Coal, Oil and Gas in West Virginia: 1971-1986*, 89 W. VA. L. REV. 757 (1987).

to *KML*, the editors observe that “[t]o the uninitiated, the practice of mineral law in Kentucky often seems hopelessly confusing. Although it is virtually impossible to practice law in Kentucky without encountering legal problems involving minerals, it is also nearly impossible to locate a single source for specific guidance in resolving those problems.”³

After consultation with noted Kentucky mineral law experts, the managing editors drafted an outline of the proposed contents and then recruited editors with the expertise in each of ten general areas of substantive mineral law.⁴ With the concurrence of the managing editors, each of the ten section editors organized their work into chapters and chose sixty-five contributing authors who prepared substantive manuscripts of the treatise’s chapters.

The managing editors of *KML*, Professor David C. Short and Mr. Rick L. Thomas and general editor, Ms. Suzanne D. Fong performed yeoman’s work developing and implementing a plan for the ambitious *KML* project. The logical and well-integrated organization of the treatise provides a sound framework upon which cogent and concise substantive text rests.

Organization is not the only strength of *KML*. The excellence of the treatise as a comprehensive practical guide to legal issues relating to coal, oil, and gas development in Kentucky is due in significant measure to the considerable mineral law expertise of the editors and contributing authors and to their ability to communicate their knowledge effectively.

In short, *KML* was conceived by those who knew what they were doing and where they were going with the project. The organization is conceptually excellent and the text is thoroughly researched, well written, well organized, and enhanced by skillful editing.

KML contains a number of particularly noteworthy features. A “User’s Guide” provides the reader with helpful suggestions for effective and efficient use of the treatise. Numerous model and illustrative forms have been included to assist readers in preparing and understanding a wide variety of contracts, opinions, leases, assignments, affidavits, deeds, and agreements. Informative annotations to these forms explain their purpose and discuss possible variations. Many chapters contain extensive checklists, outlines, and practice pointers that will prove invaluable to

³ *KML*, *supra* note 1, at vii. The editors also observe that “[w]e have long needed a single work which surveys the legal issues pertaining to minerals and mineral development and provides specific, practical guidelines for all concerned. *Kentucky Mineral Law* is intended to meet that need.” *Id.*

⁴ The ten general areas addressed by *KML* are: technical overviews of coal, oil, and gas operations; aspects of property law common to all minerals; aspects of property law peculiar to oil and gas; aspects of property law peculiar to coal; extraction of minerals as a business; taxation of the mineral and its extractions; labor; mineral financing and securities; transportation of the mineral; and government regulation of the mineral’s extraction.

both the novice and the experienced mineral law practitioner. In addition, two introductory chapters provide informative discussions of the technical aspects of oil, gas, and coal production that will educate uninitiated members of the bench and bar.⁵

The first substantive section of the treatise focuses on that portion of property law that is generally applicable to all types of minerals. Discussed in the seven chapters of this section are such issues as judicial interpretation of the term "mineral;" the special difficulties practitioners must face when examining mineral titles in Kentucky; conflicts between owners or lessees of different minerals that lie under the surface of the same property; and problems which may arise when more than one party owns an interest in the same mineral. Kentucky statutory remedies for resolving such disputes are analyzed: partition, actions to quiet title, and application of the "Unknown and Missing Owners Act." Finally, this section contains a thoughtful discussion of consumptive water use rights in Kentucky; a very important topic largely ignored or misunderstood by mineral law practitioners in the eastern United States.

Chapter 9, "Title to Minerals," is exceptionally well done. The information contained in that chapter provides a detailed, comprehensive description of how to conduct a title examination in Kentucky and describes common title defects and how to cure them. Chapter 9 alone provides enough help and insight to the mineral law practitioner to warrant purchasing the three volume set.

The next substantive section of *KML* addresses that body of property law relating to oil and gas development. The introduction to the section notes that Kentucky oil and gas production dates back to the state's first well drilled in 1860; only one year after Colonel Edwin Drake's first well began production in Titusville, Pennsylvania. Some may be surprised that Kentucky ranks twelfth among the states in oil and gas production.

Thus, considerable oil and gas case law has developed in the last century in Kentucky. The materials in this section emphasize understanding of the oil and gas lease which in one way or another is usually a core consideration in any oil/gas controversy. Textual discussions examine the drafting and transfer of oil/gas interests and the oil/gas operator; title searches required in the course of leasing properties; the process of obtaining oil/gas leases and the types of title opinions an operator may require at various stages in the leasing and drilling process. Issues regarding pooling and unitization, as well as release, cancellation, forfeiture, termination, subdivided leaseholds, and well plugging requirements also are examined.

Following the section on property law as it relates to oil and gas is a thorough and well-documented section that explores aspects of property law peculiar to

⁵ *KML*, *supra* note 1, at chs. 1 and 3.

coal. Addressed are questions that coal law practitioners often face: severance of surface and coal estates, mining rights, and coal leases and licenses. Chapter 37 deals with the language of instruments used to sever the title of coal from the fee estate. Express and implied rights and obligations that arise from the conveyance of a coal estate are also analyzed. A most enlightening detailed discussion of the negotiation, drafting, and interpretation of coal leases and licenses is found in Chapter 43.

The section on property law and coal is one of the strengths of the *KML* set. It provides, in clear and concise form, discussion of those coal law issues most likely to be encountered by the practitioner and provides numerous helpful suggestions on how to avoid or remedy problems.

Departing from the property law theme of the first three substantive sections of *KML*, the editors next offer materials that consider the extraction of minerals as a commercial or business matter. The editor of the section disclaims any grandiose goals. Simply put, this section is meant "to provide the practitioner with methods of analyzing each business situation and to enable the practitioner to make the most appropriate recommendation to the mineral client."⁶

The most desirable form of business organization may be an issue of great import for those who seek to extract minerals. Organizational possibilities include sole proprietorships, mining partnerships, joint ventures, limited partnerships, business trusts, cotenancy, grubstake agreements, and last but not least, the corporate entity. Chapter 47 offers basic and sound advice to those who must decide on the appropriate business organization for a given enterprise.

Acquisition of a mineral-producing business is the focus of Chapter 49. Such acquisitions can be complex and fraught with dangers for unsophisticated investors. This chapter provides cogent advice and information to those who might wish to acquire or dispose of a mineral business. Various types of acquisitions are reviewed. Corporate law issues are explored, as are shareholders rights, tax concerns, and securities law considerations. Also covered are successor liability, antitrust problems, and drafting of acquisition documents.

The only significant gap in the coverage of the chapter is its failure to address the dangers attendant an acquisition of mineral properties or businesses that exhibit often enormously costly preexisting or potential environmental liabilities. Notwithstanding this omission, the chapter is an excellent combination of legal scholarship and prudent business advice.

Contract mining, equipment leasing, domestic coal supply contracts, and mineral enterprise bankruptcy round out this thorough and pragmatic section on the business aspects of mineral extraction.

⁶ *Id.*, ch. 45, at 3.

Following in logical sequence after the discussion of business concerns is a section on mineral taxation which does not attempt to duplicate the work of other authors or treatises. Rather, the editors set their sights on a realistic goal: "to provide practitioners with overviews of both federal and Kentucky tax provisions which particularly affect the mineral industry."⁷ To the extent that the *KML* tax materials focus on specifics, they consider selected issues raised when certain tax law provisions actually are applied to coal, oil, and gas production. Selected tax consequences of advanced coal royalties, mine development expenditures, and percentage depletion are explored in Chapters 63, 65, and 67. An excellent practitioner's aid is found in Chapter 71, which examines administrative and judicial review of tax assessment decisions made under Kentucky law.

Following the tax materials, *KML* examines labor law issues which arise in the context of mineral development. Included are chapters on labor relations generally, workers' compensation, black lung claims, unfair union representation issues, pension claims, and the doctrine of employment at will. The materials in this section provide an essential core of information that will be of significant assistance to the mineral law practitioner when he or she is called upon to deal with employer-employee-union issues. These issues can consume a significant portion of the case load of a practitioner located in the coal fields of Kentucky. Practitioners who can pull *KML* from the shelves of their libraries will have a significant advantage over lawyers who must rummage through numerous labor law, contracts, and workers' compensation texts to find authority relevant to a mineral law context.

Departing from labor issues, *KML* reviews mineral financing and securities problems and considerations in the next section of the work. The editor and authors of this well-researched and concisely written section have captured the essence of mineral enterprise financing and securities issues in a way that will garner accolades from those lawyers, including this reviewer, who are generally inclined to lump such matters under the heading "esoteric specialization."

While many specific mineral financing and securities issues will remain beyond the ken of general practitioners, there are many other issues that they can comfortably handle with the assistance of a text like *KML*. Indeed, the materials in this section relating to bank financing of mining and oil/gas enterprises are must background reading for those lawyers whose clients are involved in some way with such financing.

Likewise, state and federal securities law and regulation of mineral financing endeavors should be familiar to attorneys whose mineral clients utilize securities as a means of raising revenue. A wise lawyer who wishes to maintain the best rapport with his or her clients will seek self-education on issues like mineral fi-

⁷ *Id.*, ch. 58, at 3.

nancing and securities even though the knowledge gained may be used directly on infrequent occasions. In sum, this section provides basic practical and background information that a mineral lawyer should be aware of, or at least have available when the need for such information arises.

Transportation of coal by rail, motor carrier, and water, and oil and gas by pipeline, is the topic of the penultimate section of the treatise. The section is not an exhaustive treatment of all transportation issues; rather it serves to acquaint practitioners with legal principles attendant mineral transportation arrangements. Administrative procedures relevant to mineral transportation and governing state and federal statutes are also discussed. The information contained in this section on mineral transportation in Kentucky is not duplicated anywhere; it will truly be a blessing for the Kentucky mineral practitioner to find such a collection of research and authority in one place.

The last substantive section of *KML* deals with a catch-all topic: "government regulation of the mineral's extraction." Under this heading are chapters on coal mine safety and health law issues; discrimination and miners rights under the Federal Mine Safety and Health Act of 1977; and practice and procedures under the Federal Surface Mining Control and Reclamation Act of 1977 and Kentucky surface mining law. Also under the rubric of surface mining are more specialized discussions of statutory provisions which allow the prohibition of coal mining in some circumstances, and the representation of citizens in surface mining cases, a topic that, until publication of *KML*, has received little attention from commentators.

The only non-coal chapter in the government regulation section is Chapter 117 which addresses the Commonwealth of Kentucky's regulation of oil and gas production. That chapter analyzes Kentucky law and regulations relating to drilling permits, bonding to insure well plugging, well spacing, and forced pooling or unitization to obtain drilling permits. This section seems to contain adequate basic information but might be improved by more comprehensive treatment in future supplements to *KML*.

The true test of the value of a legal treatise is the extent to which it is actually used by practitioners. *Moore's Federal Practice* or Larson's treatise on *Workmen's Compensation Law* are the type of essential books whose pages quickly become "dog-eared" through extensive use. Only time will tell whether Kentucky mineral law practitioners will find *KML* to be an indispensable aid to their practice. My bet is that *Kentucky Mineral Law* soon will be found in the library of every mineral law practitioner in Kentucky—or at least on the shelves of the best Kentucky mineral lawyers. The most successful practitioners will greatly appreciate the edge *KML* gives them over others who continue to flounder in a maze of disorganized mineral law cases and commentary.

Kentucky Mineral Law is an excellent addition to the mineral literature; it will complement other treatises like the *American Law of Mining*,⁸ *Coal Law and Regulation*,⁹ *Regulation of the Gas Industry*,¹⁰ and *Oil and Gas Law*.¹¹ All of those individuals who spent endless hours of organizing, writing, and editing *Kentucky Mineral Law* can be proud of their efforts.

⁸ ROCKY MOUNTAIN MINERAL LAW FOUND., *AMERICAN LAW OF MINING* (2d ed. 1984).

⁹ *COAL LAW AND REGULATION* (P. McGinley & D. Vish eds. 1983).

¹⁰ AMERICAN GAS ASS'N, *REGULATION OF THE GAS INDUSTRY* (1981).

¹¹ H. WILLIAMS & C. MEYERS, *OIL AND GAS LAW* (1959).

