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Recommended Citation

Laura H. Burney, “Oil, Gas, and Other Minerals” Clauses in Texas: Who’s on First?, 41 SW L.J. 695 (1987).

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“OIL, GAS, AND OTHER MINERALS” CLAUSES IN TEXAS: WHO’S ON FIRST?

by

Laura H. Burney*

Costello: You know the names of the guys on the baseball team?
Go ahead. Who’s on first base?
Abbott: Who.
Costello: The guy playing first base.
Abbott: Who is on first.
Costello: What are you asking me for? . . . I’m asking ya, what’s
the guy’s name on first base?
Abbott: No, What’s on second.
Costello: I’m not askin’ you who’s on second.
Abbott: Who is on first.
Costello: One base at a time now!
Abbott: Who is on first.
Costello: I don’t know.
Abbott: He’s on third.
Costello: How could I get on third base?
Abbott: You mentioned his name.
Costello: I mentioned his name! I dunno anybody’s name on this
team. How could I mention the guy’s name?¹

LEGAL scholars have frequently turned to nonlegal sources, not for their precedential value, but for comparison, explanation, and enlightenment.² This source proves to be relevant once again in analyzing the current state of the law on “oil, gas, and other minerals” clauses in Texas. The following sarcastic, but accurate summary of Texas law by Justice C. L. Ray in *Schwarz v. State*³ is reminiscent of the confused tone in Abbott and Costello’s dialogue:

[T]he surface belongs to the surface estate owner and the minerals belong to the mineral estate owner, except in pre-June 8, 1983 severances where nobody knows who owns what (not even a title examiner) until

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1. Video Tape, “Hey Abbott,” Video-America.

2. See, e.g., *United States v. Apfelbaum*, 445 U.S. 115, 131 n.13 (1980) (Shakespeare’s lines “express sound legal doctrine”); *Memorial Hosp. v. Maricopa County*, 415 U.S. 250, 261 (1974) (admonition in Bible illustrates theory behind right of travel); Harris, *Gas Royalties — Leading State and Federal Cases Reviewed: Alice’s Adventure in “Royalty-land,”* 37 OKLA. L. REV. 699, 699 (1984) (dialogue between Humpty Dumpty and Alice explains how words have dual meanings).

3. 703 S.W.2d 187 (Tex. 1986) (*Schwarz II*).

ownership has been litigated, in which case if some portion of a mineral is found within 200 feet of the surface, it belongs to the surface owner unless, of course, the land was purchased pursuant to the Land Sales Act of 1895, in which case even though the estates were severed before June 8, 1983, the minerals belong to the mineral estate, or the State.⁴

The Texas Supreme Court intended to instill certainty in Texas land titles in its opinion in *Moser v. United States Steel Corp. (Moser II)*.⁵ As evidenced by *Schwarz* and other post-*Moser* decisions,⁶ however, the court has not reached this goal. Moreover, certainty in land titles will not be established until one barrier is totally removed: the surface destruction test.⁷

Moser II permitted the surface destruction test to survive instead of summarily burying it.⁸ Courts in subsequent decisions, therefore, have necessarily injected new curves into the already contorted state of the law.⁹ This Article demonstrates that courts should accept the following propositions in order to clear the path toward certainty of Texas land titles: (1) adopt a definition of the "ordinary and natural meaning" test similar to that proposed by Dean Eugene Kuntz; and (2) bury the surface destruction test by applying this test retrospectively.

I. HISTORY OF THE SURFACE DESTRUCTION TEST

A. 1900-1983

Numerous articles have traced the evolution of the surface destruction test.¹⁰ While a detailed history is beyond the scope of this Article, a sum-

4. *Id.* at 193 (Ray, J., concurring).

5. 676 S.W.2d 99, 101 (Tex. 1984). Dean Eugene Kuntz has noted, "In matters of land titles, and most certainly in the field of oil and gas where heavy expenditures of capital are incident to exploration, development and production, certainty is of the utmost importance." Kuntz, *The Law Relating to Oil and Gas in Wyoming*, 3 WYO. L. J. 107, 114 (1949); see Note, *Interpretation of "Other Minerals" in a Grant or Reservation of a Mineral Interest*, 71 CORNELL L. REV. 618, 620 (1986) (stability and certainty of land titles encourages development of mineral resources and means individuals need not resort to judiciary for interpretations).

6. See, e.g., *Schwarz II*, 703 S.W.2d at 189 (special rule for state); *Friedman v. Texaco*, 691 S.W.2d 586, 589 (Tex. 1985) (surface destruction test applies retrospectively); *Atlantic Richfield Co. v. Lindholm*, 714 S.W.2d 390, 393 (Tex. App.—Corpus Christi 1986, writ ref'd n.r.e.) (Texas Uranium Surface Mining and Reclamation Act, TEX. NAT. RES. CODE ANN. §§ 131.001-.305 (Vernon Supp. 1987) does not abrogate surface destruction test).

7. The surface destruction test requires the court to determine if the mineral can be recovered only by quarrying or open-pit strip mining that destroys the surface for agricultural and grazing purposes. *Heinatz v. Allen*, 147 Tex. 512, 519, 217 S.W.2d 994, 998 (1949).

8. 676 S.W.2d at 103 (new rules applied only prospectively).

9. See *Schwarz II*, 703 S.W.2d at 189 (special rule for state); *Friedman v. Texaco*, 691 S.W.2d at 589 (surface destruction test applies retrospectively).

10. See Emery, *What Surface Is Mineral and What Mineral Is Surface?*, 12 OKLA. L. REV. 499, 510-20 (1959); Comment, *Lignite: Surface or Mineral—The Destruction Test and More*, 29 BAYLOR L. REV. 879, 885-96 (1977) [hereinafter Comment, *Lignite: Surface or Mineral*]; Comment, *Lignite: Surface or Mineral? The Single Test Causes Double Trouble*, 28 BAYLOR L. REV. 287, 300-03 (1976); Comment, *What "Other Minerals" Should Mean in Wyoming*, 21 LAND & WATER L. REV. 417, 418-26 (1986); Comment, *The Need for Certainty in Ownership of Minerals: Coal, Lignite, and Other Minerals*, 22 S. TEX. L.J. 287, 293-95 (1982); Comment, *A New Approach to the Use of the Surface Estate by a Lessee Under an Oil and Gas Lease*, 13 S. TEX. L.J. 269, 269-80, 284-93 (1972); Comment, *Determining Mineral Ownership in Texas After Moser v. United States Steel Corp.—the Surface Destruction Nightmare Contin-*

mary appears necessary. As the importance of oil and gas flourished in Texas in the early 1900s, so did litigation among the owners of mineral and surface estates concerning the ownership of these and other valuable substances.¹¹ Courts quickly declined to apply the rule of *ejusdem generis*¹² to determine if disputed substances passed in a grant of minerals. Courts instead focused on ascertaining the intent of the parties from the four corners of the document.¹³ A corollary to this approach involved determining that a lack of actual knowledge of a substance's existence would not detract from an intent to convey all minerals.¹⁴ By 1936 the Texas Supreme Court had declared, as matter of law, that the term "minerals" included oil and gas.¹⁵ The fortuitous presence, however, of many other valuable substances in the state would allow the controversies to continue. For example, *Psencik v. Wessels*,¹⁶ an appellate decision in which ownership of sand and gravel was at issue, espoused a test that gave a broad definition to the term "minerals."¹⁷

In 1949, two years after the *Psencik* decision, the supreme court decided

ues, 17 ST. MARY'S L.J. 185, 186-93 (1985) [hereinafter Comment, *Determining Mineral Ownership*]; Comment, *Is Coal Included in a Grant or Reservation of Oil, Gas or Other Minerals?*, 30 SW. L.J. 481, 487-88 (1976); Note, *Determination of Ownership of Near-Surface Minerals as a Matter of Law*, 36 BAYLOR L. REV. 715, 716-19 (1984) [hereinafter Note, *Determination of Ownership*]; Note, *supra* note 5, at 624-29; Note, *Minerals: Moser v. United States Steel: A New Approach to Ownership of Unspecified Minerals in Texas and Oklahoma*, 37 OKLA. L. REV. 352, 357-67 (1984) [hereinafter Note, *Minerals: Moser v. United States Steel*]; Note, *Mines and Minerals—Title to Minerals—Title to Substances Determined To Be Minerals as a Matter of Law Is Held by Owner of the Mineral Estate*, 15 ST. MARY'S L.J. 477, 477-91 (1984); Note, *Title to Uranium Is Held by the Mineral Estate Owner as a Matter of Law*, 16 TEX. TECH L. REV. 809, 810-17 (1985) [hereinafter Note, *Title to Uranium*]; Note, *Ownership of Unspecified Mineral Interests in Texas and Oklahoma After Reed v. Wylie II*, 16 TULSA L.J. 511, 512-22 (1981).

11. *Luse v. Boatman*, 217 S.W. 1096, 1096 (Tex. Civ. App.—Fort Worth 1919, writ ref'd) (appellees argued minerals did not include oil and gas because such inclusion was not common at the time). The Supreme Court of Texas adopted the *Luse* opinion in *Elliot v. Nelson*, 113 Tex. 62, 70-71, 251 S.W. 501, 504 (1923).

12. See *Luse v. Boatman*, 217 S.W. at 1099; *Cronkhite v. Falkenstein*, 352 P.2d 396, 396-98 (Okla. 1960). *Ejusdem generis* is a well-known maxim of construction, which dictates that a court interpret a general word or phrase following a specific word or phrase as referring to things of the same kind or character as the specific terms. *Bumpus v. United States*, 325 F.2d 264, 266-67 (10th Cir. 1963). In *Luse* the appellate court considered *ejusdem generis* difficult to apply and "an unsafe guide." 217 S.W. at 1099; see *Anderson & Kerr Drilling Co. v. Bruhlmeier*, 134 Tex. 574, 582, 136 S.W.2d 800, 804 (1940).

13. See, e.g., *Anderson & Kerr Drilling Co. v. Bruhlmeier*, 134 Tex. 574, 583, 136 S.W.2d 800, 805 (1940) (when terms not ambiguous, court ascertained intent from document alone); *Winsett v. Watson*, 206 S.W.2d 656, 658 (Tex. Civ. App.—Fort Worth 1947, writ ref'd n.r.e.) (provision in deed did not show intent to convey sand and gravel); *Praetorian Diamond Oil Ass'n v. Garvey*, 15 S.W.2d 698, 700 (Tex. Civ. App.—Beaumont 1929, writ ref'd) (question not whether gravel is mineral, but whether gravel was intended to be conveyed).

14. See *Cain v. Neumann*, 316 S.W.2d 915, 922 (Tex. Civ. App.—San Antonio 1958, no writ) (whether parties knew of uranium did not alter intent to convey minerals); *Luse v. Boatman*, 217 S.W. at 1100 (lack of knowledge of presence of oil and gas not important).

15. *Rio Bravo Oil Co. v. McEntire*, 128 Tex. 124, 133, 95 S.W.2d 381, 386 (1936).

16. 205 S.W.2d 658 (Tex. Civ. App.—Austin 1947, writ ref'd).

17. *Id.* at 661. In holding that common knowledge required specific referral to sand and gravel in a conveyance of such, the court stated that the definition of minerals should include "what that word means in the vernacular of the mining world, the commercial world, and land owners at the time of the grant." *Id.*

Heinatz v. Allen.¹⁸ Relying on *Psencik*, the *Heinatz* court held that a substance must be considered a mineral within the "ordinary and natural meaning" of the word.¹⁹ The court, however, did not define the contours of that test. The court's only guidelines included the assessment that the scientific definition of the word "mineral" would not govern unless intended.²⁰ The court also considered factors such as the nature of the substance, the substance's relation to the surface, whether the substance had special value, and the effect of the substance's removal upon the surface.²¹ The court noted that the limestone in this particular tract was recoverable only by surface destructive methods, although the court expressly stated that this fact was not decisive.²² The subsequent case of *Cain v. Neumann*,²³ involving conveyed uranium, failed to cite the *Heinatz* opinion at all.²⁴ The court in *Cain* specifically stated that no Texas precedents discussed uranium.²⁵ In the following years the El Paso court of civil appeals rejected the special value criterion set forth in *Heinatz*,²⁶ and applied the test from *Psencik*.²⁷ This court held that the surface destruction element, although not a decisive factor, warranted consideration.²⁸

In 1971 the Supreme Court of Texas elevated the surface destruction factor to an all-determinative test in *Acker v. Guinn*.²⁹ *Reed v. Wylie*,³⁰ a coal

18. 147 Tex. 512, 217 S.W.2d 994 (1949) (this case questioned whether a devise of mineral rights included commercial limestone).

19. *Id.* at 517, 217 S.W.2d at 997.

20. *Id.*

21. *Id.* at 516-17, 217 S.W.2d at 996-97.

22. *Id.* at 518, 217 S.W.2d at 998.

23. 316 S.W.2d 915 (Tex. Civ. App.—San Antonio 1958, no writ).

24. *Id.* at 921-22. The court did point out that the parties had not briefed the issue in *Heinatz*. *Id.* at 921.

25. *Id.*

26. See *supra* notes 19-21 and accompanying text.

27. See *Atwood v. Rodman*, 355 S.W.2d 206, 215-16 (Tex. Civ. App.—El Paso 1962, writ ref'd n.r.e.). In *Heinatz* the court held that "substances such as sand, gravel and limestone are not minerals within the ordinary and natural meaning of the word unless they are rare and exceptional in character or possess a peculiar property giving them special value . . ." 147 Tex. at 518, 217 S.W.2d at 997; see *Eldridge v. Edmondson*, 252 S.W.2d 605, 607 (Tex. Civ. App.—Eastland 1952, writ ref'd n.r.e.) (reservation of minerals in a deed does not ordinarily include limestone). The *Atwood* court viewed the special value criterion from *Heinatz* as obiter dictum. *Atwood v. Rodman*, 355 S.W.2d at 215.

28. See *Atwood v. Rodman*, 355 S.W.2d at 211-13; *Eldridge v. Edmondson*, 252 S.W.2d at 608.

29. 464 S.W.2d 348 (Tex. 1971). *Acker* involved the question of whether a deed that conveyed a 1/2 interest to "oil, gas, and other minerals" passed an interest in iron ore to a grantee. *Id.* at 349. The court, in deciding that the interest remained with the surface estate, stated the following rule:

It is not ordinarily contemplated, however, that the utility of the surface for agricultural or grazing purposes will be destroyed or substantially impaired. Unless the contrary intention is affirmatively and fairly expressed, therefore, a grant or reservation of "minerals" or "mineral rights" should not be construed to include a substance that must be removed by methods that will, in effect, consume or deplete the surface estate.

Id. at 352; see Recent Development, *Texas Reexamines the Meaning of 'Minerals'*: *Moser v. United States Steel Corp.*, 19 TULSA L.J. 448, 449 (1984) (surface destruction becomes conclusive test in *Acker*). For two cases that applied the surface destruction test as set forth in *Acker*, see *DuBois v. Jacobs*, 551 S.W.2d 147, 149-50 (Tex. Civ. App.—Austin 1977, no writ) (recla-

and lignite case that reached the supreme court twice, subsequently modified this all-determinative test. In the opinion's final form the surface destruction test required numerous factual determinations before a decision could be made regarding who owned what substance.³¹ These determinations ranged from the various locations of the substance on the particular tract to the available methods of substance removal.³²

B. Moser II and Its Deficiencies

The surface destruction test resulted in land titles being decided more by inspecting the land than by reading the instruments of conveyance.³³ In *Moser v. United States Steel Corp.*³⁴ the supreme court recognized that determining ownership of minerals by land inspection led to title uncertainty.³⁵ The court, therefore, purported to abandon the surface destruction test.³⁶

The court additionally set forth rules governing surface damage, suggested by Dean Eugene Kuntz,³⁷ in an attempt to strike an equitable balance between the rights of the mineral and surface estate owners.³⁸ These rules require the mineral estate owner to compensate the surface owner only for

mation efforts deemed immaterial by the court) and *Williford v. Spies*, 530 S.W.2d 127, 130-31 (Tex. Civ. App.—Waco 1975, no writ) (court deemed reclamation efforts immaterial).

30. 554 S.W.2d 169 (Tex. 1977) (*Reed I*), *modified*, 597 S.W.2d 743 (Tex. 1980) (*Reed II*). In the *Reed* cases the dispute concerned ownership of coal and lignite. *Reed I* added to the *Acker* test by requiring proof, "as of the date of the instrument being construed," that extraction of the near-surface substance would necessarily have consumed or depleted the surface. *Reed I*, 554 S.W.2d at 172. The court in *Reed I* also held that only those substances that *must* be removed by surface destructive methods belong to the surface estate. *Id.* The supreme court remanded the case to the trial court because the record did not contain information regarding the location of the lignite. *Id.* at 173. When the case reached the supreme court again, the court made the following changes: (1) a substance that is "near-surface" will not be granted or retained as a mineral if the surface owner shows that *any reasonable* method of removal will destroy or deplete the surface; (2) the court considered the trial date, rather than the date of the instrument, important; and (3) the court defined surface and near-surface as a matter of law. *Reed II*, 597 S.W.2d at 747-48 (emphasis added).

31. *Reed II*, 597 S.W.2d at 750 (Spears, J., concurring). Judge Spears noted that a court must resolve at least four possible fact issues in order to determine whether the surface owner or the mineral estate owner owns coal and lignite: (1) whether deposits are located in the immediate vicinity of the surface; (2) whether deposits lie "at or near" the surface; (3) whether deposits must conform to the earth's surface; and (4) whether a method of recovery is reasonable. *Id.*

32. *Id.*

33. See *Reed I*, 554 S.W.2d at 182 (Daniels, J., dissenting), *modified*, *Reed II*, 597 S.W.2d at 743.

34. 26 Tex. Sup. Ct. J. 427 (June 8, 1983) (*Moser I*), *opinion withdrawn*, 676 S.W.2d 99 (Tex. 1984) (*Moser II*).

35. *Moser II*, 676 S.W.2d at 101; *Moser I*, 26 Tex. Sup. Ct. J. at 428.

36. *Moser II*, 676 S.W.2d at 102. The court held that "a severance of minerals in an oil, gas and other minerals clause includes all substances within the ordinary and natural meaning of that word, whether their presence or value is known at the time of the severance." *Id.* The withdrawn opinion, *Moser I*, referred to knowledge at the time of "extraction." 26 Tex. Sup. Ct. J. at 429.

37. Dean Eugene O. Kuntz was admitted to practice in Texas in 1938. Dean Kuntz received an LL.M from Harvard University and taught at the University of Wyoming.

38. *Moser II*, 676 S.W.2d at 102.

negligently inflicted damage when a substance is specifically conveyed.³⁹ When a mineral estate owner takes a substance through a general grant of "other minerals," however, the surface owner is liable for any surface damage.⁴⁰

The supreme court handed down its original opinion on June 8, 1983. One year later the court withdrew the opinion and replaced it with *Moser II*.⁴¹ As in *Moser I*, the court's opinion in *Moser II* failed to clarify the "ordinary and natural meaning" test.⁴² *Moser II* also did not specify factors to be considered in determining damages.⁴³ Nevertheless, the two opinions differed significantly. First, the court ruled that the standards set forth in *Moser II* would only apply prospectively from the date of the first opinion, thus eliminating a "window period" set forth in *Moser I*.⁴⁴ Second, the court added the opinion of *Reed v. Wylie*⁴⁵ to its list of cases that it would continue to recognize as establishing certain substances as belonging to the surface estate as a matter of law.⁴⁶ Although this second difference appears subtle, its effect is significant. In *Reed II* the court applied the surface destruction test to determine the ownership of near-surface lignite, iron, and coal.⁴⁷ It appears incongruous for the court to overrule the surface destruction test and, in the same opinion, add a case that applied the surface destruction test to its list of substances that belong to the surface. As many writers have noted,⁴⁸ however, in *Moser II* the court indicated that the sur-

39. *Id.* The court reasoned that when a substance is specifically named, the parties probably contemplated some surface damage in negotiating a price. *Id.* at 103.

40. *Id.*

41. See *supra* note 34.

42. In establishing the "ordinary and natural meaning" test as law, the opinions simply cite *Psencik*, *Heinatz*, and *Cain* without further elaboration. *Moser II*, 676 S.W.2d at 102; *Moser I*, 26 Tex. Sup. Ct. J. at 428-29.

43. Neither opinion provided a formula, such as the difference in market value before and after extraction. Both opinions, however, contain a footnote stating that the damages rules will not affect the statutory duties of mineral owners under the reclamation acts. *Moser II*, 676 S.W.2d at 103 n.4; *Moser I*, 26 Tex. Sup. Ct. J. at 429 n.4.

44. *Moser II*, 676 S.W.2d at 103. In *Moser I* the court held that the surface destruction test would still apply to leases and deeds executed between the date of the *Acker* opinion, February 10, 1971, and the date of its opinion, June 8, 1983. 26 Tex. Sup. Ct. J. at 430. Many writers criticized this window period. See, e.g., Laity, *Oil Gas & Minerals, Annual Survey of Texas Law*, 38 Sw. L.J. 195, 197, 198 (1984) (litigation not reduced due to window period); Note, *Minerals: Moser v. United States Steel*, *supra* note 10, at 367 (fact scenarios of problems caused by window period); Recent Developments, *supra* note 29, at 455 (window period equitable, but causes problems for title examiners and courts). The court chose to rule prospectively in both opinions under an assumption that parties could have relied on its holdings in *Acker* and *Reed II*. *Moser II*, 676 S.W.2d at 103; *Moser I*, 26 Tex. Sup. Ct. J. at 430.

45. 554 S.W.2d 169 (Tex. 1977) (*Reed I*), modified, 597 S.W.2d 743 (Tex. 1980) (*Reed II*).

46. Compare *Moser II*, 676 S.W.2d at 101 (list includes *Reed II*, 597 S.W.2d 743 (Tex. 1980); *Sun Oil Co. v. Whitaker*, 483 S.W.2d 808 (Tex. 1972); *Heinatz v. Allen*, 147 Tex. 512, 217 S.W.2d 994 (1949); *Atwood v. Rodman*, 355 S.W.2d 206 (Tex. Civ. App.—El Paso 1962, writ ref'd n.r.e.); *Union Sulphur Co. v. Texas Gulf Sulphur Co.*, 42 S.W.2d 182 (Tex. Civ. App.—Austin 1931, writ ref'd); *Praeletorian Diamond Oil Ass'n v. Garvey*, 15 S.W.2d 698 (Tex. Civ. App.—Beaumont 1979, writ ref'd)) with *Moser I*, 26 Tex. Sup. Ct. J. at 428 (*Reed I* not included in list).

47. 597 S.W.2d at 748 (coal and lignite awarded to surface owner under surface destruction test).

48. See A. H. WILLIAMS & C. MEYERS, *OIL AND GAS LAW* § 219 (1986); Comment,

face destruction test was to continue to be viable for near-surface lignite, iron, and coal, even after June 8, 1983.⁴⁹ The court's opinion in *Moser II*, therefore, due to its prospective ruling and the addition of *Reed II*, pumped new life into the surface destruction test, rather than removing its crippling effects on Texas land titles.

II. THE POST-MOSER CASES

Moser II proved deficient in three respects. First, it allowed the surface destruction test to survive. Second, it did not provide a clear definition of the "ordinary and natural meaning" test. Third, it did not clarify the damages issue. The first *Moser II* deficiency, allowing the surface destruction test to survive, appeared in *Friedman v. Texaco*,⁵⁰ *Schwarz v. State*,⁵¹ and *Atlantic Richfield Co. v. Lindholm*.⁵² The courts handed down all of these decisions after the *Moser II* opinion.

A. *Friedman v. Texaco—The Retroactive Rule*

In *Friedman* the supreme court clarified the prospective ruling in *Moser II* by holding that the new rules would apply to "severances" of "other minerals" that occurred after June 8, 1983.⁵³ This holding ended speculation as to which event would trigger application of the *Moser* rules.⁵⁴ The *Friedman* court, however, also held that the surface destruction test applied to all severances prior to June 8, 1983, even those that pre-dated the *Acker* and *Reed* opinions.⁵⁵

As in *Moser*, the *Friedman* decision involved a dispute over uranium ownership between the owners of the mineral and surface estates. In 1939 Adele Friedman leased the oil, gas, and other minerals to Magnolia Petroleum. In 1959 Mrs. Friedman sold the land to Martin subject to a reservation of all the oil, gas, and other minerals. Martin subsequently executed a lease to Texaco.

Determining Mineral Ownership, *supra* note 10, at 201; Note, *Determination of Ownership*, *supra* note 10, at 725; Note, *supra* note 5, at 639 n.107; Note, *Title to Uranium*, *supra* note 10, at 822.

49. See *Schwarz v. State*, 703 S.W.2d 187, 188 (Tex. 1986) (*Schwarz II*) (*Moser II* held that near-surface iron ore, coal, and lignite belong to surface as matter of law); *Hobbs v. Hutson*, 733 S.W.2d 269, 271 (Tex. App.—Texarkana 1987, writ granted) (held lignite near-surface as matter of law); *Holland v. Kiper*, 696 S.W.2d 588, 591 (Tex. App.—Tyler 1984, writ ref'd n.r.e.) (cited *Moser II* for proposition that surface destruction test determines ownership of coal and lignite).

50. 691 S.W.2d 586, 589 (Tex. 1985).

51. 28 Tex. Sup. Ct. J. 488, 491 (June 12, 1985) (*Schwarz I*), *opinion withdrawn*, 703 S.W.2d 187, 193 (Tex. 1986) (*Schwarz II*).

52. 714 S.W.2d 390, 393 (Tex. App.—Corpus Christi 1986, writ ref'd n.r.e.).

53. 692 S.W.2d at 589.

54. The *Moser II* opinion did not clarify whether the date of trial, severance, or extraction would govern. 676 S.W.2d at 103; see Comment, *Determining Mineral Ownership*, *supra* note 10, at 196 (three possible events were severance, mineral transaction, and trial date).

55. 691 S.W.2d at 589. The court held that the test "will apply even in cases where there has been no reliance on *Acker* and *Reed* because the minerals conveyed in a pre-*Acker* severance should not depend on the fortuitous event of reliance on subsequent law by a subsequent lessee or purchaser." *Id.*

Justice Spears, writing for the majority, recognized that at the time of the conveyance in 1954, the court had not yet written the *Acker* and *Reed* opinions.⁵⁶ Justice Spears stated, however, that while the law remained unsettled at that time, the surface destruction concept was not new.⁵⁷ This historical background led the court to apply the surface destruction test to a 1939 lease and a 1959 deed.⁵⁸

This holding contorts the already confused state of the law in this area. The case permits the surface destruction test to apply to instruments executed not only before the test was formulated, but also to those instruments executed even before surface destruction was considered a significant factor.⁵⁹ This extension of the surface destruction test contradicts the very premise supporting the court's prospective ruling in *Moser II*: the protection of parties who could have relied upon the *Acker* and *Reed* opinions.⁶⁰ The *Friedman* opinion, however, stands as an unwarranted retroactive extension of the surface destruction test, which further detracts from the remedial goals of *Moser II*.

B. *Schwartz v. State—The State Exception*

The supreme court's second post-*Moser* decision arose in *Schwarz v. State*.⁶¹ The court once again withdrew its original opinion, *Schwarz I*, and replaced it with a second, *Schwarz II*. The two opinions produced opposite results. The final holding, however, introduced the following exception to the already exceptional rules in this area: when the state includes a general reservation of minerals in a conveyance, the intent is that all coal and lignite are to be withheld, regardless of any destruction occurring in recovery.⁶²

The facts of the *Schwarz* case differ from others in that the State of Texas, rather than an individual, owned the mineral estate. The reservation of the minerals occurred in a conveyance of the land made pursuant to the Land Sales Act of 1895 and the 1907 amendments thereto.⁶³ The reservation itself

56. *Id.* at 588.

57. *Id.*

58. *Id.* at 589. The court applied the surface destruction test and held that uranium did not pass to Magnolia under the 1939 lease, but that Friedman retained and conveyed the uranium to Martin in the 1959 deed. *Id.*

59. *See supra* notes 11-22 and accompanying text. Prior to *Heintz*, 147 Tex. 512, 217 S.W.2d 994 (1949), the courts focused on the intent of the parties and did not discuss surface destruction. *See supra* note 13 and accompanying text.

60. *Moser II*, 676 S.W.2d at 103. The court ruled prospectively due to "the extent of public reliance" on *Acker* and *Reed* and "because of an inability to foresee a coming change in the law." *Id.*

61. 28 Tex. Sup. Ct. J. 488 (June 12, 1985) (*Schwarz I*), *opinion withdrawn*, 703 S.W.2d 187 (Tex. 1986) (*Schwarz II*).

62. *Schwarz II*, 703 S.W.2d at 189. The state made the conveyance pursuant to the Land Sales Act of 1895 and the 1907 amendments thereto, Land Sales Act of 1895, 1895 Tex. Gen. Laws 47, 10 H. GAMMEL, LAWS OF TEXAS 793 (1898) (as amended) (codified at TEX. NAT. RES. CODE ANN. § 51.011 (Vernon 1978)). *Schwarz II*, 703 S.W.2d at 188. The court's holding, therefore, may be restricted to patents issued under these acts.

63. *Schwarz II*, 703 S.W.2d at 188. The legislature passed the Land Sales Acts to enable the state to convey lands that had been declared public domain. *See Schendell v. Rogan*, 94

did not specifically mention coal and lignite.⁶⁴ In *Schwarz* the court followed the dictates of *Moser II* and *Friedman* and applied the surface destruction test, since the severance occurred prior to June 8, 1983,⁶⁵ and the instrument did not express a contrary intent.⁶⁶ The court in *Schwarz I* held that the surface owners had established their burden of proof and awarded them the rights to the coal and lignite; it expressly rejected the state's position that the legislature intended to reserve all minerals "with the corresponding right to destroy the surface."⁶⁷

In *Schwarz II* this rejected contention became the court's holding.⁶⁸ The court in arriving at this conclusion emphasized that the "presumed intent" rule developed in the *Acker* and *Reed* decisions is merely a construction device, which must not be applied when specific intent is expressed or when another rule of construction controls.⁶⁹ The court believed that since the state was the grantor, the rules of construction favored the state.⁷⁰

The court also stated that history revealed empirical evidence that the legislature intended a broad reservation of minerals.⁷¹ The *Schwarz II* court, however, relied on the same history in *Schwarz I* in support of the opposite conclusion.⁷² From this fact alone, even without a close examination of the

Tex. 585, 586, 63 S.W. 1001, 1002 (1901). The 1907 Act amended the 1905 Act by adding the following section:

The land which is now or may hereafter be classified as mineral may be sold for agricultural or grazing purposes, but all sales of such land shall be upon the express condition that the minerals shall be and are reserved to the fund to which the land belongs and such reservations shall be stated in all applications to purchase

Schwarz II, 703 S.W.2d at 188 (citing Act of May 16, 1907, ch. 20, § 2, 1907 Tex. Gen. Laws 490, 495 (codified at TEX. NAT. RES. CODE ANN. § 51.011 (Vernon 1978)). For a review of Sales Acts and other statutes applicable to land purchases from the state, see 3 F. LANGE, LAND TITLES AND TITLE EXAMINATION §§ 231-239 (Texas Practice 1961 & Supp. 1978).

64. *Schwarz II*, 703 S.W.2d at 188. The patent issued to Schwarz's predecessor in title stated that "[A]ll of the minerals in the above described land are reserved to the state." *Id.*

65. Compare *Moser II*, 676 S.W.2d at 103 (holding applies prospectively from June 8, 1983) with *Friedman v. Texaco*, 691 S.W.2d 586, 589 (Tex. 1985) (*Moser II* applies to severances after June 8, 1983).

66. See *Reed II*, 597 S.W.2d at 745 (surface destruction test applies only when no contrary intent expressed); *Acker v. Guinn*, 464 S.W.2d 348, 352 (Tex. 1971).

67. 28 Tex. Sup. Ct. J. at 491. Expert testimony established that coal was located at a depth averaging 50 feet, which qualifies as surface as a matter of law under *Reed II*. *Id.*

68. 703 S.W.2d at 189. The court held that:

[T]he proper interpretation of the conveyance between the Alexanders and the State of Texas is that the State of Texas meant to withhold from conveyance all of the coal or lignite located on or under the surface of the land granted, whether or not recovery of such would destroy or deplete the surface estate.

Id.

69. *Id.*

70. *Id.* (citing *Empire Gas & Fuel Co. v. State*, 121 Tex. 138, 158-59, 47 S.W.2d 265, 272 (1932)). The court noted that "legislative grants of property, rights, or privileges must be construed strictly in favor of the State on grounds of public policy, and whatever is not unequivocally granted in clear and explicit terms is withheld." *Id.*

71. *Id.* at 189-90. The empirical evidence surveyed Mexican law, the Land Sales Act of 1895, the Texas Constitution, and case law. See *infra* note 72.

72. *Schwarz II*, 703 S.W.2d at 189-90 (citing *Cowan v. Hardeman*, 26 Tex. 217 (1862); S. SCOTT, LAS SIETE PARTIDAS partida II, title XV (1931); Mining Act of 1883, 1883 Tex. Gen. Laws 97, § 3, 9 H. GAMMEL, LAWS OF TEXAS 406 (1898) (repealed 1967)).

specific cases and legislation relied upon in the two opinions,⁷³ one conclusion may be drawn: the intent of the legislature in providing for a general mineral reservation is unclear.⁷⁴

The surface destruction test evolved because parties who were unclear in their documents utilized the broad clause of "oil, gas, and other minerals." In most cases parties did not express their intent on a particular substance because, due to lack of knowledge or concern, they had no intent.⁷⁵ The surface destruction test, in essence, looked to supply this missing intent.⁷⁶ Since that test proved unsuccessful, the court abandoned it in favor of the

73. In *Schwarz II* the court relied upon *Cowan v. Hardeman*, 26 Tex. 217 (1862), for the proposition that the state intended a broad definition of minerals and stated that "[i]t is difficult to rationalize how a dry salt lake on the surface of a grant is part of the reserved mineral estate and a deposit of lignite 50 feet below the surface is not." *Schwarz II*, 703 S.W.2d at 190. The reliance on *Cowan*, however, is misplaced for two reasons. First, the court decided *Cowan* prior to the constitution of 1866 when the state adopted and declared a policy different from that of Mexican law. Under Mexican law, which had been adopted by statute in Texas, no minerals passed by an ordinary grant without express words of designation. See *Cox v. Robinson*, 105 Tex. 426, 439, 150 S.W. 1149, 1156 (1912); G. SMEDLEY, OIL AND GAS LAWS OF TEXAS 8-12 (1921). In the constitutions of 1866, 1869, and 1876, however, the state released all "mines and mineral substances" to the owner of the soil. See TEX. CONST. art. VII, § 39 (1866); TEX. CONST. art. X, § 9 (1869); TEX. CONST. art. XIV, § 7 (1876); Comment, *Relinquishment of State Owned Minerals—The Agency Relationship Between the "Owner of the Soil" and the State*, 7 ST. MARY'S L.J. 62, 62-63 (1975) (traces history and purposes of the constitutional mandates. This evolution expressed a policy in favor of private, as opposed to state, ownership of minerals, thus reversing the policy under Mexican law, which governed when the court decided *Cowan*. See G. SMEDLEY, *supra*, at 7-12. The second reason the court's reliance on *Cowan* is misplaced is that the *Cowan* court was construing a proviso in a statute to determine the validity of a patent to a particular tract of land with a salt spring on it. 26 Tex. at 219-20. The proviso read as follows: "Provided, that no lands granted by this government shall be located on salt springs, gold or silver mines, copper or lead, or other minerals, or any island of the republic." *Id.* at 220. In the statute containing the proviso in question the legislature clearly espoused its intent to keep specific substances for the benefit of the public. On the contrary, the Land Sales Act of 1895, as amended in 1907, simply contained a general reservation of "minerals" in lands they granted expressly for "agricultural or grazing purposes." Act of May 16, 1907, ch. 20, § 2, 1907 Tex. Gen. Laws 490, 490-95 (codified at TEX. NAT. RES. CODE ANN. § 51.011 (Vernon 1978)). It is incongruous to hold that the state also reserved the right to destroy the surface for agricultural or grazing purposes. Accord *Schwarz I*, 28 Tex. Sup. Ct. J. at 490 (Justice McGee analyzed the Land Sales Act and concluded that its clear intent was "to encourage the settlement" of the state and "to convey the surface estate for farming or agricultural purposes"). Dean Kuntz suggests using a very broad definition of minerals when presented with a general reservation of minerals. See Kuntz, *supra* note 5, at 112. The Supreme Court of Texas cites this approach with approval in *Moser II*, 676 S.W.2d at 102.

74. The difficulty in ascertaining the legislature's intent when it passes a law respecting public lands was appropriately set forth by the Supreme Court of Texas in *Magnolia Petroleum Co. v. Walker*, 125 Tex. 430, 436, 83 S.W.2d 929, 932, *cert. denied*, 296 U.S. 623 (1935): Many laws have been enacted respecting public lands and the minerals therein. . . . To one who will study the extent and intricacies of our school land laws, and the purposes for which they were enacted, it is quite obvious that they were not always clear in their meaning. . . . [O]ur school land laws have been to a large extent patchwork, each law being cumulative of the other, and no new law repealing a prior law, unless clearly repugnant to the prior law.

75. See Kuntz, *supra* note 5, at 112. Dean Kuntz stated that "[t]he contradiction and conflict between the cases on the point arise from the very fact that the courts are seeking to give effect to an *intention* to include or exclude a *specific substance*, when, as a matter of fact, the parties had nothing specific in mind on the matter at all." *Id.* (emphasis in original); accord *Moser II*, 676 S.W.2d at 102 (cites Kuntz with approval).

76. See *Acker v. Guinn*, 464 S.W.2d 348, 352 (Tex. 1971) (unless contrary intent ex-

“ordinary and natural meaning” test.⁷⁷ As Justice C.L. Ray pointed out in his concurrence in *Schwarz II*, had the court ruled retrospectively in *Moser II* to enable it to apply an “ordinary and natural meaning” test to the conveyance in *Schwarz*, it could have achieved the same equitable result.⁷⁸ *Schwarz II* instead stands as another exception, with questionable basis, to the *Moser II* rules.

C. Atlantic Richfield Co. v. Lindholm—*Manifestations of the Moser II Deficiencies*

The Corpus Christi court of appeals' opinion in *Atlantic Richfield Co. v. Lindholm*⁷⁹ is the most recent decision to apply the *Moser II* rules. The same issue as in *Moser* appeared: whether uranium belonged to the surface estate owner or the mineral estate owner.⁸⁰ Unlike other post-*Moser* decisions, *Atlantic Richfield* did not create a new contortion in this area of the law because the court precisely followed the dictates of *Moser II* and *Friedman*.⁸¹ *Atlantic Richfield* instead demonstrates two inequities that will persist since the supreme court allowed the surface destruction test to survive.

The court's holding in *Friedman* made the first inequity possible.⁸² As in *Friedman*, the *Atlantic Richfield* court applied the surface destruction test to deeds executed decades before formulation of the test.⁸³ The second inequity stemmed from the retrospective rulings in *Moser II* and *Friedman*. These retrospective rulings allowed the *Atlantic Richfield* court to ignore the mineral owner's argument that the Texas Uranium Surface Mining and Reclamation Act⁸⁴ overcomes the surface destruction rule.⁸⁵

The reclamation statutes became law after the supreme court formulated the surface destruction test in *Acker*.⁸⁶ In *Reed I*, however, a decision handed down after the reclamation statutes became law, the Texas Supreme

pressed, court will construe intent to exclude from term “minerals” substances that surface destruction methods must remove).

77. *Schwarz II*, 703 S.W.2d at 192-93.

78. *Id.* at 192-93 (Ray, J., concurring).

79. 714 S.W.2d 390 (Tex. App.—Corpus Christi 1986, writ ref'd n.r.e.).

80. *Id.* at 391.

81. *Id.* at 392. The court cited *Moser II* and *Friedman* for the rule that *Reed II* governs severances of uranium prior to June 8, 1983. *Id.* The court awarded the uranium to the surface owner, since expert testimony revealed that any reasonable method of extraction would destroy the surface. *Id.* Another recent decision on this issue viewed *Moser II* as establishing that near-surface lignite belongs to the surface owner as a matter of law; the surface destruction test was therefore not applied. See *Hobbs v. Hutson*, 733 S.W.2d 269, 271 (Tex. App.—Texarkana 1987, writ granted).

82. See *supra* notes 44-60 and accompanying text.

83. 714 S.W.2d at 391. The court applied the surface destruction test to 1934 and 1949 deeds. *Id.*

84. TEX. NAT. RES. CODE ANN. § 131.002(2) (Vernon Supp. 1987).

85. 714 S.W.2d at 393. The mineral owners argued that the land could not be considered destroyed since it must be restored. *Id.*

86. See Note, *Texas Surface Mining and Reclamation Act—New Hope for Protection of Texas Resources*, 7 ST. MARY'S L.J. 850, 850 (1976). Reclamation statutes require that land be restored to “the same or a substantially beneficial condition.” TEX. NAT. RES. CODE ANN. § 131.102(b)(2) (Vernon Supp. 1987). Compare *Acker v. Guinn*, 464 S.W.2d 348, 352 (Tex. 1971) (adopted surface destruction test in 1971) with Texas Uranium Surface Mining and Rec-

Court held that surface restoration or reclamation possibilities became irrelevant under the surface destruction test.⁸⁷ This holding denied the very premise upon which the formulators based the surface destruction test: if the surface will be destroyed, the substance belongs to the surface estate owner; if the surface will not be destroyed due to reclamation efforts, the substance should belong to the mineral estate owner.⁸⁸ The appellate court in *Atlantic Richfield*, however, relied on *Reed I* and declared reclamation efforts irrelevant.⁸⁹ *Reed I* still possesses precedential value to pre-June 8, 1983, decisions due to the retroactive rulings. The supreme court's view on reclamation statutes in *Reed*, however, contradicts its latest expression on the significance of these statutes in *Schwarz II*. In *Schwarz II* the court stressed the importance of these reclamation statutes in holding that the state intended to reserve all minerals whether or not the surface is destroyed.⁹⁰

In *Schwarz II* and *Moser II* the supreme court recognized that when the reclamation statutes and the payment of damages protect the surface owner, ownership of the substances should not change.⁹¹ In *Atlantic Richfield*, however, inequities resulted due to the prospective ruling in *Moser II* and the retrospective extension of the surface destruction test in *Friedman*. The court gave the surface owner the uranium despite the fact that the deeds predated the emergence of the surface destruction test and that reclamation statutes required the mineral owner to restore the land, thereby possibly negating all surface destruction.⁹²

III. THE ROYALTY RULES—A PRE-MOSER CONTORTION

Atlantic Richfield demonstrates that the inequities of the surface destruction test will flourish due to the retrospective extension of the test in *Friedman* and the prospective ruling in *Moser II*. In *Schwarz* the court created one exception to the *Moser II* rulings.⁹³ *Martin v. Schneider*,⁹⁴ a pre-*Moser* case, created another exception to the application of the surface destruction

lamation Act, TEX. NAT. RES. CODE ANN. §§ 131.001-.305 (Vernon Supp. 1987) (first passed in 1975 as Texas Surface Mining and Reclamation Act).

87. 554 S.W.2d at 172 ("If the method of production required the removal of surface soil, it is immaterial that devices of restoration or reclamation were available."); accord *Williford v. Spies*, 530 S.W.2d 127, 131 (Tex. Civ. App.—Waco 1975, no writ) (fact that mining company took steps to restore land immaterial).

88. See *supra* notes 20-32 and accompanying text.

89. 714 S.W.2d at 393.

90. 703 S.W.2d at 191. The court cited TEX. NAT. RES. CODE ANN. §§ 53.065-.066 (Vernon 1978), which provide that money paid to the mineral estate owner for certain minerals reserved to the state will be divided with the surface owner to compensate for damages to the soil. *Id.* The court also noted that chapter 131 of the Natural Resources Code requires reclamation. *Id.*

91. *Schwarz II*, 703 S.W.2d at 191 (existence of reclamation statutes one reason court held state reserved all minerals); *Moser II*, 676 S.W.2d at 102-03 (damages required to balance rights of surface and mineral estate owners, but duties under reclamation statutes still apply).

92. *Atlantic Richfield*, 714 S.W.2d at 393.

93. See *supra* notes 61-78 and accompanying text.

94. 622 S.W.2d 620 (Tex. App.—Corpus Christi 1981, writ ref'd n.r.e.).

test.⁹⁵

In *Martin* the Corpus Christi court of appeals faced a controversy between the owner of the surface and mineral estates in a tract and his grantor, who had reserved a nonparticipating royalty interest in oil, gas, and other minerals. The owner executed a mining lease, and subsequently uranium was discovered. The owner claimed all rights in the uranium, since under the surface destruction test the uranium would be considered part of the surface estate. The court ruled that the surface destruction test did not apply to a royalty interest standing alone.⁹⁶ The court justified this exception by stating that a nonparticipating royalty owner possesses no right to produce the minerals, but must await production by the owner of the tract.⁹⁷ Since the land will only be destroyed when the owner institutes production, the court determined that the owner does not need protection.⁹⁸ The court, therefore, ruled that the "other minerals" clause in his conveyance entitled the grantor of the nonparticipating royalty interest to royalties.⁹⁹

A subsequent civil appeals case, which presented basically the same question, came to a different result. In *Storm Associates, Inc. v. Texaco, Inc.*¹⁰⁰ the owners of both the surface and mineral estates conveyed royalty interests to three different parties. Storm Associates, Inc. succeeded in interest to one of the three royalty deeds. Years later, the owners sold the surface estate to Martin with a reservation of all the oil, gas, and other minerals. Martin subsequently leased the estate to Texaco. One of the original grantors, joined by the royalty owners, sought a declaratory judgment that the deed to Martin conveyed no interest in the uranium. The court concluded that under the surface destruction test the surface owner owned the uranium.¹⁰¹ The court ruled that the royalty owners possessed no rights in the uranium despite the fact that they received their interests when their grantors owned both the mineral and surface estates.¹⁰² The *Storm* court attempted to distinguish the *Martin* opinion but the two remain irreconcilable.¹⁰³ In both

95. *Id.* at 622.

96. *Id.* at 622. The court stated that the surface destruction test is "limited to mineral ownership and not applicable to a mere royalty interest." *Id.* But see *Hobbs v. Hutson*, 733 S.W.2d 269, 271 (Tex. App.—Texarkana 1987, writ granted) (applied the presumed general intent rule of the surface destruction test even though a nonparticipating royalty owner was involved).

97. *Id.*

98. *Id.*

99. *Id.* An earlier appellate court decision had applied the surface destruction test to a reservation of a royalty interest. See *Dubois v. Jacobs*, 551 S.W.2d 147, 148-49 (Tex. Civ. App.—Austin 1977, no writ). The *Martin* court distinguished *Jacobs* because the Austin court of appeals decided the case before either of the *Reed* decisions. *Martin*, 622 S.W.2d at 622. For a detailed examination of the implications of *Martin*, see Note, *Determination of Ownership*, *supra* note 10, at 719-24 (views *Martin* as establishing three different classes of royalty owners).

100. 645 S.W.2d 579 (Tex. App.—San Antonio 1982), *aff'd*, 691 S.W.2d 586 (Tex. 1985).

101. 645 S.W.2d at 584-85.

102. *Id.* at 587.

103. See *id.* The court distinguished *Martin* by saying:

[T]he court in *Martin* found that the appellant owned the *mineral estate*; and we must assume that the royalty reserved was an interest in the mineral estate. That is not the case here, where the trial court has found, and we have agreed,

cases the grantor owned both the mineral and surface estates when the royalty owners took their interests.¹⁰⁴ In *Storm*, however, a subsequent severance of the mineral and surface estates occurred, and the court, in distinguishing *Martin*, ruled that the surface destruction test applied to that conveyance as well as to the royalty deeds.¹⁰⁵ This severance, however, should not affect the interests previously conveyed. Unfortunately, the supreme court did not have the opportunity to clarify the conflict in the two cases since the royalty owners in *Storm* did not appeal.

Under *Moser II* and *Friedman* two rulings on the rights of royalty owners will persist. For pre-June 8, 1983, severances, the royalty interests conveyed in an oil, gas, and other minerals clause could depend upon whether or not the estate had previously been severed, the substance's location, and methods of extraction. According to *Storm*, a subsequent severance may be determinative. Under an ordinary and natural meaning test, however, a royalty owner would simply need to check his title to insure that his grantor owned the mineral estate at severance. Even if there had been a prior severance, there would be no possibility that substances satisfying the ordinary and natural meaning test belonged to the surface estate. This impossibility would render other factual determinations regarding location of the substance unnecessary. Similarly, a subsequent severance would not affect previously conveyed royalty interests. Unfortunately, title inquiry for royalty owners who acquired their interests before June 8, 1983, is not this simple due to the survival of the surface destruction test.

IV. THE "ORDINARY AND NATURAL MEANING" TEST

A. *The Problem*

As the three post-*Moser* decisions illustrate, one deficiency of *Moser II* is that it allowed the admittedly villainous surface destruction test to continue.¹⁰⁶ Another deficiency in *Moser II* involved the failure of the court to delineate the contours of the ordinary and natural meaning test that it adopted. As the majority and dissenting opinions in *Friedman* demonstrate, the state of the law in Texas prior to *Acker v. Guinn* stands disputed.¹⁰⁷ Many writers have stated that the ordinary and natural meaning test, as formulated in *Heinatz*,¹⁰⁸ represented the law.¹⁰⁹ While the *Heinatz* court

that *Martin* owns the uranium by virtue of ownership of the surface estate, not of the mineral estate.

Id. (emphasis in original).

104. Compare *id.* at 581 with *Martin v. Schneider*, 622 S.W.2d 620, 621 (Tex. App.—Corpus Christi 1981, writ ref'd n.r.e.).

105. *Storm*, 645 S.W.2d at 587.

106. See *supra* notes 33-49 and accompanying text.

107. Compare *Friedman v. Texaco*, 691 S.W.2d 587, 588-89 (Spears, J., for majority) (*Acker* did not change law as surface destruction was not new concept) with *Friedman v. Texaco*, 691 S.W.2d 587, 589 (Tex. 1985) (Ray, J., dissenting) (in 1959 "ordinary and natural meaning test used to determine what constituted 'minerals'").

108. See *supra* notes 18-21.

109. See, e.g., *Schwarz II*, 703 S.W.2d at 192 (Ray, J., concurring) ("For decades the term mineral was governed by the ordinary and natural meaning of the word."); Comment, *Deter-*

did state that courts were to accord the term "other minerals" its ordinary and natural meaning,¹¹⁰ the court did not clarify this statement. The court simply added that courts should consider certain factors, including surface destruction.¹¹¹ None of the cases after *Heinatz* clearly followed an ordinary and natural meaning test.¹¹² Texas law prior to *Acker* involved a substance-by-substance approach¹¹³ and the test from *Psencik*.¹¹⁴ As noted earlier,¹¹⁵ the *Psencik* test focused on the vernacular of the word minerals as determined by land owners and those in the commercial world.¹¹⁶

After *Moser II* it is apparent that the courts will continue to use a substance-by-substance approach.¹¹⁷ What is not clear, however, is whether the court intended to adopt the *Psencik* approach as the ordinary and natural meaning test. While precedent might permit this,¹¹⁸ it does not require such an adoption since the court never clearly defined or followed the ordinary and natural meaning test. Furthermore, the *Psencik* test would do little to achieve land title stability. In applying the surface destruction test such an approach would require numerous factual findings. Testimony on custom and usage would simply replace testimony regarding the location of the substance and reasonable extraction methods. Dean Kuntz admonished against the use of testimony on custom and usage.¹¹⁹ In order to obtain the Texas

mining Mineral Ownership, *supra* note 10, at 187 n.8 (prior to *Acker*, Texas courts followed an ordinary and natural meaning test); Note, *supra* note 5, at 625 n.29 (prior to *Acker*, Texas used ordinary and natural meaning test, but considered surface destruction a factor). *But see* Dobray, *Oil Shale, Tar Sands and the Definition of a Mineral: An Old Problem in a New Context*, 22 TULSA L.J. 1, 16 (1986) (cites *Heinatz* as case applying surface destruction test).

110. *Heinatz v. Allen*, 147 Tex. 512, 517-19, 217 S.W.2d 994, 997-98 (1949).

111. *Id.*

112. *See* *Atwood v. Rodman*, 355 S.W.2d 206, 215 (Tex. Civ. App.—El Paso 1962, writ ref'd n.r.e.) (rejected special value criterion of *Heinatz*); *Fleming v. Texaco*, 337 S.W.2d 846, 852 (Tex. Civ. App.—Amarillo 1960, writ ref'd n.r.e.) (used test from *Psencik* and focused on usage of word "minerals"); *Cain v. Neumann*, 316 S.W.2d 915, 921-22 (Tex. Civ. App.—San Antonio 1958, no writ) (neither *Heinatz* nor ordinary and natural meaning test cited).

113. *See Moser II*, 676 S.W.2d at 101 (lists cases that determined certain substances belong to surface as matter of law); *Rio Bravo Oil Co. v. McEntire*, 128 Tex. 124, 133, 95 S.W.2d 381, 386 (1936) (oil and gas included in "other minerals" clause as matter of law).

114. *See* *Atwood v. Rodman*, 355 S.W.2d 206, 213 (Tex. Civ. App.—El Paso 1962, writ ref'd n.r.e.); *Fleming v. Texaco*, 337 S.W.2d 846, 852 (Tex. Civ. App.—Amarillo 1960, writ ref'd n.r.e.).

115. *See supra* notes 17-21 and accompanying text.

116. *Psencik v. Wessels*, 205 S.W.2d 658, 661 (Tex. Civ. App.—Austin 1947, writ ref'd). The court relied on an English case in formulating this test. *Id.*

117. *See Moser II*, 676 S.W.2d at 101 (lists substances that shall belong to surface as matter of law).

118. *See* *Heinatz v. Allen*, 147 Tex. 512, 518, 522, 217 S.W.2d 994, 997, 1000 (1949). In *Heinatz* the court cited *Psencik* as authority for stating that "sand, gravel and limestone are not minerals within the ordinary and natural meaning of the word . . ." *Id.* at 518, 217 S.W.2d at 997. The court also pointed out that it had refused writ in *Heinatz* and thereby evidenced "its conviction that the principles of law declared [therein] were correctly determined." *Id.* at 522, 217 S.W.2d at 1000. Subsequent cases used the *Psencik* test. *See* *Atwood v. Rodman*, 355 S.W.2d 206, 213 (Tex. Civ. App.—El Paso 1962, writ ref'd n.r.e.); *Fleming v. Texaco*, 337 S.W.2d 846, 852 (Tex. Civ. App.—Amarillo 1960, writ ref'd n.r.e.).

119. *Kuntz*, *supra* note 5, at 114. Dean Kuntz stated, "A rule which requires consideration of the contemporaneous factual or legal setting would create the impossible situation of requiring the title examiner . . . to retain a catalogued knowledge of the law as to dates of development. In either event, he could never be confident of his conclusion." *Id.*

Supreme Court's goal of title certainty, the test followed in Texas must avoid factual determinations apart from the instrument itself. If the ordinary and natural meaning test is to be effective in the future, the court must define its contours.

B. A Solution

In *Moser II* the Texas Supreme Court adopted Dean Kuntz's philosophy of separating the questions of what is a mineral and whether an owner may extract that mineral.¹²⁰ The *Moser II* court should have gone further and adopted Dean Kuntz's definition or test for the language "other minerals" in Texas clauses. The definition or test involves defining minerals broadly.¹²¹ Texas, however, already has determined that certain substances, though valuable and separate from the soil, belong to the surface.¹²² One author suggested that these decisions could make adoption of the Kuntz approach difficult, but offered the following solution: do not overrule decisions that have determined certain substances are surface or mineral as a matter of law, but view them as exceptions to the broad category of minerals espoused by Dean Kuntz.¹²³ The ordinary and natural meaning test in Texas would consist of a general rule that a mineral estate owner possesses all valuable substances. Sand, gravel, limestone, caliche, surface shale, and water would be exceptions to this rule.¹²⁴ To determine whether minerals can be extracted, courts should turn to the accommodation of estates doctrine as modified in *Moser II*.¹²⁵ This test would be consistent with the admonition in *Heinatz* that courts should not use the term "minerals" in the technical sense.¹²⁶ The test is also consistent with the substance-by-substance approach, which, as demonstrated in *Moser II*, Texas courts will continue to use.¹²⁷ The test,

120. 676 S.W.2d at 102.

121. Kuntz, *supra* note 5, at 113. Dean Kuntz defines minerals as "all substances presently valuable in themselves, apart from the soil, whether their presence is known or not . . . and that nothing presently or prospectively valuable as extracted substances would be intended to be excluded from the mineral estate." *Id.*

122. See *Sun Oil Co. v. Whitaker*, 483 S.W.2d 808, 811 (Tex. 1972) (fresh water); *Heinatz v. Allen*, 147 Tex. 512, 518, 217 S.W.2d 994, 997 (1949) (limestone); *Atwood v. Rodman*, 355 S.W.2d 206, 211 (Tex. Civ. App.—El Paso 1962, writ ref'd n.r.e.) (caliche and surface shale); *Praetorian Diamond Oil Ass'n v. Garvey*, 15 S.W.2d 698, 700 (Tex. Civ. App.—Beaumont 1929, writ ref'd) (sand and gravel).

123. See Broyles, *The Right to Mine Texas Uranium and Coal By Surface Methods: Acker v. Guinn Revisited*, 13 HOUS. L. REV. 451, 475-76 (1976).

124. The *Moser II* court listed these substances as those that the Texas courts previously had determined belonged to the surface estate as a matter of law. 676 S.W.2d at 101. The *Moser II* court also cited *Reed II* for the proposition that near-surface lignite, iron, and coal belong to the surface. *Id.* at 101. As previously noted, inclusion is improper since *Reed II* employed the surface destruction test. See *supra* notes 44-49 and accompanying text. Under the Kuntz test, lignite, iron, and coal would belong to the mineral estate owner.

125. See *infra* notes 156-175 and accompanying text.

126. *Heinatz v. Allen*, 147 Tex. 512, 517, 217 S.W.2d 994, 997 (1949). The court disapproved of the scientific definition because that broad definition included "even the soil itself." *Id.* For a further discussion of *Heinatz*, see *supra* notes 18-21 and accompanying text. The Kuntz rule modified by the exceptions would narrow the definition so as to be consistent with this statement.

127. See *supra* notes 34-40 and accompanying text.

however, would avoid the factual determinations inevitable in a test focusing on custom and usage as stipulated in *Psencik*. Furthermore, in *Acker*, the case that first clearly established the surface destruction test, the court relied upon Dean Kuntz's theory.¹²⁸ Adopting the above test would finally follow this reliance to its logical conclusion.¹²⁹

The ordinary and natural meaning test as formulated above provides the only solution that will satisfy both Texas precedent and the omnipresent goal of achieving title certainty. A title examiner would know that a lease or deed with an "other minerals" clause conveyed all valuable substances except limestone, gravel, water, caliche, surface shale, and sand. Uranium, coal, iron, and lignite would all pass to the grantee. Similarly, any newly discovered substance of value would pass to the grantee.¹³⁰ The test would also withstand technological advances in that ownership of a substance would not change even if new methods of recovery are developed that alleviate surface destructive effects. Since the rule is clear and stable, parties would immediately be aware of the need to express a different intent if they did not wish the rule to apply to a particular severance. In other words, title examiners and other interested parties would no longer need to await innumerable factual determinations about location of a substance and surface destruction before knowing who owned what substance. Unfortunately, due to the prospective rulings in *Moser II* and *Friedman*, Texas land titles have not reached this pinnacle.

128. *Acker v. Guinn*, 464 S.W.2d 348, 352 (Tex. 1971). The court quoted at length from Dean Kuntz's article. *Id.*

129. Several writers have pointed out that the court relied upon Dean Kuntz's theory in *Acker*, but in fact adopted an opposite rule. See, e.g., Broyles, *supra* note 123, at 475 (court did what Kuntz warned about and conferred valuable mineral upon surface owner); Comment, *Lignite: Surface Or Mineral?*, *supra* note 10, at 288 (*Acker* uses Kuntz's philosophy, but comes to opposite result in fact); Comment, *Surface or Mineral: A Single Test?*, 23 BAYLOR L. REV 407, 414 (1971) (*Acker* test does not apply Kuntz test).

130. A problem previously addressed concerns whether substances such as tar sands and oil shale fit into the list of substances that belong to the surface as a matter of law. See Dobray, *supra* note 109, at 1. Texas's rejection of *ejusdem generis* may indicate that it would be improper to engage in a comparison of the similarities between the disputed substance and substances in the list of exceptions. Since oil shale and tar sands are substances valuable in themselves apart from the soil, they would fall within the general Kuntz rule and, therefore, belong to the mineral estate owner. Interested parties would need to tailor their instrument to avoid application of the general rule if that rule does not accord with their intent. This general rule application would be more appropriate for the stability of land titles than broadening the list of excepted substances on a case-by-case basis. This analysis also demonstrates why near-surface coal and lignite should also be considered minerals. Those substances became valuable only recently, which explains why earlier conveyances failed to mention them. In the author's opinion, one should not view *Reed II* as holding that near-surface coal and lignite belong to the surface owner as a matter of law, because the court in that case applied the surface destruction test, which *Moser II* subsequently overruled. See *supra* note 36 and accompanying text. The addition of *Reed II* to the list of cases establishing that certain substances belong to the surface as a matter of law should be dismissed as obiter dictum. See *supra* note 46 and accompanying text.

V. AN ARGUMENT FOR RETROSPECTIVE APPLICATION OF THE ORDINARY AND NATURAL MEANING TEST

In *Moser II* the Texas Supreme Court chose to rule prospectively "[b]ecause of the extent of public reliance"¹³¹ on *Reed II* and *Acker*. The court also rendered a prospective ruling "because of an inability to foresee a coming change in the law."¹³² A review of the principles that govern a court's deciding whether to accord an overruling decision retrospective or prospective effect reveals that the prospective ruling in *Moser II* was unnecessary.

In 1932 the United States Supreme Court held that a state court has the discretion to determine whether a decision will be given retrospective or prospective application.¹³³ The Texas Supreme Court has noted that a supreme court's decision is generally retrospective.¹³⁴ Exceptions to this rule arise depending upon "the extent of public reliance" and "the ability to foresee a coming change in the law."¹³⁵ The Texas Supreme Court concluded that the *Moser II* rulings fell within the exceptions.¹³⁶ Extensive reliance, however, on the surface destruction test appears inherently impossible for two reasons. First, the supreme court revised the test two times after its formulation in 1971.¹³⁷ Second, a court must make numerous factual determinations before it can determine ownership. A title examiner, without these determinations, does not know what minerals the parties conveyed in an "other minerals" clause. The primary message of the surface destruction test, therefore, was to warn the public to draft instruments clearly to avoid its application by

131. 676 S.W.2d at 103.

132. *Id.*

133. See *Great N.Y. v. Sunburst Oil & Ref. Co.*, 287 U.S. 358, 365 (1932). The Court held that the Supreme Court of Montana possessed the right to limit prospectively its decision to overrule a case dealing with shippers' rights upon reduction of interstate freight rates. *Id.* at 360-66.

134. *Sanchez v. Schindler*, 651 S.W.2d 249, 254 (Tex. 1983). This common law tradition viewed the law as a "brooding omnipresence" and implied that judges did not make the law, but found it. An overruling decision, therefore, signified not that the overruled decision "was *bad law*, but that it was *not law*; that is, that it [was] not the established custom of the realm, as [had] been erroneously determined." 1 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 69-70 (1765). See Currier, *Times and Change in Judge-Made Law: Prospective Overruling*, 51 VA. L. REV. 201 (1965) (traces evolution of theories on prospective and retrospective overruling). Today, the general rule remains unchanged, although the common law basis has subsided. See *Johnson v. McKaskle*, 591 F. Supp. 511, 517 (S.D. Tex.), *vacated on unrelated error*, 727 F.2d 998 (5th Cir. 1984); *Sanchez v. Schindler*, 651 S.W.2d 249, 254 (Tex. 1983); Orelan & Stebing, *Retroactivity in Review: The Federal and Washington Approaches*, 16 GONZ. L. REV. 855, 869 (1981); Note, *Prospective Overruling and Retroactive Application in the Federal Courts*, 71 YALE L.J. 907, 909-16 (1962).

135. *Sanchez v. Schindler*, 651 S.W.2d 249, 254 (Tex. 1983); see also *In re S/S Helena*, 529 F.2d 744, 754 (5th Cir. 1976) (retroactive effect to be granted unless overriding equitable considerations); *Johnson v. McKaskle*, 591 F. Supp. 511, 515 (S.D. Tex.), *vacated on unrelated error*, 727 F.2d 998 (5th Cir. 1984) (injunctive decree issued pursuant to class action presumed retroactive); *City of Farmers Branch v. Matushita Elec. Corp.*, 537 S.W.2d 452, 454 (Tex.) (retroactive tax liability not inequitable), *cert. denied*, 429 U.S. 861 (1976).

136. *Moser II*, 676 S.W.2d at 103.

137. Compare *Acker v. Guinn*, 464 S.W.2d 348, 352 (Tex. 1971) (first established surface destruction test) with *Reed II*, 597 S.W.2d at 747 (modified *Acker* test and *Reed I*).

expressing a specific intent.¹³⁸ A retrospective ruling would not affect individuals who heeded this warning.

The court's general rule and exceptions, espoused in *Sanchez*, are not the only guidelines the court must consider in reaching a decision to rule retroactively or prospectively. The United States Supreme Court listed the following guidelines in *Chevron Oil Co. v. Huson*:¹³⁹ (1) if the decision is to be applied nonretroactively, it "must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed . . .";¹⁴⁰ (2) the "merits and demerits" of each case must be weighed "by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation";¹⁴¹ and (3) a decision should not be applied retroactively if it would produce "substantial inequitable results."¹⁴² The *Chevron* guidelines have provided the basis of numerous decisions, both civil and criminal, state and federal.¹⁴³ When one applies these criteria to the *Moser II* rulings, a retrospective ruling appears appropriate. First, the decision in *Moser II* did not overrule "clear past precedent." This conclusion is drawn from the unsettled state of the surface destruction test and the necessary factual determinations involved. The second and third *Chevron* guidelines involve a balancing test: a court must weigh the purpose and history of the rule against any inequitable results that retrospective operation would cause. In this instance, the purpose of the overruling decision was to instill certainty into Texas land titles.¹⁴⁴ As the court noted in *Moser II*, the history of the surface destruction test revealed that it had devastated land title stability.¹⁴⁵ The post-*Moser* cases have demonstrated that the prospective ruling has done little to remedy the contorted state of the law.¹⁴⁶ On the other hand,

138. See *Reed II*, 597 S.W.2d at 751-52 (Spears, J., concurring). In commenting on the possible reliance by parties on the surface destruction test, Justice Spears stated that "[t]he only likely change in the conduct of surface owners who were aware of those decisions would have been to specifically name iron, coal, and lignite in their grant or reservation and thus remove any doubt about their intent." *Id.*

139. 404 U.S. 97 (1971) (construed application of statute of limitations for personal injury).

140. *Id.* at 106 (citations omitted).

141. *Id.* at 106-07 (quoting *Linkletter v. Walker*, 381 U.S. 618, 629 (1965)).

142. *Id.* at 107.

143. See, e.g., *Edwards v. Sea-Land Serv., Inc.*, 720 F.2d 857, 860 (5th Cir.) (civil case), *vacated*, 462 U.S. 1127 (1983); *Battie v. Estelle*, 655 F.2d 692, 697 (5th Cir. 1981) (criminal case); *Williams v. Phil Rich Fan Mfg. Co.*, 552 F.2d 596, 598-600 (5th Cir. 1977) (federal statute); *Ex parte Hovermale*, 636 S.W.2d 828, 835 (Tex. App.—San Antonio 1982, no writ) (state court). In *Linkletter v. Walker*, 381 U.S. 618, 627 (1965), the United States Supreme Court found no distinction between civil and criminal litigation in reaching a decision regarding retrospective effect.

144. *Moser II*, 676 S.W.2d at 101.

145. *Id.* The court stated that:

Application of this rule has required the determination of several fact issues to establish whether the owner of the surface or the mineral estate owns a substance not specifically referred to in a grant, reservation or exception. As a result, it could not be determined from the [instrument] alone who owned title to an unnamed substance.

Id. (citation omitted).

146. See *supra* notes 53-91 and accompanying text.

retroactive operation of the *Moser II* rules would greatly promote the courts' purpose.

A court should consider other factors in choosing to rule prospectively or retrospectively. A court should not overrule rules of property retrospectively, for example, unless there are other controlling considerations.¹⁴⁷ This rule reflects the protection accorded vested property rights.¹⁴⁸ On the other hand, a change in a rule of construction is more susceptible to a retrospective application.¹⁴⁹ Rules formulated for interpretation of an "other minerals" clause appear more closely akin to rules of construction than rules of property.¹⁵⁰ Once again, due to the nature of the surface destruction test, one cannot be certain that he has obtained a vested property right in a disputed substance until after the litigation of numerous factual questions. Since one cannot determine ownership, title uncertainty results. It becomes erroneous, therefore, to state that the surface destruction test conferred vested property rights that warrant protection via a prospective ruling.¹⁵¹

In an effort to protect those who may have relied on precedent, the court allowed the surface destruction test to survive by overruling it prospectively.¹⁵² Ironically, the court's zealous concern for public reliance was absent in the *Friedman* opinion, in which the court ruled that the surface

147. See, e.g., *Friendswood Dev. Co. v. Smith-Southwest Indus.*, 576 S.W.2d 21, 22 (Tex. 1978) (common law rule governing withdrawal of ground-water rule of property; therefore, change in rules restricted to prospective application); *Southland Royalty Co. v. Humble Oil & Ref. Co.*, 151 Tex. 324, 328, 249 S.W. 2d 914, 916 (1952) (decisions holding that lessors jointly executing general form lease intend to unitize their properties had become rule of property not to be changed absent "other controlling circumstances"); *Davis v. First Nat'l Bank*, 145 S.W.2d 707, 710 (Tex. Civ. App.—Waco 1940) (rule in Shelley's case was rule of property), *aff'd*, 139 Tex. 36, 40, 161 S.W.2d 467, 470 (1942); *Currier*, *supra* note 134, at 242. *Currier* states that "a change in property law fairly cries out for prospective overruling. . . . This is so . . . because of the obviously great societal interest in stability in this area, in land titles, for instance." *Id.* The justification in this instance does not apply since the court is overruling the rule that has caused instability in land titles.

148. See TEX. CONST. art. I, § 16 (retroactive law prohibited when impairs obligation of contracts); *Dotson v. Fluor Corp.*, 492 F. Supp. 313, 315-16 (W.D. Tex. 1980) (amendments to Texas long-arm statute could be given retrospective application since defendant's vested rights not affected); *Gonzalez v. Texas Employers' Ins. Ass'n*, 509 S.W.2d 423, 427 (Tex. Civ. App.—Dallas 1974, writ ref'd n.r.e.) (judgment pending on appeal does not establish vested rights that prevent retrospective ruling).

149. See *Carter Oil Co. v. Weil*, 209 Ark. 653, 192 S.W.2d 215, 219 (1946) (rule that habendum clause contradicting granting clause must be rejected was merely rule of construction, not rule of property, and retroactive ruling was proper); *Crow v. State*, 147 Tex. Crim. 292, 296, 180 S.W.2d 354, 356 (1944) (change in construction of statute not limited to prospective effect). Courts will ascertain the intent of the parties through a rule of construction. Alternatively, a rule of property evidences a settled legal principle, which governs ownership of property. R. PATTON & C. PATTON, *PATTON ON TITLES* § 529 at 404 n.78 (2d ed. 1957).

150. See *Moser II*, 676 S.W.2d at 101. The court reviewed "a number of construction aids" Texas courts have considered in construing an "other minerals" clause, including *eiusdem generis*, the ordinary and natural meaning test, and the surface destruction test. *Id.* at 101-02. In *Reed I* the majority opinion referred to the *Acker* rule as a "rule of construction." 554 S.W.2d at 172. Similarly, in *Schwarz II* the supreme court referred to the surface destruction test as a construction "device." 703 S.W.2d at 189 (surface destruction test not applicable when another rule of construction applies).

151. *Accord* *Murphy v. Amoco Prod. Co.*, 729 F.2d 552 (8th Cir. 1984) (mineral owner's expectations did not constitute property right).

152. *Moser II*, 676 S.W.2d at 103.

destruction test applied to instruments executed before formulation of the test.¹⁵³ This ruling will purge Texas law of some of the adverse effects of the surface destruction test over a long period of time.¹⁵⁴ The importance of achieving land title certainty immediately, however, outweighs any inequities suffered by those who supposedly relied on the test.¹⁵⁵

VI. ACCOMMODATION OF ESTATES DOCTRINE AND DAMAGES UNDER *MOSEER II*

The prospective limitation of *Moser II* to all severances and leases made after June 8, 1983, also applies to the damages rules formulated in that case. These rules are:

The limitation of the dominant mineral owner's liability to negligently inflicted damages does not control in a case . . . of "other minerals." When dealing with the rights of a mineral owner who has taken title by a grant or reservation of an unnamed substance such as this, liability of the mineral owner must include compensation to the surface owner for surface destruction.¹⁵⁶

The *Moser II* court emphasized that in both a specific grant of minerals and a grant in an "other minerals" clause the dictates of the "due regard" or "accommodation" doctrine restrict the mineral owner's use of the surface estate.¹⁵⁷ To understand the impact of this holding, a review of the law on surface use and liability of the mineral estate owner will be helpful.

The mineral estate owner possesses the right to use so much of the land, both surface and subsurface, as is reasonably necessary to comply with the terms of the lease and to carry out the intentions of the parties.¹⁵⁸ The mineral estate owner may not use the surface or subsurface, however, in a negligent manner without liability to the surface owner for any negligently caused damages.¹⁵⁹ A mineral owner, therefore, can be liable for (1) using more land than reasonably necessary, or (2) using a reasonable amount of land,

153. See *supra* 54-55 and accompanying text.

154. As noted earlier in this article, courts may still use the surface destruction test for near-surface lignite, iron, and coal since *Moser II* cited *Reed* for the proposition that these substances belong to the surface as a matter of law. See *supra* note 49 and accompanying text.

155. One author makes the following observation about the effect of replacing other rules with Dean Kuntz's theory:

Its adoption might be disruptive to settled principles of law, but the impact on property owners need not be substantial. Furthermore, constructive disruption is one of the functions of our judicial system, and the short-term price would be more than outweighed by the long-term certainty and stability that would follow.

Lowe, *Developments in Nonregulatory Oil and Gas Law*, 32 INST. ON OIL & GAS L. & TAX'N 117, 142 (1981) (footnote omitted).

156. *Moser II*, 676 S.W.2d at 103 (footnote omitted).

157. *Id.*

158. See, e.g., *Sun Oil Co. v. Whitaker*, 483 S.W.2d 808, 810 (Tex. 1972) (mineral lessee has implied right to use surface as necessary); *Humble Oil & Ref. Co. v. Williams*, 420 S.W.2d 133, 134 (Tex. 1967) (lessee had right to use as much of premises as reasonably necessary); *Warren Petroleum Corp. v. Martin*, 153 Tex. 465, 469, 271 S.W.2d 410, 413 (1954) (dominant estate had legal right to use premises as reasonably necessary).

159. See *Humble Oil & Ref. Co. v. Williams*, 420 S.W.2d 133, 134 (Tex. 1967).

but doing so in a negligent manner.¹⁶⁰

The Texas Supreme Court applies the due regard concept as an aid in deciding what constitutes a reasonable use.¹⁶¹ In *Getty Oil Co. v. Jones*¹⁶² the mineral lessee could not interfere with the surface owner's preexisting irrigation system when a reasonable alternative existed on the property.¹⁶³ If no reasonable alternatives exist on the property, however, as in *Sun Oil Co. v. Whitaker*,¹⁶⁴ a court will deem a lessee's use reasonable even if it renders the surface virtually worthless.¹⁶⁵

The due regard or accommodation of estates doctrine developed from cases in which substance ownership was not in dispute.¹⁶⁶ Unfortunately, the *Acker* court announced a new rule, which changed substance ownership, rather than following the logic embodied in the accommodation of estates doctrine, which compensates the surface owner for the extra burden on his estate.¹⁶⁷ After *Moser II*, however, the theories behind both rules stand unified: courts will no longer use the surface destruction test to determine substance ownership. The mineral owner, however, can only make reasonable use of the surface. The question then becomes: Is a method of extraction that destroys the surface, such as strip mining, a reasonable use? Due to the statutes regulating strip mining¹⁶⁸ and Texas's constitutional mandate en-

160. *Id.*

161. *See, e.g.,* *Humble Oil & Ref. Co. v. West*, 508 S.W.2d 812, 815-16 (Tex. 1974) (reasonable for oil company to use gas field for storage); *Robinson v. Robbins Petroleum Corp.*, 501 S.W.2d 865, 867 (Tex. 1973) (not reasonable for lessee to use water to benefit other tracts); *Getty Oil Co. v. Jones*, 470 S.W.2d 618, 622 (Tex. 1971) (not reasonable for lessee exclusively to use superadjacent air).

162. 470 S.W.2d 618 (Tex. 1971).

163. *Id.* at 622.

164. 483 S.W.2d 808 (Tex. 1972).

165. *Id.* at 812. In *Whitaker* the lessee used fresh water from the tract for its waterflood program. The jury found that this use would "materially affect" the surface owner's ability to produce water for irrigation purposes. *Id.* The court upheld the use and said, "To hold that Sun can be required to purchase water from other sources or owners of other tracts in the area, would be in derogation of the dominant estate." *Id.* The court distinguished *Getty* on the basis that in *Getty* reasonable alternatives "on the leased premises" existed. *Id.*

166. *See, e.g.,* *Robinson v. Robbins Petroleum Corp.*, 501 S.W.2d 865, 867 (Tex. 1973) (surface owner brought suit for wrongful taking of salt water in oil production); *Sun Oil Co. v. Whitaker*, 483 S.W.2d at 810 (controversy regarding use of water in oil production); *Getty Oil Co. v. Jones*, 470 S.W.2d at 622 (surface owner brought suit to enjoin lessee from using vertical air space for oil and gas production).

167. *Compare* *Acker v. Guinn*, 464 S.W.2d 348, 352 (Tex. 1971) (established surface destruction test in 1971 for deciding ownership disputes between surface and mineral owners) with *Getty Oil Co. v. Jones*, 470 S.W.2d at 622 (used due regard concept to determine if lessee's use was reasonable).

168. *See* Texas Uranium Surface Mining and Reclamation Act, TEX. NAT. RES. CODE ANN. §§ 131.001-.305 (Vernon Supp. 1987); Texas Surface Coal Mining and Reclamation Act, TEX. REV. CIV. STAT. ANN. art. 5920-11 (Vernon Supp. 1987). The Uranium Surface Mining Act contains a policy statement, which states that reclamation will permit the mining of valuable minerals "in a manner designed for the protection and subsequent beneficial use of land." TEX. NAT. RES. CODE ANN. § 131.002(7) (Vernon Supp. 1987). The Coal Mining and Reclamation Act provides that one of the purposes of the Act is "to assure that the coal supply essential to the state's energy requirements and to its economic and social well-being is provided, and to strike a balance between protection of the environment and agricultural productivity and the state's need for coal as an essential source of energy." TEX. REV. CIV. STAT. ANN. art. 5920-11, § 2(5)(E) (Vernon Supp. 1987).

couraging the exploration of natural resources,¹⁶⁹ courts should consider strip mining a reasonable use in general.¹⁷⁰ If acceptable alternatives are available in a specific case, however, the courts could correctly hold the mineral owner liable for strip mining as using more land than is reasonably necessary.

The previous limitation to recovering damages for using more land than reasonably necessary or for using a reasonable amount negligently is expanded under *Moser II* to impose absolute liability for any surface damage when the grantor conveyed the mineral at issue in an "other minerals" clause, rather than in a specific grant.¹⁷¹ The justification is that a court would have considered surface damage if the grantor had specifically granted the substance, and the agreed-upon price would reflect the surface damage.¹⁷² If the mineral owner is mining an unspecified mineral, however, the parties most likely did not consider resulting surface damage in striking the bargain.¹⁷³

The goal of the court in *Moser II* was to use damages, rather than the surface destruction test, to protect the surface owner. Once the court decides that damages should be paid, it is not clear what these damages should be. The opinion specifically states that its holding will not affect the statutory duties of mineral owners to restore the surface under the reclamation statutes.¹⁷⁴ The difference in the fair market value of the land before and after mining and reclamation would often not fully compensate the surface owner since the value could be the same before strip mining and after reclamation. The mineral estate owner should compensate the surface owner, therefore, for the time during which he is deprived of the use of the land through recovery of lost rental values or lost profits.¹⁷⁵

169. See TEX. CONST. art XVI, § 59. The article provides that "[t]he conservation and development of all of the natural resources of this State . . . and the preservation and conservation of all such natural resources of the State are each and all hereby declared public rights and duties . . ." *Id.* § 59(a).

170. Other authors have also concluded that courts should consider strip mining a reasonable use under the accommodation of estates doctrine. See Broyles *supra* note 123, at 472; Comment, *Lignite: Surface or Mineral*, *supra* note 10, at 308.

171. *Moser II*, 676 S.W.2d at 103.

172. *Id.*

173. *Id.*

174. *Id.* at 103 n.4.

175. See Lowe, *What Substances are Minerals?*, 30 ROCKY MTN. MIN. L. INST. § 2.05[2][c] (1984). The author thinks that the eminent domain cases provide an analogy and that, therefore, the damages should be the difference between the fair market value of the land before stripping and after reclamation, plus compensation for the deprivation of the use of the land. *Id.* § 2.33. If one adheres to this analogy, then courts would not allow lost profits as a separate item of damages. See *State v. Travis*, 30 Tex. Sup. Ct. J. 144, 144 (Jan. 17, 1987) (evidence of lost profits not admissible in condemnation suits). One author has gone further and suggested that the surface owner should also be compensated for his cooperation in obtaining the necessary mining and reclamation permits. See Laity, *supra* note 44, at 197 n.20. The Texas Legislature may need to follow the lead of other jurisdictions and enact a statute governing the damages issue. See N.D. CENT. CODE § 38-11.1-04 (Interim Supp. 1987); OKLA. STAT. ANN. tit. 52, §§ 318.2-9 (West Supp. 1987).

VII. CONCLUSION

Many states are blessed with the presence of valuable substances beneath their soils. Other jurisdictions should closely heed the Texas experience. The surface destruction test produced a title examiner's nightmare. The Texas Supreme Court attempted to rectify the situation in *Moser II*. That opinion did not go far enough, however. Instead, the deficiencies in *Moser II* have caused the current state of Texas law on "oil, gas, and other minerals" clauses to resemble a confusing dialogue between two comedians. This fact is tragic, rather than comic.

The Texas Supreme Court needs to determine once and for all "who owns what," and "what is what" so that title examiners and other interested parties can stop exclaiming "I don't know." The court can accomplish this goal by adopting the Kuntz test and exceptions as the ordinary and natural meaning test. This approach satisfies Texas precedent and will go further to promote land title stability than a test that requires outside testimony regarding the meaning of words. The court should apply this ordinary and natural meaning test retroactively in order to eradicate totally the adverse effects of the surface destruction test. A retroactive ruling would also permit the supreme court to stress the importance of the reclamation statutes. Further, the special rules for the state and royalty owners would be unnecessary. Most importantly, however, the Texas Supreme Court would achieve its goal of instilling certainty in Texas land titles.