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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.

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discretion.[49] 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.[1] 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).

1. Wylie v. Reed, 538 S.W.2d 186, 189 (Tex. Civ. App.—Waco 1976), *aff'd*, 554 S.W.2d 169 (Tex. 1977).

error in the Texas Supreme Court. Defendant Wylie urged a reexamination of the rule announced in *Acker v. Guinn*[2] 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.[3]

At common law, fee simple ownership of real property embraced both the surface of the land and the subsurface minerals in place.[4] 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.[5] Such a severance resulted in the creation of a mineral estate that was separate and independent from the estate in the surface.[6] 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.[7]

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2. 464 S.W.2d 348, 352 (Tex. 1971).

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

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).

5. *See* Hagar v. Stakes, 116 Tex. 453, 471, 294 S.W. 835, 842 (1927); Humphreys-Mexia Co. v. Gammon, 113 Tex. 247, 255-56, 254 S.W. 296, 299 (1923); Perkins v. Kemp, 274 S.W.2d 892, 894 (Tex. Civ. App.—Eastland 1954, writ ref'd n.r.e.). *See generally* Stanton, *Recent Developments in the Construction of Mineral and Royalty Grants and Reservations,* PROCEEDINGS OF THE SEVENTH ANNUAL INSTITUTE ON OIL AND GAS LAW AND TAXATION AS IT AFFECTS THE OIL AND GAS INDUSTRY 301 (1956) (owner of mineral interest can either produce oil and gas at own expense, or convey such rights to another by mineral lease).

6. *See, e.g.,* Acker v. Guinn, 464 S.W.2d 348, 352 (Tex. 1971); Slack v. Magee Heirs, 252 S.W.2d 274, 278 (Tex. Civ. App.—Galveston 1952), *aff'd,* 152 Tex. 427, 258 S.W.2d 797 (1953); Norsworthy v. Hewgley, 234 S.W.2d 126, 128 (Tex. Civ. App.—El Paso 1950, writ ref'd). For an excellent discussion of the respective rights and duties of surface and mineral owners upon severance of land by grant or reservation see Walker, *Fee Simple Ownership of Oil and Gas in Texas,* 6 TEXAS L. REV. 125, 128-30 (1928).

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, 153 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. Nunnery, 170 So. 2d 24, 29 (Miss. 1964) (reasonable use includes clearance of land surface for drilling operations); Pure Oil Co. v. Gear, 83 P.2d 389, 392 (Okla. 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."[8] Under the four corners rule, a court must ascertain the intention of the parties from the language used in the deed.[9] Furthermore, extrinsic evidence of circumstances which surrounded its execution is not admissible in the absence of an ambiguity on the face of the instrument.[10] 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.[11]

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.[12] On the other hand, the doctrine of ejusdem generis[13] has been employed in a number of cases, although

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Mining on the Severed Estate—A Legislative Proposal, 17 WM. & MARY L. REV. 140, 144 (1975).

8. Northern P. Ry. v. Soderberg, 188 U.S. 526, 529 (1903). The Supreme Court stated: "The word 'mineral' is used in so many senses, dependent upon the context, that the ordinary definitions of the dictionary throw but little light upon its signification in a given case." *Id.* at 530; *see, e.g.,* Frostad v. Kitchens, 377 F.2d 475, 478 (5th Cir. 1967) (gravel not included in mineral reservation); Carson v. Missouri P. Ry., 209 S.W.2d 97, 99 (Ark. 1948) (reservation of "all coal and mineral deposits" held not to include bauxite); Cain v. Neumann, 316 S.W.2d 915, 922 (Tex. Civ. App.—San Antonio 1958, no writ) (lease of "all" minerals included uranium). Recently, several cases have held that coal was included in a grant or reservation of minerals. *See* Christman v. Emineth, 212 N.W.2d 543, 551 (N.D. 1973) (lignite coal was included in reservation of "oil, gas and other minerals"); Abbey v. State, 202 N.W.2d 844, 856 (N.D. 1972). *But see* Wulf v. Schultz, 508 P.2d 896, 900 (Kan. 1973) (coal not included in a grant of "other mineral substances"); River Rouge Minerals, Inc. v. Energy Resources, 331 So. 2d 878, 882 (La. Ct. of App.), *writ ref'd per curiam,* 337 So. 2d 221 (La. 1976). *See generally* Maxwell, *The Meaning of "Minerals"—The Relationship of Interpretation and Surface Burden,* 8 TEX. TECH L. REV. 255 (1976).

9. *E.g.,* Anderson & Kerr Drilling Co. v. Bruhlmeyer, 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.); *accord,* Rogers v. Morgan, 164 So. 2d 480, 484 (Miss. 1964); Atlantic Ref. Co. v. Beach, 436 P.2d 107, 110 (N.M. 1968).

10. *E.g.,* Texas Elec. Ry. v. Neale, 151 Tex. 526, 534, 252 S.W.2d 451, 456 (1952); Remington Rand, Inc. v. Sugarland Indus., 137 Tex. 409, 421, 153 S.W.2d 477, 483 (1941); Anderson & Kerr Drilling Co. v. Bruhlmeyer, 134 Tex. 574, 583, 136 S.W.2d 800, 805 (1940). *See also* 1 E. KUNTZ, A TREATISE ON THE LAW OF OIL AND GAS § 16.1, at 371 (1962).

11. Comment, *Surface or Mineral: A Single Test?,* 23 BAYLOR L. REV. 407, 408 (1971).

12. Psencik v. Wessels, 205 S.W.2d 658, 660 (Tex. Civ. App.—Austin 1947, writ ref'd). The Austin Court of Civil Appeals defined the term "legally cognizable" as being "restricted to such minerals and mineral substances as are commonly regarded as minerals as distinguished from the soil in general." *Id.* at 660-61; *accord,* Maynard v. McHenry, 113 S.W.2d 13, 14 (Ky. 1938). *See generally* Annot., 86 A.L.R. 983 (1933).

13. In Luse v. Boatman, 217 S.W. 1096 (Tex. Civ. App.—Fort Worth 1919, writ ref'd), the rule of ejusdem generis was stated as follows: "[w]here there is an enumeration of particular things, followed by general words, the latter shall be construed as having reference

there have been difficulties inherent in its application to mineral deeds.[14] 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.[15]

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.*[16] 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.[17] Subsequently, the Waco Court of Civil Appeals in *Williford v. Spies*[18] 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."[19] 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.[20]

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to things only of the same kind and class with those specifically mentioned. . . ." *Id.* at 1098; *see, e.g.,* Right of Way Oil Co. v. Gladys City Oil, Gas & Mfg. Co., 106 Tex. 94, 103, 157 S.W. 737, 739-40 (1913); Guinn v. Acker, 451 S.W.2d 549, 552 (Tex. Civ. App.—Tyler 1970), *aff'd,* 464 S.W.2d 348 (Tex. 1971); Fleming Foundation v. Texaco, Inc., 337 S.W.2d 846, 852 (Tex. Civ. App.—Amarillo 1960, writ ref'd n.r.e.); *accord,* Wulf v. Schultz, 508 P.2d 896, 901-02 (Kan. 1973); Witherspoon v. Campbell, 69 So. 2d 384, 388 (Miss. 1954).

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).

15. *See, e.g.,* Heinatz v. Allen, 147 Tex. 512, 517, 217 S.W.2d 994, 997 (1949); Atwood v. Rodman, 355 S.W.2d 206, 215 (Tex. Civ. App.—El Paso 1962, writ ref'd n.r.e.); Eldridge v. Edmondson, 252 S.W.2d 605, 606 (Tex. Civ. App.—Eastland 1952, writ ref'd n.r.e.).

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 MTN. 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*[21] 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.[22] 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.[23] 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.[24] 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.[25] Furthermore, it was immaterial that reclamation techniques were available or contemplated if the method of extraction necessitated the stripping away of the surface soil.[26] 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."[27]

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.[28] 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.[29]

The increasing demand for energy coupled with the diminishing supply of oil and gas has renewed national interest in coal as an alternative domes-

21. 554 S.W.2d 169 (Tex. 1977).

22. *Id.* at 174 (concurring opinion).

23. *Id.* at 172.

24. *Id.* at 172; *see* Acker v. Guinn, 464 S.W.2d 348, 352 (Tex. 1971).

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

26. *Id.* at 172; *see* Williford v. Spies, 530 S.W.2d 127, 131 (Tex. Civ. App.—Waco 1975, no writ).

27. Reed v. Wylie, 554 S.W.2d 169, 173 (Tex. 1977) (concurring opinion).

28. *Id.* at 181 (dissenting opinion).

29. *Id.* at 181 (dissenting opinion). While acknowledging that the surface destruction test of *Acker v. Guinn* should be affirmed, the dissenting justices concluded that it should not be extended to require the surface owner to prove that surface mining was the only method of extracting a near surface substance at the time of the deed. *Id.* at 174-75 (dissenting opinion).

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]

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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).

34. 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, 80-81 (1977).

35. *See* Comment, *The Common Law Rights to Subjacent Support and Surface Preservation*, 38 MO. L. REV. 234, 246 (1973). Already two million acres of land stand unreclaimed in the United States after being strip mined of nearly four and one-half billion tons of coal.

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). *See generally* Comment, *Texas Surface Mining and Reclamation Act—New Hope for Protection of Texas Resources*, 7 ST. MARY'S L.J. 850, 855-63 (1976).

37. TEX. REV. CIV. STAT. ANN. art. 5920-10, § 3 (Vernon Supp. 1976-1977). Prior to passage of the Act, the only reclamation requirements which existed in Texas were those agreed upon by the parties in their lease agreement. *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, 99 (1977).

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.[39] Subsequently, the Supreme Court of North Dakota, in *Christman v. Emineth*,[40] 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.[41] In construing the reservation, the court ruled that the term "other minerals" included lignite coal,[42] and the defendant was entitled to use so much of the surface as was reasonably necessary to remove the substance.[43] 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.[44] 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.[45] 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.[46] 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).

39. N.D. CENT. CODE § 38-14 (1972).

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").

43. Christman v. Emineth, 212 N.W.2d 543, 550 (N.D. 1973); *cf.* Kenny v. Texas Gulf Sulphur Co., 351 S.W.2d 612, 614 (Tex. Civ. App.—Waco 1961, writ ref'd) (reasonable use includes production of minerals by means of only available method, regardless of surface damage).

44. *Compare* Christman v. Emineth, 212 N.W.2d 543, 550 (N.D. 1973) *with* Reed v. Wylie, 554 S.W.2d 169, 178 (Tex. 1977) (dissenting opinion).

45. Christman v. Emineth, 212 N.W.2d 543, 550-51 (N.D. 1973); *see* Reiss v. Rummel, 232 N.W.2d 40, 44-45 (N.D. 1975); Olson v. Dillerud, 226 N.W.2d 363, 367 (N.D. 1975); *cf.* Martin v. Kentucky Oak Mining Co., 429 S.W.2d 395, 399 (Ky. 1968) (rejected surface destruction argument, although not expressly on basis of Kentucky reclamation statute). *But see* Wulf v. Schultz, 508 P.2d 896, 900 (Kan. 1973).

46. Reed v. Wylie, 554 S.W.2d 169, 172 (Tex. 1977); *see* Williford v. Spies, 530 S.W.2d 127, 131 (Tex. Civ. App.—Waco 1975, no writ).

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]

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47. *See* Broyles, *The Right to Mine Texas Uranium and Coal by Surface Methods: Acker v. Guinn Revisited*, 13 HOUS. L. REV. 451, 471-72 (1976).

48. *Compare* Olson v. Dillerud, 226 N.W.2d 363, 367 (N.D. 1975) *and* Christman v. Emineth, 212 N.W.2d 543, 549-50 (N.D. 1973) *with* Reed v. Wylie, 554 S.W.2d 169, 172 (Tex. 1977) *and* Acker v. Guinn, 464 S.W.2d 348, 352 (Tex. 1971).

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).

50. Texaco, Inc. v. Spires, 435 S.W.2d 550, 553 (Tex. Civ. App.—Eastland 1968, writ ref'd n.r.e.); *see* Brown v. Lundell, 162 Tex. 84, 86, 344 S.W.2d 863, 865 (1961).

51. Humble Oil & Ref. Co. v. Williams, 420 S.W.2d 133, 134-35 (Tex. 1967); Meyer v. Cox, 252 S.W.2d 207, 208 (Tex. Civ. App.—San Antonio 1952, writ ref'd).

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.

54. *Id.* at 622. *Compare* Getty Oil Co. v. Jones, 470 S.W.2d 618, 622 (Tex. 1971) *with* Acker v. Guinn, 464 S.W.2d 348, 352 (Tex. 1971).

55. Getty Oil Co. v. Jones, 470 S.W.2d 618, 622 (Tex. 1971); *see* Kenny v. Texas Gulf Sulphur Co., 351 S.W.2d 612, 614 (Tex. Civ. App.—Waco 1961, writ ref'd).

56. Getty Oil Co. v. Jones, 470 S.W.2d 618, 622 (Tex. 1971). The accommodation of

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.[57] The court in *Reed*, however, restricted the definition of minerals to those substances which can be extracted without substantial destruction of the surface.[58] 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.[59]

The distinguishing factor between the *Reed* and *Acker* decisions is the burden of proof requirement which has been imposed on the surface owner.[60] 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.[61] 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.[62] 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.[63] This burden could be onerous, especially with regard to extremely old deeds and leases.[64] In the future, title to specific minerals under a

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estates doctrine established in *Getty* has been applied in several Texas cases. *See* Humble Oil & Ref. Co. v. West, 508 S.W.2d 812, 816 (Tex. 1974); Sun Oil Co. v. Whitaker, 483 S.W.2d 808, 817 (Tex. 1972) (dissenting opinion). *See generally* Smith, *Oil and Gas*, 29 Sw. L.J. 109, 111 (1975).

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).

61. *Compare* Reed v. Wylie, 554 S.W.2d 169, 172 (Tex. 1977) *with* Acker v. Guinn, 464 S.W.2d 348, 352 (Tex. 1971).

62. *E.g.*, Anderson & Kerr Drilling Co. v. Bruhlmeyer, 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:

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.[65] Consequently, the test promulgated by the majority in *Reed* may create uncertainty in Texas land titles, notably where ownership of lignite coal is concerned.[66]

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.[67] 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.[68]

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.[69] In so doing, *Reed* affords greater protection for

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> 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 folk-lore 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.

Kuntz, *The Law Relating to Oil and Gas in Wyoming*, 3 WYO. L.J. 107, 114 (1949).

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).

68. Kuntz, *The Law Relating to Oil and Gas in Wyoming*, 3 WYO. L.J. 107, 115 (1949).

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