Surface Owner Must Establish That, at the Time the Instrument Was Executed, Removal of a Near-Surface Substance Would Have Destroyed the Land Surface before a Mineral Reservation Is Construed to Exclude That Substance.

Peter H. Carroll III

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discretion. The Hood decision is a sound one. It not only serves the best interests of the medical community and the general public by encouraging innovative treatments and procedures, but it also protects the patient from imprudent practitioners. Texas physicians who persist in following outmoded methods of treatment should therefore take notice that safety in numbers does not apply to malpractice cases.

Rand J. Riklin

MINES AND MINERALS—Mineral Reservation—Surface Owner Must Establish That, at the Time the Instrument Was Executed, Removal of a Near-Surface Substance Would Have Destroyed the Land Surface Before a Mineral Reservation Is Construed to Exclude That Substance

Reed v. Wylie,
554 S.W.2d 169 (Tex. 1977).

On September 30, 1950, W.C. Wylie and his wife Iva conveyed to James F. Baker approximately 224 acres of land in Freestone County, Texas. The deed reserved to the grantors a one-fourth undivided interest in “all oil, gas and other minerals on and under the land,” and the right to reasonable use of the surface for mining operations. Baker’s interest in the property was subsequently acquired by Bette Reed, Trustee, a co-partnership. Reed filed suit against Wylie, seeking a declaratory judgment to determine whether the reservation in the 1950 deed entitled defendant to a one-fourth interest in coal and lignite in the land. Reed moved for summary judgment on the basis of an affidavit, which stated that coal and lignite on the property could be extracted only by techniques which would substantially damage the surface. In granting the motion, the trial court declared the plaintiff to be the owner of all coal and lignite that could be removed from the land by open pit and strip mining methods. Defendant appealed and the court of civil appeals reversed and remanded, holding that proof was inadequate to support a summary judgment. Both parties sought writ of

49. See Rickett v. Hayes, 511 S.W.2d 187, 194-95 (Ark. 1974) (physician not liable for following one of several possible modes of treatment where there is an honest difference of opinion among competent physicians); Haase v. Garfinkel, 418 S.W.2d 108, 114 (Mo. 1967) (physician entitled to wide range in exercise of his judgment in treatment of heart disease).

error in the Texas Supreme Court. Defendant Wylie urged a reexamination of the rule announced in *Acker v. Guinn* and challenged its application by the lower court to the reservation in question. Held—Affirmed. A surface owner must establish that, at the time the instrument was executed, removal of a near-surface substance would have substantially destroyed the land surface before a mineral reservation is construed to exclude that substance.

At common law, fee simple ownership of real property embraced both the surface of the land and the subsurface minerals in place. The fee, however, could be divided horizontally, either by a grant of the minerals by the owner of the land, or by a grant of the land excepting or reserving the minerals. Such a severance resulted in the creation of a mineral estate that was separate and independent from the estate in the surface. Thereafter, the surface estate was servient to the mineral estate for purposes of exploration and production, subject only to a duty on the part of the mineral owner to exercise his right of reasonable use with due regard for the rights of the surface owner.

2. 464 S.W.2d 348, 352 (Tex. 1971).
4. Del Monte Mining & Milling Co. v. Last Chance Mining & Milling Co., 171 U.S. 55, 60 (1898); accord, Winter v. Mackie, 135 N.W.2d 364, 369 (Mich. 1965) (right to sell or lease oil, gas and minerals in soil is incident to fee simple ownership); see Humble Oil & Ref. Co. v. West, 508 S.W.2d 812, 815 (Tex. 1974); Gregg v. Delhi-Taylor Oil Corp., 162 Tex. 26, 37, 344 S.W.2d 411, 419 (1961). See generally 1 H. Williams & C. Meyers, Oil & Gas Law § 202, at 20 (1975).
7. General Crude Oil Co. v. Aiken, 162 Tex. 104, 106, 344 S.W.2d 668, 669 (1961) (pollution of underground water supply by mineral owner’s negligent disposal of salt water constitutes breach of duty to surface owner); Warren Petroleum Corp. v. Martin, 193 Tex. 465, 469, 271 S.W.2d 410, 413 (1954) (oil lessee owes duty to surface owner not to intentionally or wantonly injure his cattle); Carter v. Simmons, 178 S.W.2d 743, 746 (Tex. Civ. App.—Waco 1944, no writ) (maintenance of slush pits, flow tanks and storage tanks is reasonable and necessary use of surface in oil operations); accord, Sun Oil Co. v. Nurney, 170 So. 2d 24, 29 (Miss. 1964) (reasonable use includes clearance of land surface for drilling operations); Pure Oil Co. v. Gear, 80 F.2d 389, 392 (Okl. 1938) (reasonable use extends to erection of salt water storage tanks on surface). See also Comment, Between a Rock and a Hard Place: Surface
Where ownership of a particular substance has not been specifically allowed or prohibited by the terms of a conveyance, a question arises whether that substance is included in the grant or reservation of "minerals." Under the four corners rule, a court must ascertain the intention of the parties from the language used in the deed. Furthermore, extrinsic evidence of circumstances which surrounded its execution is not admissible in the absence of an ambiguity on the face of the instrument.

Nevertheless, various rules of construction have been utilized by the Texas courts to arrive at the intent of the parties concerning ownership of a specific substance as a matter of law.

Several decisions have interpreted a grant or reservation of minerals to include all substances "legally cognizable" as minerals, in the absence of terms in the instrument to the contrary. On the other hand, the doctrine of ejusdem generis has been employed in a number of cases, although...
there have been difficulties inherent in its application to mineral deeds. Generally, however, Texas courts have construed the term “minerals” according to its natural and ordinary meaning, and have applied that standard to determine ownership of a certain substance under a grant or reservation of minerals.

The increased use of surface mining as an economical alternative to underground mining provided a major impetus for the Texas Supreme Court’s decision in Acker v. Guinn. In Acker it was held that a grant or reservation of “minerals” would not be considered to include a substance that must be removed by methods that would substantially impair a surface estate for agricultural and grazing purposes. Subsequently, the Waco Court of Civil Appeals in Williford v. Spies applied the surface destruction test promulgated in Acker, holding that coal would not pass to the mineral estate under a conveyance of “oil, gas and other minerals.” The court reasoned that the parties to the conveyance could not have intended to define “minerals” as a substance which had to be removed by methods that would destroy the surface estate, in the absence of an intention affirmatively expressed in the instrument containing the grant or reservation.

14. In Luse v. Boatman, 217 S.W. 1096 (Tex. Civ. App.—Fort Worth 1919, writ ref’d) the court rejected the ejusdem generis rule because it could not determine whether the form, color, weight, use, density or value of a particular substance should serve as the basis of classification in its application to a coal reservation. Id. at 1099. Subsequently, the Supreme Court of North Dakota refused to apply the doctrine of ejusdem generis to exclude coal from the term “other minerals” because of the numerous similarities between coal and oil and gas. Christman v. Emineth, 212 N.W.2d 543, 549 (N.D. 1973); see Comment, Is Coal Included in a Grant or Reservation of “Oil, Gas, or Other Minerals?” 30 Sw. L.J. 481, 490-91 (1976).


16. 464 S.W.2d 348 (Tex. 1971).

17. Id. at 352. The Acker court specifically stated that it was not basing its opinion on the ejusdem generis rule, which was in keeping with its previous decisions on this point. Id. at 350; cf. Southland Royalty Co. v. Pan Am. Petroleum Corp., 378 S.W.2d 50, 54 (Tex. 1964) (doctrine of ejusdem generis as applied to minerals has not been accepted in Texas). See also Patton, Recent Changes in the Correlative Rights of Surface and Mineral Owners, 18 Rocky Mt. Min. L. Inst. 19, 21-26 (1973).

18. 530 S.W.2d 127 (Tex. Civ. App.—Waco 1975, no writ).

19. Id. at 131.

20. Id. at 129-30. Since no such intention was expressed, the Williford court decided that the coal and lignite belonged to the surface estate. Id. at 131; see Acker v. Guinn, 464 S.W.2d 348, 352 (Tex. 1971). See also Comment, Is Coal Included in a Grant or Reservation of “Oil, Gas, or Other Minerals?”, 30 Sw. L.J. 481, 488 (1976).
In Reed v. Wylie the Texas Supreme Court considered whether a substance passed as a mineral under a grant or reservation, when such substance could either be extracted by strip mining methods which would destroy the surface estate, or by techniques which would not deplete the land surface. In affirming its decision in Acker the majority opinion held that before a mineral reservation will be construed to exclude a near-surface substance, the surface owner must prove that, at the time the instrument was executed, removal of the substance would have destroyed the surface of the land. The court reasoned that destruction of the surface by the mineral owner was not ordinarily within the general intent of the parties to a mineral conveyance, and therefore, a near-surface substance could not have been contemplated in the reservation of "minerals" absent a showing of an intent to the contrary. Once ownership of the substance was ascertained, the majority in Reed stated that such a construction of the instrument controlled title to that substance at any depth. Furthermore, it was immaterial that reclamation techniques were available or contemplated if the method of extraction necessitated the stripping away of the surface soil. The concurring opinion of Chief Justice Greenhill, however, advocated a less difficult burden of proof in light of the Acker decision, maintaining that the surface owner need only show that "any reasonable method of production would have destroyed or depleted the surface estate." 

The dissent in Reed by Justice Daniel criticized the majority for placing an unreasonable burden of proof on the surface owner with regard to near-surface substances. Daniel reasoned that the decisive factor in Acker was the physical proximity of the substance to the surface, and that further, the Acker opinion had made no requirement of proof that removal of the substance on the date of the instrument would have impaired the surface of the land.

The increasing demand for energy coupled with the diminishing supply of oil and gas has renewed national interest in coal as an alternative domes-
tic fuel.30 Lignite coal is rapidly becoming a major energy source in Texas, and presently about eight to ten million tons of it are produced in this state each year.31 Deposits of lignite are generally located in east Texas along the Texas coastal plain, in the Wilcox Group north of the Colorado River, and near Freestone County in central Texas.32 Surveys and geological findings estimate the extent of near-surface deposits at 3.3 billion short tons, most of which is located at a depth of ninety feet or less.33 Today, all of the lignite produced in Texas is strip mined, and the extent of recovery is estimated at eighty to eighty-five percent.34

Lignite coal has not been utilized in the past primarily because of the adverse environmental effects of surface mining.35 In 1975, however, the Texas Surface Mining and Reclamation Act was passed by the Texas Legislature.36 The legislative intent behind this enactment is to promote the extraction of mineral resources by surface mining, and to assure the restoration of affected land through subsequent reclamation.37 Moreover, the specific reclamation standards which must be observed by operators are enumerated in section 11 of the Act.38

30. See Comment, Is Coal Included in a Grant or Reservation of "Oil, Gas, or Other Minerals?", 30 Sw. L.J. 481, 481 (1976).
31. Lampkin, A Texas Comparison of the Coal Lease with the Oil and Gas Lease, 16 S. Tex. L.J. 309, 309 (1975).
32. See Meroney, Title to and Leasing of Coal and Lignite in Texas, PROCEEDINGS OF THE TWENTY-EIGHTH ANNUAL INSTITUTE ON OIL AND GAS LAW AND TAXATION 77, 78-80 (1977).
33. Id. at 78-79. A "short ton" is a unit of measure equal to twenty short hundredweight or 2000 pounds, and is used primarily in the United States. It can be distinguished from the English "long ton" which is equal to 2240 pounds. I. Asimov, REALM OF MEASURE 88-89 (1960).
36. See Tex. Rev. Civ. Stat. Ann. art. 5920-10 (Vernon Supp. 1976-1977). The requirements of the Texas Surface Mining and Reclamation Act apply to all surface mining operations which have commenced since its enactment on June 21, 1975. Id. § 5(2). To obtain a permit to engage in strip mining, an operator must submit a proposed reclamation plan and execute a performance bond to secure the cost of such reclamation. Id. §§ 10, 14. Permits for the surface mining of coal and lignite are issued for a term not to exceed five years. Id. § 8(b).
38. Basically, the Act requires that the land be restored to substantially the same condition it was in prior to the mining operation. It must be graded to its original contour, and the topsoil must be restored. Revegetation must be commenced upon cessation of mining operations, and continued for a period of four years. Tex. Rev. Civ. Stat. Ann. art. 5920-10,
North Dakota enacted a similar state reclamation statute in 1969. Subsequently, the Supreme Court of North Dakota, in Christman v. Emineth, was presented with the identical question decided in Reed. In Christman the defendant held title to fifty percent of all "oil, gas and other minerals" in and under certain real property, together with the right of reasonable surface use to explore and produce such minerals. The plaintiff contended that lignite coal was not included in the reservation of minerals, and that it constituted part of the surface estate. In construing the reservation, the court ruled that the term "other minerals" included lignite coal, and the defendant was entitled to use so much of the surface as was reasonably necessary to remove the substance. The court noted that lignite coal had been known to exist in the area, and that strip mining was the best method of producing it at the time the instrument was executed.

Although it was forcefully argued that strip mining of the substance would destroy the surface for agricultural purposes, the Christman court held that compliance with the state reclamation statute would result in restoration of the surface temporarily damaged by surface mining. The majority in Reed, however, maintained that it was immaterial that methods of restoration and reclamation were available to restore the surface after strip mining. Thus, the Reed opinion appears inconsistent with current legislative policy which promotes surface mining of natural resources and seeks

§ 11 (Vernon Supp. 1976-1977). Texas may have to revise its state reclamation statute in accordance with the requirements of the Surface Mining Control and Reclamation Act of 1977, if it wishes to continue to exercise exclusive jurisdiction over the regulation of surface coal mining and reclamation operations on non-Federal lands within the state. See Surface Mining Control and Reclamation Act of 1977, Pub. L. No. 95-87, § 503, 91 Stat. 445, 470 (1977).

40. 212 N.W.2d 543 (N.D. 1973).
41. Id. at 547.
42. Id. at 548-49; see Abbey v. State, 202 N.W.2d 844, 856 (N.D. 1972); Adams County v. Smith, 23 N.W.2d 873, 875 (N.D. 1946). But see Reed v. Wylie, 554 S.W.2d 169, 175 (Tex. 1977) (dissenting opinion) (majority of jurisdictions hold coal not included in reservation of "other minerals").
to provide adequate protection for the surface owner. 47

Whereas Christman treated ownership of minerals and the right of extraction by surface mining as independent issues, the court in Reed declared that a substance is owned by the surface owner if it can only be removed by substantial destruction to the surface. 48 It is well settled that a mineral owner has the right to use as much of the surface as is reasonably necessary to produce minerals and effectuate the purpose of the grant. 49 As long as his operation is conducted with due regard for the rights of the surface estate, the mineral owner will not be liable for resulting damage to the surface in the absence of negligence, 50 or a contract to pay for such surface damage. 51 In Getty Oil Co. v. Jones 52 the Texas Supreme Court attempted to balance the policy favoring development of the surface for agricultural purposes against the policy of encouraging mineral exploration. 53 With reference to its prior holding in Acker, the majority in Getty observed that destruction of the surface for agricultural purposes by the mineral owner was not ordinarily contemplated as being within the scope of reasonable use of the surface for the production of minerals. 54 The court reasoned that where only one manner of surface use could be implemented to produce minerals, the mineral owner had the right to pursue such use regardless of surface damage. 55 Conversely, if the mineral owner had a reasonable alternative method of production, the rule of reasonable use would require utilization of that technique rather than cause injury to the surface. 56

49. E.g., Humble Oil & Ref. Co. v. Williams, 420 S.W.2d 133, 134 (Tex. 1967); General Crude Oil Co. v. Aiken, 162 Tex. 104, 106, 344 S.W.2d 668, 669 (1961); Warren Petroleum Corp. v. Monzingo, 157 Tex. 479, 481, 304 S.W.2d 362, 363 (1957).
52. 470 S.W.2d 618 (Tex. 1971).
53. Id. at 622-23. In Getty the surface owner brought an action to enjoin an oil and gas lessee from using two beam-type pumping units, one of which was seventeen feet high at the top of its upstroke, and the other thirty-four feet in height. The vertical space required for the pumping units interfered with the surface owner's use of an automatic irrigation sprinkler system, resulting in a devaluation of the land for agricultural production. The court held that Getty's use of the surface was unreasonable because of the availability of non-interfering pumping units as a reasonable alternative method of production. Id. at 622-23.
Under the accommodation of estates approach announced in Getty, it could be argued that strip mining is within the mineral owner's right to a reasonable and necessary use of the surface where there is no alternative means of removal available. The court in Reed, however, restricted the definition of minerals to those substances which can be extracted without substantial destruction of the surface. Rather than limit surface use by the dominant mineral estate, the Reed opinion allows the surface estate to retain part of what was traditionally granted or reserved to the mineral estate in an effort to protect the surface estate from damage due to surface mining.

The distinguishing factor between the Reed and Acker decisions is the burden of proof requirement which has been imposed on the surface owner. Whereas Acker ruled that a substance which can be extracted only by substantial depletion of the surface belongs to the surface owner, the majority in Reed maintained that such a construction would not be applicable unless the surface owner proved that surface mining of the substance, at the time the instrument was executed, would have destroyed the surface estate. Traditionally, the intention of the parties to a conveyance has been objectively determined from the language used in the instrument in the absence of an ambiguity. The Reed court, however, had adopted a subjective standard, conditioning title to minerals upon evidence of production methods and facts which existed at the time of the deed's execution. This burden could be onerous, especially with regard to extremely old deeds and leases. In the future, title to specific minerals under a

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57. See Comment, Is Coal Included in a Grant or Reservation of "Oil, Gas, or Other Minerals?", 30 Sw. L.J. 481, 498 (1976).
58. Reed v. Wylie, 554 S.W.2d 169, 172 (Tex. 1977); see Acker v. Guinn, 464 S.W.2d 348, 352 (Tex. 1971).
59. See Comment, Is Coal Included in a Grant or Reservation of "Oil, Gas, or Other Minerals?", 30 Sw. L.J. 481, 499-500 (1976).
60. See Reed v. Wylie, 554 S.W.2d 169, 172 (Tex. 1977).
62. E.g., Anderson & Kerr Drilling Co. v. Bruhlmeier, 134 Tex. 574, 583, 136 S.W.2d 800, 805 (1940); Colquitt v. Eureka Producing Co., 63 S.W.2d 1018, 1021 (Tex. Comm'n App. 1933, judgmt adopted); Chandler v. Hartt, 467 S.W.2d 629, 634 (Tex. Civ. App.—Tyler 1971, writ ref'd n.r.e.).
63. Reed v. Wylie, 554 S.W.2d 169, 182 (Tex. 1977) (dissenting opinion). Although there was evidence of shaft mining for lignite in Freestone County prior to 1950, the majority in Reed maintained that this was immaterial if removal of the near-surface lignite in 1950 would have destroyed the land surface. Id. at 173.
64. Id. at 181. In his analysis of oil and gas law in Wyoming, Professor Eugene Kuntz stated:
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general grant or reservation will be established on a case by case basis, depending upon expert testimony and jury determinations as to facts which existed at the date of the deed's execution. Consequently, the test promulgated by the majority in Reed may create uncertainty in Texas land titles, notably where ownership of lignite coal is concerned.

One commentator has proposed an alternative view which permits a mineral owner to strip mine near-surface substances, but only in the event he compensates the surface owner for the damage to the surface estate. If, however, the instrument specifically reserves a substance and the method of extraction, the mineral owner would not be liable for surface damage resulting from the mining operation.

No other matter better illustrates the conflict between America's need for new sources of energy and the environmental impact entailed in securing such resources than that of strip mining. Due to the extensive lignite deposits in Texas and the increasing use of those deposits within the state, ownership of coal and lignite will continue to be an issue of serious litigation in the future. Although the Texas Supreme Court in Reed purported to reaffirm its decision in Acker, it has adopted a more conservative approach by imposing a heavy burden on the surface owner which must be met before a near-surface substance will be excluded from a grant or reservation of minerals.

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. A rule which requires consideration of the contemporaneous factual or legal setting would create the impossible situation of requiring the title examiner to inquire into the local folklore of the area or of requiring the 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.


65. Reed v. Wylie, 554 S.W.2d 169, 182 (Tex. 1977) (dissenting opinion).

66. Wylie argued that a mineral owner should be vested with title to all minerals, subject to reasonable use of the surface for production. The majority in Reed rejected Wylie's contention that such a rule would provide more certainty in matters of land titles and mineral ownership. Reed v. Wylie, 554 S.W.2d 169, 171 (Tex. 1977); see Kuntz, The Law Relating to Oil and Gas in Wyoming, 3 Wyo. L.J. 107, 114 (1949) (policy favoring production is enhanced by rule which makes title to minerals most certain).

67. See Kuntz, The Law Relating to Oil and Gas in Wyoming, 3 Wyo. L.J. 107, 115 (1949). Professor Kuntz argues that a conveyance or reservation of minerals severs the entire mineral estate from the surface estate, including near surface substances. Id. at 112. Although the mineral owner is entitled to reasonable use of the surface estate, surface mining is an unreasonable use and the surface owner is entitled to compensation for his injury. Id. at 115; cf. Smith v. Moore, 474 P.2d 794, 795-96 (Colo. 1970) (en banc) (in absence of an express provision to the contrary, strip mining without compensation would be an uncontemplated burden on the surface estate). But see Martin v. Kentucky Oak Mining Co., 429 S.W.2d 395, 399 (Ky. 1968). See also Comment, Surface or Mineral: A Single Test?, 23 BAYLOR L. REV. 407, 416 (1971).


69. See Reed v. Wylie, 554 S.W.2d 169, 172 (Tex. 1977).