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Surface Ownership Includes at Surface Substances and Those Near Surface Substances Whose Removal Involves Destruction of Surface by Any Reasonable Method Known at Time Extraction Is Planned.

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Powers: Surface Ownership Includes at Surface Substances and Those Near S

MINES AND MINERALS—Mineral Reservation—Surface Ownership Includes At Surface Substances and Those Near Surface Substances Whose Removal Involves Destruction of Surface By Any Reasonable Method Known at Time Extraction is Planned.

Reed v. Wylie,
597 S.W.2d 743 (Tex. 1980).

In 1949, the Wylies, owners of the surface estate and three-fourths of the mineral estate of a tract of land, executed a lease granting the right to mine coal and lignite by strip mining.[1] After termination of the lease, the Wylies conveyed the tract to Reed's predecessors in title, reserving a one-fourth undivided interest in and to "all oil, gas and other minerals" on and under the land.[2] Reed sued Wylie seeking title to coal and lignite capable of being extracted by open pit or strip mining methods and was awarded summary judgment on the basis of an affidavit stating coal and lignite could be removed only by surface destructive methods.[3] The Waco Court of Civil Appeals reversed and remanded, holding the evidence precluded summary judgment because a question of material fact remained regarding the necessity of surface destructive methods.[4] On appeal, the Supreme Court of Texas affirmed the judgment of the court of civil appeals[5] further ruling that a surface owner must prove "as of the date of

1. The tract of land involved is situated in Freestone County, Texas. Reed v. Wylie, 554 S.W.2d 169, 170 (Tex. 1977) (Reed I) (rev'd on other grounds, 597 S.W.2d 743, 747 (Tex. 1980)). In recognition of the damage to the surface inherent in such mining, Wylie was to be paid $50.00 per acre for the land destroyed or rendered useless. Reed v. Wylie, 597 S.W.2d 743, 745 (Tex. 1980) (Reed II).

2. The Wylies considered the lignite would be strip mined at the time of the 1950 deed since they had previously granted the lignite strip mining lease. *See id.* at 745.

3. *See id.* at 746. Reed's summary judgment motion was based on *Acker v. Guinn,* 464 S.W.2d 348 (Tex. 1971).

4. *See* Wylie v. Reed, 538 S.W.2d 186, 189 (Tex. Civ. App.—Waco 1976), *aff'd,* 554 S.W.2d 169 (Tex. 1977) (reversed on other grounds, 597 S.W.2d 743 (Tex. 1980)). The court said Reed had the burden of proving the lignite must be removed by surface destructive methods. *Id.* at 189. A concurring opinion stated Reed could not have the lignite "which *may* be mined by open pit methods" but only the lignite which *must* be extracted thereby. *Id.* at 189 (Hall, J., concurring). A dissenting opinion urged affirming the trial court, adding that Reed owned all the lignite that *must* be mined by surface destructive methods. *Id.* at 189-90 (James, J., dissenting).

5. *See* Reed v. Wylie, 554 S.W.2d 169, 173 (Tex. 1977) (rev'd on other grounds, 597 S.W.2d 743 (Tex. 1980)). This opinion was substituted for a prior opinion as printed in 20 Tex. Sup. Ct. J. 327 (May 25, 1977), *withdrawn and superseded,* 554 S.W.2d 169 (Tex. 1977). The prior opinion stated the test was whether the surface would be substantially destroyed in extracting *commercially producible quantities* of a particular substance. *Id.* at

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the instrument being construed," extraction of a near surface substance "would necessarily have depleted" the surface before a mineral reservation would be interpreted to exclude that substance.[6] The case was remanded to the trial court for a determination of the depth of the lignite.[7] On remand the trial court held, as a matter of law, that the lignite was *at the surface* and, therefore, owned by Reed, as owner of the surface estate.[8] Subsequently, the Waco Court of Civil Appeals reversed and remanded, and Reed appealed to the Supreme Court of Texas urging reinstatement of the trial court's judgment.[9] Held — *Judgment affirmed — holding and opinion disapproved.* Surface ownership includes *at surface* substances and those *near surface* substances whose removal involves destruction of the surface by any reasonable method known at time extraction is planned.[10]

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329. The subsequent opinion stated the test was whether the surface would be substantially destroyed in extracting *substantial quantities* of the substance. Reed v. Wylie, 554 S.W.2d 169, 172 (Tex. 1977) (rev'd on other grounds, 597 S.W.2d 743, 747 (Tex. 1980)).

6. Reed v. Wylie, 554 S.W.2d 169, 172 (Tex. 1977) (rev'd 597 S.W.2d 743, 744 (Tex. 1980)). *See generally* Comment, *Lignite: Surface or Mineral — The Surface Destruction Test and More,* 29 BAYLOR L. REV. 879, 893 (1977); Note, *Beneath the Surface-Destruction Test: The Dialectic of Intention and Policy,* 56 TEXAS L. REV. 99, 103 (1977); 15 HOUS. L. REV. 187, 191 (1977); 9 ST. MARY'S L.J. 624, 625 (1978); 31 SW. L.J. 1163, 1166 (1977).

7. The finding was considered necessary to show whether extraction of the lignite would necessarily have destroyed the surface. Reed v. Wylie, 554 S.W.2d 169, 173 (Tex. 1977) (rev'd on other grounds 597 S.W.2d 743, 744 (Tex. 1980)). *Reed I* ruled if lignite existed *at* the surface, no further proof would be necessary to grant the surface owner title to the lignite; if lignite existed *near* surface, the surface owner would have to show, as of the date of the instrument being construed, extraction of the substance would necessarily have destroyed the surface. Reed v. Wylie, 554 S.W.2d 169, 172-73 (Tex. 1977) (rev'd in part 597 S.W.2d 743, 746-47 (Tex. 1980)). *Reed II* found the surface owner entitled to the lignite because it existed *at* surface as a matter of law; however, if the substance had existed near surface, the surface owner would need to show removal involved destruction of the surface by any reasonable method known at the time extraction was contemplated. *See* Reed v. Wylie, 597 S.W.2d 743, 746-47 (Tex. 1980).

8. *See* Reed v. Wylie, 597 S.W.2d 743, 744 (Tex. 1980) (grantor not entitled to reformation of the deed).

9. Wylie v. Reed, 579 S.W.2d 329, 334-35 (Tex. Civ. App.—Waco 1979), *judgment aff'd—holding and opinion disapproved,* 597 S.W.2d 743 (Tex. 1980). The court of civil appeals held summary judgment was precluded in part since "we cannot say as a matter of law that if the lignite had been mined on the tract . . . in 1950, that such mining would have consumed or depleted the land surface" since shaft or underground methods were feasible in 1950. *Id.* at 334-35. The court stated there was conflicting evidence whether the lignite was *at the surface;* it implicitly ruled the lignite must outcrop on the *particular* tract, not just in the immediate vicinity, before the lignite can be said to be at the surface. *Id.* at 334.

10. Reed v. Wylie, 597 S.W.2d 743, 747-48 (Tex. 1980). The Supreme Court of Texas affirmed the judgment of the court of civil appeals, agreeing summary judgment on the reformation issue was precluded under the evidence presented in support thereof; however, it

At common law, fee simple ownership extended indefinitely upwards as well as downwards.[11] The landowner was the sole person entitled to the use of anything found on or beneath the surface of his land.[12] In Texas, however, mineral rights did not become vested in owners of the land until the Constitution of 1866 was passed.[13]

All states provide for the separation of the mineral estate from the surface estate;[14] most states provide the mineral estate owner with fee simple title absent execution of a lease or conveyance of less than a total mineral interest.[15] A severance of the two estates may occur by the grantor executing a deed to the surface only, expressly excepting or reserving the

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expressly disagreed with the civil appeals court's interpretation of the proof needed to show minerals exist at the surface. *See id.* at 747-48. Wylie's reformation plea was based upon affidavits of the original grantee, Baker, and the attorney who drew up the deed. The affidavits stated the parties intended to reservé ¼ of the lignite at any depth to the Wylies. The court held the affidavits would most likely give rise to a reformed deed as between Wylie and Baker based upon mutual mistake; however, the Wylies had the burden of showing all subsequent purchasers took with notice of the mutual mistake in the 1959 Wylie/Baker deed. To offer chance of proof, the case was remanded. *Id.* at 749.

11. Edwards v. Sims, 24 S.W.2d 619, 620 (Ky. 1929); Herrin v. Sutherland, 241 P. 328, 332 (Mont. 1925). "[C]ujus est solum, ejus est usque ad coelum et ad inferos." 2 W. BLACKSTONE, COMMENTARIES 18; 1 H. WILLIAMS & C. MEYERS, OIL AND GAS LAW § 202, at 20 (1975).

12. 1 H. WILLIAMS & C. MEYERS, OIL AND GAS LAW § 202, at 20 (1975).

13. *Compare* 2 H. GAMMEL, LAWS OF TEXAS 177-78 (1840) *and* Cowan v. Hardeman, 26 Tex. 217, 224-26 (1862) *with* TEX. CONST. art. VII, § 39 (1866) *and* 5 H. GAMMEL, LAWS OF TEXAS 880 (1866). Mineral ownership was also bestowed upon landowners in the Constitutions of 1869 and 1875. TEX. CONST. art. XIV, § 7 (1875); TEX. CONST. art. X, § 9 (1869); *see, e.g.*, Cox v. Robison, 105 Tex. 426, 439, 150 S.W. 1149, 1150 (1912); State v. Parker, 61 Tex. 265, 268 (1884); Allen v. Heinatz, 212 S.W.2d 987, 990 (Tex. Civ. App.—Austin 1948), *aff'd on other grounds*, 147 Tex. 512, 523, 217 S.W.2d 994, 1000 (1949). *But see* TEX. NAT. RESOURCES CODE ANN. §§ 52.171-.182 (Vernon 1978). Minerals subject to the Texas Relinquishment Act are owned by the State of Texas. Under the Act the landowner becomes the agent of the State of Texas. The landowner has no authority to convey minerals; however, after a lease has been executed, the landowner may convey an interest in the rentals and royalties reserved in the lease. *See id.* §§ 52.171-.182. *See generally* Walker, *"The Texas Relinquishment Act"*, SW. LEGAL FOUNDATION 1ST ANNUAL INST. ON OIL & GAS LAW & TAX. 245 (1949).

14. *See, e.g.*, Bodcaw Lumber Co. v. Goode, 254 S.W. 345, 347 (Ark. 1923); Jilek v. Chicago, Wilmington & Franklin Coal Co., 47 N.E.2d 96, 98 (Ill. 1943); Wilson v. Holm, 188 P.2d 899, 904 (Kan. 1948). *See generally* Masterson, *A 1952 Survey of Basic Oil and Gas Law*, 6 Sw. L.J. 1, 15 (1952).

15. Masterson, *A 1952 Survey of Basic Oil and Gas Law*, 6 Sw. L.J. 1, 15 (1952) (fee simple title created in the mineral estate regardless of adherence to ownership in place or nonownership theory); *see, e.g.*, Acker v. Guinn, 464 S.W.2d 348, 352 (Tex. 1971) (conveyance of minerals by fee owner effects horizontal severance and creation of separate mineral and surface estates); Stephens County v. Mid-Kansas Oil & Gas Co., 113 Tex. 160, 170, 254 S.W. 290, 293 (1923) (grant of exclusive right to take coal held to be severance of title to coal from remainder of estate); Texas Co. v. Daugherty, 107 Tex. 226, 233-34, 176 S.W. 717, 718-19 (1915) (conveyance of all oil, gas, coal, and other minerals a present grant of title in fee to oil and gas).

minerals, executing a deed conveying only a mineral interest, or executing a mineral lease.[16] Once a severance has been effected, the mineral estate owner may grant or reserve three basic types of interests: leasehold,[17] mineral, or royalty.[18] The mineral estate is generally presumed to be the dominant estate,[19] and its owner is entitled to reasonably use the surface estate to produce the minerals.[20] The rationale for dominance is that title to minerals would be worthless without the rights, express or implied, of ingress and egress to remove the minerals.[21]

In Texas, the mineral owner may use as much of the surface as is reasonably necessary to carry out the purpose of a mineral conveyance.[22] In

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16. *See* 1 H. WILLIAMS & C. MEYERS, OIL AND GAS LAW § 202.2, at 24-25 (1978); Masterson, *A 1952 Survey of Basic Oil and Gas Law*, 6 Sw L.J. 1, 15 (1952). In a full mineral conveyance other than in a lease, the grantee acquires the right to develop the minerals, the power to execute leases, the right to bonuses paid by the oil and gas lessee, the right to delay rentals payable by the lessee, the right to royalties, and the right "to any other interests reserved to the lessor." *Id.* at 15.

A reservation creates or reserves something out of the thing granted that was *not* in existence before. An exception is something in existence at the time of conveyance as part of the object granted and is not included in the conveyance. *See* Donnell v. Otts, 230 S.W. 864, 865 (Tex. Civ. App.—Fort Worth 1921, no writ).

17. A leasehold interest gives the lessee exclusive power to prospect for, sever, and remove the construed minerals from the land. *See* 1 H. WILLIAMS & C. MEYERS, OIL AND GAS LAW § 202.1, at 21 (1978).

18. Both a mineral and a royalty interest may be created by grant, reservation, or exception. The holder of a royalty interest, distinguished from a mineral interest, is not authorized to go upon the premises to prospect for, sever, or remove minerals, although he may possess certain rights of ingress and egress to inform himself of exploration operations on the land. The royalty owner, however, is entitled to share in such minerals as are severed. *See* Pich v. Lankford, 157 Tex. 335, 339, 302 S.W.2d 645, 648 (1957) (interest in minerals in place and interest in royalty separate and distinct estates in land); Sabine Prod. Co. v. Frost Nat'l Bank, 596 S.W.2d 271, 276 (Tex. Civ. App.—Corpus Christi 1980, no writ) (royalty an interest in land); Lone Star Gas Co. v. Murchison, 353 S.W.2d 870, 879 (Tex. Civ. App. —Dallas 1962, writ ref'd n.r.e.) (at time minerals severed minerals and royalties become personalty). *See generally* 1 H. WILLIAMS & C. MEYERS, OIL AND GAS LAW § 202.1, at 21 (1978).

19. *See, e.g.*, Sun Oil Co. v. Whitaker, 483 S.W.2d 808, 810 (Tex. 1972); General Crude Oil Co. v. Aiken, 162 Tex. 104, 106, 344 S.W.2d 668, 669 (1961); Warren Petroleum Corp. v. Martin, 153 Tex. 465, 469, 271 S.W.2d 410, 413 (1954).

20. Acker v. Guinn, 464 S.W.2d 348, 352 (Tex. 1971); *see* Sun Oil Co. v. Nunnery, 170 So. 2d 24, 29 (Miss. 1964); Pure Oil Co. v. Gear, 83 P.2d 389, 392 (Okla. 1938); General Crude Oil Co. v. Aiken, 162 Tex. 104, 106, 344 S.W.2d 668, 669 (1961). *See generally* Comment, *Between a Rock and a Hard Place: Surface Mining on the Severed Estate — A Legislative Proposal*, 17 WM. & MARY L. REV. 140, 144 (1975).

21. *See, e.g.*, Humble Oil & Ref. Co. v. Williams, 420 S.W.2d 133, 134 (Tex. 1967); Warren Petroleum Corp. v. Monzingo, 157 Tex. 479, 481, 304 S.W.2d 362, 363 (1957); Warren Petroleum Corp. v. Martin, 153 Tex. 465, 469, 271 S.W.2d 410, 413 (1954).

22. *See, e.g.*, Humble Oil & Ref. Co. v. Williams, 420 S.W.2d 133, 134 (Tex. 1967); Warren Petroleum Corp. v. Monzingo, 157 Tex. 479, 481, 304 S.W.2d 362, 363 (1957); Harris

construing what is reasonably necessary, the Supreme Court of Texas has held the mineral and surface estates must accommodate each other by conducting their operations with due regard for the rights of the other.[23] In *Getty Oil Co. v. Jones*[24] the supreme court held proof of a reasonable alternative to the challenged surface use requires the mineral owner to use that alternative technique rather than damaging the surface.[25] Under the pronouncement made in *Sun Oil v. Whitaker,*[26] however, the mineral owner need not consider alternatives unavailable on the particular tract.[27]

Generally, the surface estate includes ownership of the soil and, in Texas, certain underground water at any depth under the land.[28] Confu-

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v. Currie, 142 Tex. 93, 99, 176 S.W.2d 302, 305 (1943). At least one Texas court has held reasonable *use* of the surface has nothing to do with the question of *ownership* of a particular substance. *See* Riddlesperger v. Creslenn Ranch Co., 595 S.W.2d 193, 198 (Tex. Civ. App.—Tyler 1980, writ ref'd n.r.e.) (legal rights accruing to an expressly named substance in a conveyance not indicative of title to unnamed substance). Absent a showing of negligence or a contract to pay for damages, the mineral owner is not liable for surface damage occurring from mineral extraction. *See* McCoy v. Polvado, 583 S.W.2d 439, 441 (Tex. Civ. App.—Amarillo 1979, no writ) (when no negligence allegations made, fenced damaged during placement of gas lines as permitted in lease held reasonable use to effectuate lease purposes); Macha v. Crouch, 500 S.W.2d 902, 905-06 (Tex. Civ. App.—Corpus Christi 1973, no writ) (interference with tract by construction and maintenance in connection with production of oil and gas held not unreasonable when plaintiff failed to prove monetary loss or negligence).

23. *See* Ball v. Dillard, 23 Tex. Sup. Ct. J. 457, 459 (June 28, 1980) (surface lessee held to be trespasser when he unreasonably interfered with mineral lessee's right to explore for and extract minerals in that surface owner locked a gate and furnished mineral estate owner no key thereto); Ottis v. Haas, 569 S.W.2d 508, 513-14 (Tex. Civ. App.—Corpus Christi 1978, writ ref'd n.r.e.) (rule of reasonable accommodation held to involve more than a question of inconvenience to surface owner before it is invoked; enclosed tank batteries operated by oil and gas lessee and placed on land used only for grazing purposes held not unreasonable when plaintiff failed to show location of tanks would materially interfere with surface use).

24. 470 S.W.2d 618 (Tex. 1971).

25. *Id.* at 622.

26. 483 S.W.2d 808 (Tex. 1972).

27. *Id.* at 811-12.

28. *See id.* at 811. ("water, unsevered expressly by conveyance or reservation, is part of the surface estate"); Corpus Christi v. Pleasanton, 154 Tex. 289, 293, 276 S.W.2d 798, 802 (1955) (surface owner can use and sell all percolating water he captures from wells on his land); Texas Co. v. Burkett, 117 Tex. 16, 28-29, 296 S.W. 273, 278 (1927) (overflow of spring the source of which was subterranean stream is property of surface owner capturing same); TEX. WATER CODE ANN. § 52.002 (Vernon 1972) (ownership of underground water by landowner). *But see* Bartley v. Sone, 527 S.W.2d 754, 760 (Tex. Civ. App.—San Antonio 1974, writ ref'd n.r.e.) (rule that surface owner owns underground water held inapplicable to water flowing in subterranean stream or to overflow of rivers); Ambassador Oil Corp. v. Robertson, 384 S.W.2d 752, 763 (Tex. Civ. App.—Austin 1964, writ ref'd n.r.e.) (mineral reservation includes salt water as a mineral); TEX. WATER CODE ANN. § 52.001(3) (Vernon 1972) ("underground water" means certain percolating waters but not subterranean streams or river

sion exists, however, among jurisdictions over the meaning of the term "minerals" and what a mineral estate includes.[29] The intention of the parties to a conveyance is deemed determinative of the specific minerals included.[30] Under the majority rule, the term mineral, when used alone, includes oil and gas unless there is a demonstrated intention to the contrary.[31] The minority rule, however, requires a demonstrated intention to include oil and gas in the term mineral.[32]

Under the four corners rule of construction,[33] the intention of the parties determines whether a grant or conveyance of "oil, gas and other minerals" includes coal or lignite.[34] The question of inclusion becomes critical

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underflow). *See also* Fleming Foundation v. Texaco, Inc., 337 S.W.2d 846, 850 (Tex. Civ. App.— Amarillo 1960, writ ref'd n.r.e.) (quoting Marquette Cement Mining Co. v. Oglesby Coal Co., 253 F. 107, 111 (N.D. Ill. 1918) (surface ownership includes "not merely the top of the glacial drift, soil, or agricultural surface," but also some substances regarded as minerals other than oil and gas).

29. *Compare* Christman v. Emineth, 212 N.W.2d 543, 549 (N.D. 1973) (coal included in conveyance of minerals) *and* Southland Royalty Co. v. Pan Am. Petroleum Corp., 378 S.W.2d 50, 54 (Tex. 1964) ("minerals" includes oil and gas) *with* Besing v. Ohio Valley Coal Co., 293 N.E.2d 510, 514 (Ind. Ct. App. 1973) (coal not included in a conveyance of minerals) *and* Detlor v. Holland, 49 N.E. 690, 692-93 (Ohio 1898) ("minerals" does not include oil and gas).

30. *See* Anderson & Kerr Drilling Co. v. Bruhlmeyer, 134 Tex. 574, 583, 136 S.W.2d 800, 805 (1940). *See generally* 2 R. DEVLIN, THE LAW OF REAL PROPERTY AND DEEDS §§ 835, 836 (3d ed. 1911); 1 E. KUNTZ, A TREATISE ON THE LAW OF OIL AND GAS § 16.1 (1962).

31. Murray v. Allard, 43 S.W. 355, 357 (Tenn. 1897); *see, e.g.*, Roth v. Huser, 76 P.2d 871, 875 (Kan. 1938) (majority rule holding "minerals" includes oil and gas); Southland Royalty Co. v. Pan Am. Petroleum Corp., 378 S.W.2d 50, 54 (Tex. 1964) (majority rule holding "minerals" includes oil and gas as a matter of law); Anderson & Kerr Drilling Co. v. Bruhlmeyer, 134 Tex. 574, 582, 136 S.W.2d 800, 805 (1940) (under majority rule "minerals" includes oil and gas). *See generally* 1 E. KUNTZ, A TREATISE ON THE LAW OF OIL AND GAS § 13.3, at 300 (1962). The majority rule has been followed in Illinois, Kansas, Kentucky, Michigan, Oklahoma, Texas, Utah, Virginia, West Virginia, and "possibly in" Louisiana and Mississippi. *Id.* at 303.

32. *See* Detlor v. Holland, 49 N.W. 690, 692-93 (Ohio 1898) (oil and gas not included in grant of minerals); Dunham & Shortt v. Kirkpatrick, 101 Pa. 36, 44 (1882) (petroleum not included in reservation of minerals). *See generally* 1 E. KUNTZ, A TREATISE ON THE LAW OF OIL AND GAS § 13.3, at 300 (1962). The minority rule has been followed in Arkansas, Ohio, and Pennsylvania. *Id.* at 300-03.

33. The four corners rule states:

> When the instrument by its terms plainly and clearly discloses the intention of the parties, or is phrased in language not fairly susceptible of more than one interpretation, the intention of the parties is to be ascertained by the court as a matter of law from the language used in the writing and without aid from evidence as to the attending circumstances.

Anderson & Kerr Drilling Co. v. Bruhlmeyer, 134 Tex. 574, 583, 136 S.W.2d 800, 805 (1940).

34. *See, e.g., id.* at 805; 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.). If after applying the four corners rule of construction to

when minerals unnamed in the conveyance subsequently become valuable.[35] Absent ambiquity or language showing the parties meant to limit the meaning of "mineral," courts will not consider extrinsic evidence regarding the circumstances surrounding the deed's execution.[36] The characteristics of the substance at issue, however, may be considered in determining whether the particular unnamed substance was included in the conveyance.[37] Texas courts have applied four factors when considering the particular characteristics of the substance: the natural meaning of the word "minerals";[38] the unique value of the particular substance;[39] the re-

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a deed, the intent remains undiscernable, the doubt is generally construed against the grantor. Farmers Canal Co. v. Potthast, 587 S.W.2d 805, 808 (Tex. Civ. App.—Corpus Christi 1979, writ ref'd n.r.e.); *see* Garrett v. Dils Co., 157 Tex. 92, 95, 299 S.W.2d 904, 906 (1957); Allen v. Creighton, 131 S.W.2d 47, 50 (Tex. Civ. App.—Beaumont 1939, writ ref'd). The intention of the parties "is to be ascertained from a consideration of all the language which appears in the deed, and by harmonizing, if possible, those provisions which appear to be in conflict." Farmers Canal Co. v. Potthast, 587 S.W.2d 805, 808 (Tex. Civ. App.—Corpus Christi 1979, writ ref'd n.r.e.); *accord,* McMahon v. Christmann, 157 Tex. 403, 407, 303 S.W.2d 341, 344 (1957). *See generally* Kuntz, *The Law Relating to Oil and Gas in Wyoming,* 3 WYO. L.J. 107, 112 (1949); Comment, *Is Coal Included in a Grant or Reservation of "Oil, Gas, or Other Minerals"?,* 30 Sw. L.J. 481, 483 (1976).

35. Is coal included in a conveyance of "oil, gas, and other minerals"? *Compare* Christman v. Emineth, 212 N.W.2d 543, 549 (N.D. 1973) (yes) *and* Adams County v. Smith, 23 N.W.2d 873, 875 (N.D. 1946) (yes) *with* Besing v. Ohio Valley Coal Co., 293 N.E.2d 510, 514 (Ind. Ct. App. 1973) (no) *and* Wulf v. Shultz, 508 P.2d 896, 900 (Kan. 1973) (no) *and* MacMaster v. Onstad, 86 N.W.2d 36, 43 (N.D. 1957) (no).

36. *See, 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 generally* Comment, *Is Coal Included in a Grant or Reservation of "Oil, Gas, or Other Minerals"?,* 30 Sw. L.J. 481, 483 (1976).

37. *See* Williford v. Spies, 530 S.W.2d 127, 131 (Tex. Civ. App.—Waco 1975, no writ). After stating the deed was not ambiguous and that surrounding circumstances could not be considered, the *Williford* court went on to allow evidence of the method of extraction. *Id.* at 131. Due to the surface destructive method of extraction coal was deemed not to be included as a mineral. *See id.* at 131. *But cf.* DuBois v. Jacobs, 551 S.W.2d 147, 150 (Tex. Civ. App.—Austin 1977, no writ) (evidence as to presence or absence of specific minerals not essential to construction of deed). *See generally* Comment, *Is Coal Included in a Grant or Reservation of "Oil, Gas, or Other Minerals"?,* 30 Sw. L.J. 481, 483 (1976).

The doctrine of "ejusdem generis" has been virtually ignored in Texas as a rule of construction to glean the parties intent in a mineral deed. *See* Southland Royalty Co. v. Pan Am. Petroleum Corp., 378 S.W.2d 50, 54 (Tex. 1964). Under the doctrine, the term "other minerals" acquires meaning only when used in connection with certain, specific minerals, and the meaning is determined by the enumerated minerals. *See id.* at 54; Luse v. Boatman, 217 S.W. 1096, 1099 (Tex. Civ. App.—Fort Worth 1919, writ ref'd).

38. The natural meaning test looks at the meaning of the term "minerals" as used by the mining industry, the commercial world, and landowners. Fleming Foundation v. Texaco, Inc., 337 S.W.2d 846, 852 (Tex. Civ. App.—Amarillo 1960, writ ref'd n.r.e.); *see e.g.,* Heinatz v. Allen, 147 Tex. 512, 517, 217 S.W.2d 944, 997 (1949) (limestone not included in devise of

lation of the substance to the surface;[40] and the necessity of destroying the surface in removing the substance from the land.[41]

Illustrative of the aforementioned factors is the case of *Heinatz v. Allen*[42] in which the devise of "mineral rights" was held not to include limestone and building stone.[43] Since there was no language in the will manifesting an intent to use the words "mineral rights" in the technical or scientific sense, the court interpreted the words according to their natural and ordinary meaning.[44] Furthermore, the limestone and building stone were deemed not to have any unique value since they could be used only for road construction; and being so closely related to the surface, the substances were considered part of the soil.[45] Finally, determinative of, but not decisive of whether the substances were minerals, was the fact that the only way of removing them was by surface destructive methods.[46] A recent decision by the Arkansas Supreme Court[47] relied on the Texas cases of *Heinatz* and *Atwood v. Rodman*[48] to determine whether limes-

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"mineral rights"); Cain v. Neumann, 316 S.W.2d 915, 922 (Tex. Civ. App.—San Antonio 1958, writ ref'd n.r.e.); Psencik v. Wessels 205 S.W.2d 658, 660 (Tex. Civ. App.—Austin 1947, writ ref'd) ("grant of minerals" does not include sand and gravel). *But see* Riddlesperger v. Creslenn Ranch Co., 595 S.W.2d 193, 197 (Tex. Civ. App.—Tyler 1980, writ ref'd n.r.e) (natural meaning test applied to gravel but not to coal).

39. The unique value test considers minerals to be those substances having special value apart from the surface. Heinatz v. Allen, 147 Tex. 512, 518, 217 S.W.2d 994, 997 (1949); *cf.* Robinson v. Robbins Petroleum Corp., 501 S.W.2d 865, 867 (Tex. 1973) (salt water could be mineral if of such value or character as to be useful).

40. The relation to the surface test considers whether the substance is so close to the surface as to be part of the use and enjoyment of the surface. *See* Heinatz v. Allen, 147 Tex. 512, 517, 217 S.W.2d 994, 997 (1949); *cf.* Reed v. Wylie, 597 S.W.2d 743, 747 (Tex. 1980) (controlling factor, under surface destruction test, is "close physical relationship").

41. The surface destruction test entitles the surface owner to any substance the extraction of which depletes the surface. *See, e.g.*, Reed v. Wylie, 597 S.W.2d 743, 747 (Tex. 1980); Reed v. Wylie, 554 S.W.2d 169, 172 (Tex. 1977) (rev'd on other grounds 597 S.W.2d 743 (Tex. 1980)); Acker v. Guinn, 464 S.W.2d 348, 352-53 (Tex. 1971). *See generally* Comment, *Lignite — Surface or Mineral? The Single Test Causes Double Trouble*, 28 BAYLOR L. REV. 287, 290 (1976); Comment, *Lignite: Surface or Mineral — The Surface Destruction Test and More*, 29 BAYLOR L. REV. 879, 886 (1977); Comment, *Surface or Mineral: A Single Test?*, 23 BAYLOR L. REV. 407, 413-14 (1971).

42. 147 Tex. 512, 217 S.W.2d 994 (1949).

43. *Id.* at 523, 217 S.W.2d at 1000; *accord*, Southern Title Ins. Co. v. Oller, 595 S.W.2d 681, 682-83 (Ark. 1980) (citing *Heinatz* as authority and applying the natural meaning, unique value, and surface destruction tests to find limestone not a mineral).

44. Heinatz v. Allen, 147 Tex. 512, 517, 217 S.W.2d 994, 997 (1949).

45. *Id.* at 518, 217 S.W.2d at 997.

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

47. Southern Title Ins. Co. v. Oller, 595 S.W.2d 681, 682-83 (Ark. 1980).

48. 355 S.W.2d 206, 216 (Tex. Civ. App.—El Paso 1962, writ ref'd n.r.e.). A conveyance of "oil, gas, and other minerals" was deemed not to include limestone, caliche, and surface shale that could have been profitably sold for making cement and, therefore, possessed of

tone is a mineral.[49] The court expressly stated a determination of mineral rights entails consideration of the surface destruction factor as well as the value and commercial profitability of the substance, local custom and usage, and the parties' intent.[50] Though limestone was being profitably mined in the area,[51] the court held that because limestone is generally removed by surface destructive methods and there was no evidence chalk or limestone was generally known in the area as a mineral, the limestone was not a mineral.[52]

A leading Texas case on construing the language of mineral conveyances is *Acker v. Guinn*.[53] In *Acker* the court addressed the issue of whether the mineral grant included iron ore.[54] Absent an affirmative intention to the contrary, the court ruled the instrument should not be construed to include a substance that *must* be removed by surface destructive methods.[55] The court balanced three factors in determining the iron ore was part of the surface estate: relation of the iron ore to the surface; methods of extraction; and the effect of production upon the surface.[56]

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special value. *Id.* at 216. Although its holding was in accord with *Heinatz*, the *Atwood* court considered the unique value test as applied in *Heinatz* to be obiter dictum. *Id.* at 216. Since *Atwood* adjudged the limestone in the particular circumstances as not of exceptional or rare character, it is apparent the *Atwood* court did not reject the unique value test itself, but merely considered the test outweighed by the surface destruction factor. *See* Comment, *Is Coal Included in a Grant or Reservation of "Oil, Gas, or Other Minerals"?*, 30 Sw. L.J. 481, 486 (1976).

49. Southern Title Ins. Co. v. Oller, 595 S.W.2d 681, 682-83 (Ark. 1980).

50. *Id.* at 684.

51. *Id.* at 683.

52. *See id.* at 684 (limestone approximately fifty feet below surface). The exclusionary cause of the title insurance policy on the tract was found not to except title defects due to a reservation of an interest in chalk deposits. The title insurance was restricted to coverage for "mineral leased or reserved," although there was a recorded reservation of a ½ interest in the chalk deposits. The court concluded chalk was the equivalent of limestone. *See id.* at 682.

53. 464 S.W.2d 348 (Tex. 1971).

54. *See id.* at 349.

55. *See id.* at 352. *See generally* Clark, *Uranium Problems*, 18 TEX. B.J. 505, 540 (1955).

56. Acker v. Guinn, 464 S.W.2d 348, 352-53 (Tex. 1971). Undisputed in *Acker* was the fact the *only* way to produce the iron ore was by open pit or strip mining methods. *Id.* at 351; *see* Reed v. Wylie, 554 S.W.2d 169, 174 (Tex. 1977) (Greenhill, C.J., concurring) (rev'd on other grounds 597 S.W.2d 743, 747 (Tex. 1980)). In 1975, after *Acker*, the Texas Legislature passed the Texas Surface Coal Mining and Reclamation Act, TEX. REV. CIV. STAT. ANN. art. 5920-10 (Vernon Supp. 1976-1977) (current version at art. 5920-11 (Vernon Supp. 1980)). Pursuant to the dictates of the Federal Surface Mining Control and Reclamation Act of 1977, the Texas law was amended. *See* 30 U.S.C. §§ 1201-1328 (1977); TEX. REV. CIV. STAT. ANN. art. 5920-11 (Vernon Supp. 1980). The Texas Act requires surface miners to restore the land to an equivalent of, or better than, pre-mining status after removal of minerals, with strict standards of topographical restoration and revegetation being set forth. *See*

Although the court cited *Heinatz* as precedent,[57] the *Acker* surface destruction test overlooks the *Heinatz* natural meaning and unique value criteria.[58]

Prior to 1977 the only cases dealing with the question of whether the term "minerals" included coal applied the *Acker* surface destruction test.[59] In *Williford v. Spies,*[60] the Waco Court of Civil Appeals reasoned a conveyance of "oil, gas and other minerals" did not include coal since the parties could not have intended to define "minerals" as a substance which had to be removed by surface destructive methods.[61] In *DuBois v. Jacobs,*[62] the Austin Court of Civil Appeals addressed the issue of whether reservation of an undivided one-half non-participating royalty of all oil, gas, and/or other minerals included any sand, gravel, coal, or lignite.[63] Applying reasoning similar to that relied upon in *Williford,* the court held the mineral reservation did not include any substance which must be removed by surface destructive methods, absent an express intent to the contrary.[64]

Acker was affirmed by the Texas Supreme Court[65] in the first appeal of *Reed v. Wylie.*[66] At issue in *Reed* was whether an interest in coal and lignite had been reserved to the grantor in a reservation "in and to all oil, gas and other minerals on and under the land and premises."[67] The test formulated by the court required the surface owner to prove "as of the date of the instrument being construed, if the substance near the surface had been extracted, that extraction would necessarily have consumed or depleted the surface."[68] The majority holding, therefore, required the sur-

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id.

57. Acker v. Guinn, 464 S.W.2d 348, 351 (Tex. 1971).

58. *See id.* at 352. *Compare id.* at 352 (considering relation to surface, methods of extraction, and effect of production on surface) *with* Heinatz v. Allen, 147 Tex. 512, 523, 217 S.W.2d 994, 997-98 (1949) (considering natural meaning, unique value, relation to surface, and surface destruction).

59. DuBois v. Jacobs, 551 S.W.2d 147, 148 (Tex. Civ. App.—Austin 1977, no writ); Williford v. Spies, 530 S.W.2d 127, 130 (Tex. Civ. App.—Waco 1975, no writ). *See generally* 15 Hous. L. Rev. 187, 190 (1977).

60. 530 S.W.2d 127 (Tex. Civ. App.—Waco 1975, no writ).

61. *See id.* at 130.

62. 551 S.W.2d 147 (Tex. Civ. App.—Austin 1977, no writ).

63. *Id.* at 149.

64. *See id.* at 150.

65. *See* Reed v. Wylie, 554 S.W.2d 169, 172 (Tex. 1977) (rev'd on other grounds 597 S.W.2d 743, 748 (Tex. 1980)) (holding the *Acker* rule controlled the interpretation of the instrument "as to the same substance at all depths").

66. *Id.* at 172.

67. *Id.* at 170.

68. The case was remanded to determine the depth at which the lignite was located and to prove whether extraction of the lignite would have destroyed the surface. *Id.* at 173. In

face owner to show the *only* method of extracting the minerals would have destroyed the surface.[69] The dissenting opinion argued the controlling principle of *Acker* had been the iron ore's relation to the surface rather than the surface destructive method of removal.[70] In addition, the *Acker* opinion stated the surface estate owns lignite if it lies at the surface.[71] Furthermore, *Acker* does not require the surface owner to prove the extraction method, envisioned at the time of the deed, would necessarily have destroyed the surface.[72]

Subsequent to *Reed v. Wylie I*, the Tyler Court of Civil Appeals in *Riddlesperger v. Creslenn Ranch Co.*[73] was presented with the question whether coal was included in a reservation of "all of the oil, gas, uranium, and other minerals and gravel in, on and under the land."[74] The mineral owners, relying on the *Acker* and *Reed I* surface destruction tests,[75]

Acker the Texas Supreme Court applied the surface destruction test to a form of mineral extraction wherein the surface must be destroyed and formulated a rule to be applied thereto. Acker v. Guinn, 464 S.W.2d 348, 352 (Tex. 1971). In *Reed I*, the court construed the specific and limited rule of *Acker* to be an "if" rule: if the surface must be destroyed, the minerals belong to the surface. *See* Reed v. Wylie, 554 S.W.2d 169, 172 (Tex. 1977) (rev'd 597 S.W.2d 743 (Tex. 1980)). In *Reed* one of the reasonable methods of extracting the coal in question was strip mining. *See id.* at 173-74 (Greenhill, C.J., concurring). As Justice Greenhill stated, "[i]n *Acker v. Guinn*, therefore, this Court did not decide the question of whether a substance passes as a mineral if that substance may be, but does not have to be, mined by surface destroying methods." *Id.* at 174 (Greenhill, C.J., concurring).

69. *See* Reed v. Wylie, 554 S.W.2d 169, 173 (Tex. 1977) (rev'd 597 S.W.2d 743, 747 (Tex. 1980)).

70. *See id.* at 175 (Daniel, J., dissenting). Justice Daniel's stance was adopted in the majority opinion in *Reed II*. *See* Reed v. Wylie, 597 S.W.2d 743, 747 (Tex. 1980).

71. Reed v. Wylie, 554 S.W.2d 169, 175 (Tex. 1977) (Daniel, J., dissenting) (aff'd 597 S.W.2d 743, 747 (Tex. 1980)).

72. *Id.* at 175 (Daniel, J., dissenting). In *Reed II* Justice Daniel also prevailed on this point. *See* Reed v. Wylie, 597 S.W.2d 743, 747 (Tex. 1980).

73. Riddlesperger v. Creslenn Ranch Co., 595 S.W.2d 193, 194 (Tex. Civ. App.—Tyler 1980, writ ref'd n.r.e.).

74. *See id.* at 194. A coal and lignite leaseholder had obtained a lease from the surface estate owner and at trial argued: "(1) the coal and lignite were not specifically reserved; (2) the minerals were so near the surface of the land that they could only be produced or recovered by strip mining;" and (3) the deed failed to give the grantor the right to strip mine the substances. *Id.* at 194. The mineral estate owners argued coal and lignite are minerals, and since gravel and uranium must be mined by surface destructive methods, the deed affirmatively showed the parties intention to allow the destruction of the surface estate to remove all minerals, including unnamed minerals such as coal and lignite. *Id.* at 195. After considering detailed evidence as to the location of the lignite and the methods of production capable of extracting the substances, the court stated as of the date of the deed, 71% of the lignite underlying the tract *could only* have been extracted through surface mining. *Id.* at 195.

75. *See* Reed v. Wylie, 554 S.W.2d 169, 172 (Tex. 1977) (rev'd in part 597 S.W.2d 743, 747 (Tex. 1980)); Acker v. Guinn, 464 S.W.2d 348, 352 (Tex. 1971). The *Reed* court stated:

If the instrument had specifically reserved coal and lignite, or if the conveyance had

sought to prove the deed's inclusion of gravel and uranium, substances whose removal may be surface destructive, affirmatively expressed the parties' intent to allow surface destruction when removing all reserved substances.[76] The mineral owners argued coal and lignite were, therefore, reserved mineral substances.[77] Gravel, however, was held not to be a mineral based upon the natural meaning test of *Heinatz*.[78] As such, a reservation of gravel was not considered to have any probative value in determining whether any other substance was included in the reservation of "other minerals."[79] Regarding the deed's inclusion of uranium, the mineral owners failed to prove the uranium was so near the surface that it *must* have been extracted by surface destructive methods.[80] Furthermore, even if the mineral owners had presented sufficient proof, coal could not pass as a mineral because reasonable *use* of the surface, by the uranium owners, is not determinative of *ownership* of another unnamed substance.[81]

> expressly reserved all minerals lying upon the surface or at any depth and including those minerals which may be produced by open pit or strip mining, the intention and effect of the instrument would have been clearly expressed.

Reed v. Wylie, 554 S.W.2d 169, 172 (Tex. 1977) (rev'd on other grounds 597 S.W.2d 743, 747 (Tex. 1980)). The *Acker* court stated:

> 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.

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

76. Riddlesperger v. Creslenn Ranch Co., 595 S.W.2d 193, 195 (Tex. Civ. App.—Tyler 1980, writ ref'd n.r.e.).

77. *Id.* at 195.

78. *Id.* at 197; *cf.* San Jacinto Sand Co. v. Southwestern Bell Tel. Co., 426 S.W.2d 338, 346 (Tex. Civ. App.—Houston [14th Dist.] 1968, writ ref'd n.r.e.) (sand and gravel not minerals), *cert. denied*, 393 U.S. 1027 (1969); Watkins v. Certain-Teed Prod. Corp., 231 S.W.2d 981, 985 (Tex. Civ. App.—Amarillo 1950, no writ) (sand and gravel not minerals because possessed of no peculiar value).

79. Riddlesperger v. Cresslenn Ranch Co., 595 S.W.2d 193, 197 (Tex. Civ. App.—Tyler 1980, writ ref'd n.r.e.).

80. *Id.* at 197. The court's statement adhered to the reasoning in *Reed I;* however, *Reed II* overruled the *must* requirement and allowed a showing that any reasonable method of extraction would destroy the surface to show an intent to regard a substance as part of the surface estate. Reed v. Wylie, 597 S.W.2d 743, 747 (Tex. 1980).

81. *Cf.* Riddlesperger v. Creslenn Ranch Co., 595 S.W.2d 193, 198 (Tex. Civ. App.—Tyler 1980, writ ref'd n.r.e.) (*ownership* of an unnamed substance not to be based on right of reasonable *use* of surface in removing expressly reserved substance). In *Sheffield v. Gibbs Bros. & Co.*, 596 S.W.2d 227 (Tex. Civ. App.—Houston [1st Dist.] 1980, no writ) the mandates of *Reed I* were also construed. Coal was held not to be included in a reservation of "all of the minerals and mineral rights, except sand, gravel and stone." *Id.* at 230. Relying on *Reed I* and *Acker*, the court stated the intention to include coal and lignite within the meaning of the words "minerals" must be affirmatively and fairly expressed. *Id.* at 230. A

In *Reed v. Wylie II*[82] the Texas Supreme Court squarely faced the issue of what is meant by *at the surface* for purposes of delimiting a mineral reservation.[83] The court defined *at the surface* to be "a depth shallow enough that it must have been contemplated that its removal would be by a surface destructive method."[84] The court overruled *Reed I* in part, by requiring the surface owner to establish at the time extraction was planned, rather than at the time of the deed's execution, whether any reasonable method of removing the *near surface* substance would consume, deplete, or destroy the surface.[85] Further established by *Reed II*,

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conclusive presumption arises that there was no intention to grant surface coal and lignite in a mineral grant, absent an affirmative statement to the contrary. *Id.* at 229. The court, therefore, approached a standard that coal and lignite are not "minerals" as a matter of law. *Cf. id.* at 229 (reservation of mineral rights conclusively presumes ownership of coal and lignite). The mineral estate owners argued the deed listed and excepted exclusively the substances whose removal would destroy the surface and which were to be classed part of surface ownership, that is, sand, gravel, and stone; therefore, any other minerals whose removal would destroy the surface belonged to the mineral owner. *See id.* at 229. The court, implicitly relying on a natural meaning test, rejected the mineral owners' argument and stated sand, gravel, and stone are not usually considered minerals. *Id.* at 229. An inference exists, therefore, that all other "substances," an apparent reference to matter not usually classed as minerals, whose removal would destroy the surface are included in the term "minerals." *See id.* at 229. The converse, however, is not necessarily true since all minerals whose removal would destroy the surface are not included in the mineral estate absent a showing to the contrary in the deed. *Cf. id.* at 229 (conclusive presumption arises there is no intent to include coal and lignite in a conveyance of minerals). Since a fact issue remained whether the coal and lignite in question lay so near the surface that their extraction must destroy the surface, the case was reversed and remanded. *Id.* at 230.

82. 597 S.W.2d 743 (Tex. 1980).

83. *See id.* at 744. The court was provided with the depth of the lignite and held as a matter of law the lignite was at the surface. *Id.* at 744.

84. *Id.* at 76. The court implied the parties must have had some actual or constructive notice the coal was so close to the surface it would *have* to be removed by strip mining. Notice apparently was present due to the outcropping of lignite in a gully on the tract and in the general area of the county. *See id.* at 745.

85. *Id.* at 747. The *Reed I* court required the surface owner to prove the surface would be substantially destroyed by removing *substantial* quantities of the substance. Reed v. Wylie, 554 S.W.2d 169, 172 (Tex. 1977) (rev'd on other grounds 597 S.W.2d 743, 747 (Tex. 1980)). The withdrawn and superseded opinion of *Reed I* required the surface owner to show the surface would be substantially destroyed in removing *commercially producible quantities* of a substance. Reed v. Wylie, 20 Tex. Sup. Ct. J. 327, 329 (May 25, 1977), *withdrawn and superseded,* 554 S.W.2d 169 (Tex. 1977). The *Reed II* opinion did not expressly overrule the substantial quantity test of the final *Reed I* opinion. *See* Reed v. Wylie, 597 S.W.2d 743, 746-49 (Tex. 1980). A presumption, therefore, arises that the surface owner must prove substantial destruction would occur in removing substantial quantities of a substance. Regardless of the *quantities* involved, the surface owner must prove that removal of the substance would substantially destroy the surface. *Cf.* Reed v. Wylie, 554 S.W.2d 169, 172 (Tex. 1977) (substantial destruction from removal of substantial quantities must be proven by surface owner) (rev'd on other grounds 597 S.W.2d 743, 747 (Tex. 1980)).

ownership will run to whatever depth the substance can be found once the surface owner proves ownership of the substance at or near the surface.[86] The majority rejected the lower court's requirement that to be considered at the surface the substance must outcrop on the particular tract in question, rather than merely in the immediate vicinity.[87] The court reasoned proof of an outcropping within a half mile of the Reed tract and in a creekbed on the Reed tract was sufficient to meet the *Acker* test for determining at the surface.[88]

Justice Spears, in a concurring opinion, advocated the need for a new rule allowing ownership of the substance in question to be determined from the instrument alone, rather than from ascertaining facts relative to each tract.[89] He delineated four rules,[90] stating any one would be fairer than the majority's rule because ownership of the substance could be determined as a matter of law, rather than on extrinsic evidence pertaining to characteristics of the substance and methods of its removal.[91]

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86. *Id.* at 748. This rule was taken from *Reed I* at 172. No precedent existed for so stating. For an analysis of the problems created by such a rule, see Comment, *Lignite: Surface or Mineral—The Surface Destruction Test and More*, 29 BAYLOR L. REV. 879, 898 (1977). The *Reed II* court ruled deposits within two hundred feet of the surface are near surface as a matter of law. Reed v. Wylie, 597 S.W.2d 743, 748 (Tex. 1980). The court's conclusion was based upon the fact that current technology can strip mine lignite down to that depth. *See* Reed v. Wylie, 554 S.W.2d 169, 180 (Tex. 1977) (Daniel, J., dissenting) (rev'd on other grounds 597 S.W.2d 743, 747 (Tex. 1980)). Lignite occurs in Texas to depths of five thousand feet. *See id.* at 180 (Daniel, J., dissenting).

87. Reed v. Wylie, 597 S.W.2d 743, 748 (Tex. 1980).

88. The court said the inability to see lignite on the surface would not preclude finding a substance existed at surface. *See id.* at 746, 748. The only evidence of at surface substances in *Acker* was an outcropping within one mile of the 68½ acre tract. *Id.* at 748. In *Reed II* proof of an outcropping within one half mile of the tract in question and in a creekbed therein was sufficient to establish the coal to be at surface. *See id.* at 748.

89. *See id.* at 750 (Spears, J., concurring). Justice Spears recognized at least four possible fact issues which must be resolved to determine ownership of lignite under the rationale of the majority: "(1) are there deposits in the 'reasonably immediate vicinity'; (2) are there deposits 'at or near' the surface; (3) must the deposits conform generally to the earth's surface as suggested by *Acker;* and (4) what is a 'reasonable' method of recovery?" *Id.* at 750 (Spears, J., concurring).

90. Construing minerals according to the natural meaning without regard to extraction methods and limiting the mineral owner to reasonable use of the surface is one possible rule. Reed v. Wylie, 597 S.W.2d 743, 750 (Tex. 1980) (Spears, J., concurring). Another rule would give coal and lignite to the surface owner as a matter of law, regardless of depth and method of production of the substances. *Id.* at 750 (Spears, J., concurring). A third rule would not include coal and lignite as minerals as a matter of law. *Id.* at 750-51 (Spears, J., concurring). Lastly, the mineral estate owner in a grant of "oil, gas and other minerals" would be entitled to substances extractable by underground methods only as long as he used the surface in a reasonably necessary manner. *Id.* at 751 (Spears, J., concurring). *See generally* Kuntz, *The Law Relating to Oil and Gas in Wyoming*, 3 WYO. L.J. 107, 115 (1949).

91. *See* Reed v. Wylie, 597 S.W.2d 743, 751 (Tex. 1980) (Spears, J., concurring).

Powers: Surface Ownership Includes at Surface Substances and Those Near S

Although the particular facts and circumstances of *Reed II* were addressed as an *at the surface* issue, the court reexamined *Reed I* relative to a *near surface* substance.[92] In ruling the surface owner need only prove a reasonable method, rather than the only method, of removal would destroy the surface,[93] the court expressly stated the controlling factor in a *near surface* issue is the substance's relation to the surface.[94] The court, therefore, has deflated the importance of the surface destruction test, while keeping it of crucial concern,[95] and revived the relation to the surface test espoused in *Heinatz* but overlooked in *Reed I.*[96] Left to be resolved is whether the unique value of a particular substance and/or the natural meaning of the word "minerals" are also to be revived and considered, as in *Heinatz,* in a determination of what "minerals" means in a conveyance.[97]

Relying on *Heinatz* and *Atwood,* the Arkansas Supreme Court recently balanced a local custom and usage factor[98] with the surface destruction factor against the unique value factor.[99] The Texas Supreme Court, on the other hand, has inconsistently applied the *Heinatz* criteria as a result of their decision in *Acker.*[100] *Acker* cited *Heinatz* but only in regard to

92. *See id.* at 746-48.

93. *Id.* at 747.

94. *Id.* at 747.

95. *See id.* at 747.

96. *Compare id.* at 750 (relation to surface controlling) *and* Heinatz v. Allen, 147 Tex. 512, 517-19, 217 S.W.2d 994, 995-96 (1949) ("minerals" to be determined by substance's nature, relation to the surface, value, and method of extraction) *with* Reed v. Wylie, 554 S.W.2d 169, 172 (Tex. 1977) (rev'd 597 S.W.2d 743, 747 (Tex. 1980)) (surface owner must prove removal of near surface substance would necessarily have depleted surface) *and* Acker v. Guinn, 464 S.W.2d 348, 352 (Tex. 1971) (unless contrary intention affirmatively and fairly expressed, conveyance of "minerals" does not include substances that must be removed by surface destructive methods).

97. *See* Heinatz v. Allen, 147 Tex. 512, 517-18, 217 S.W.2d 994, 997 (1949). *See generally* Comment, *Lignite: Surface or Mineral — The Surface Destruction Test and More,* 29 BAYLOR L. REV. 879, 892-94 (1977); Comment, *Lignite-Surface or Mineral? The Single Test Causes Double Trouble,* 28 BAYLOR L. REV. 287, 288-89 (1976); Comment, *Surface or Mineral: A Single Test?,* 23 BAYLOR L. REV. 407, 415 (1971).

98. The local custom and usage factor is nothing more than the natural meaning factor. *Compare* Southern Title Ins. Co. v. Oller, 595 S.W.2d 681, 684 (Ark. 1980) (considering whether at any time chalk or limestone was generally known in the area as a mineral) *with* Fleming Foundation v. Texaco, Inc., 337 S.W.2d 846, 852 (Tex. Civ. App.—Amarillo 1960, writ ref'd n.r.e.) (meaning of "minerals" entails considering the vernacular of the mining industry, the commercial world, and the landowners).

99. *See* Southern Title Ins. Co. v. Oller, 595 S.W.2d 681, 684 (Ark. 1980).

100. *Compare* Reed v. Wylie, 597 S.W.2d 743, 747 (Tex. 1980) (considering surface destruction factor and relation to surface factor) *with* Reed v. Wylie, 554 S.W.2d 169, 172 (Tex. 1977) (considering surface destruction factor) (modified 597 S.W.2d 743, 747 (Tex. 1980)) *and* Acker v. Guinn, 464 S.W.2d 348, 351 (Tex. 1971) (considering surface destruction

the latter's consideration of the natural meaning and surface destruction tests.[101] *Acker* then espoused a rule dependent upon relation to the surface and surface destruction factors,[102] disregarding *Heinatz's* natural meaning and unique value tests.[103] The *Acker* test was subsequently adhered to in both *Reed* opinions.[104] *Reed II,* therefore, bases ownership of a substance near the surface upon the method of production and whether that method will deplete, consume, or destroy the surface.[105] As considered in the *Reed I* dissent, title examiners still cannot glean from the conveying instrument who owns coal or lignite.[106] Factual analysis, therefore, is mandated on a tract by tract basis to consider depth of the lignite and mode of extraction.[107] Applying the test adopted by *Reed II,* the general intent of the parties is not considered worthy of attention, but rather the specific intent of the parties in considering a mode of production is paramount.[108] Were the courts to return to the natural meaning and unique value factors as additional concerns,[109] the general intent of the parties would be of utmost concern leading to increased faith in the law as well as certainty in land titles.[110]

Getty Oil Co. v. Jones, addressing the issue of reasonable use of the surface, held the mineral leaseholder has the right to damage the surface

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and relation to surface factor) *and* Heinatz v. Allen, 147 Tex. 512, 517-19, 217 S.W.2d 994, 997 (1949) (considering natural meaning, unique value, relation to surface, and surface destruction factors).

101. *See* Acker v. Guinn, 464 S.W.2d 348, 351 (Tex. 1971).

102. *Id.* at 352. The court held the ore was similar to limestone and gravel, which are surface estate substances, because of the ore's relation to the surface, extraction methods, and mining effects on the surface. *Id.* at 352.

103. *Id.* at 352.

104. *See* Reed v. Wylie, 597 S.W.2d 743, 747 (Tex. 1980); Reed v. Wylie, 554 S.W.2d 169, 172 (Tex. 1977) (rev'd in part 597 S.W.2d 743, 747 (Tex. 1980)).

105. *See* Reed v. Wylie, 597 S.W.2d 743, 747 (Tex. 1980).

106. *See* Reed v. Wylie, 554 S.W.2d 169, 179 (Tex. 1977) (Daniel, J., dissenting) (rev'd on other grounds 597 S.W.2d 743, 747 (Tex. 1980)).

107. *Id.* at 178 (Daniel, J., dissenting); *accord,* Kuntz, *The Law Relating to Oil and Gas in Wyoming,* 3 WYO. L.J. 107, 114 (1949) (consideration of factual setting requires title examiner to apprise himself of local folklore).

108. *Cf.* Reed v. Wylie, 597 S.W.2d 743, 747 (Tex. 1980) (ownership dependent on surface destruction in removing substance). *See also* Kuntz, *The Law Relating to Oil and Gas in Wyoming,* 3 WYO. L.J. 107, 112 (1949).

109. Heinatz v. Allen, 147 Tex. 512, 517, 217 S.W.2d 994, 997 (1949) (unique value determined by special value of substance apart from land); Fleming Foundation v. Texaco, Inc., 337 S.W.2d 846, 852 (Tex. Civ. App.—Amarillo 1960, writ ref'd n.r.e.) (natural meaning determined by mining world, commercial world, and landowners).

110. Indeed, in *Reed I* the court noted mineral ores, coal, and lignite would ordinarily be reserved to the mineral estate in a conveyance of "oil, gas and other minerals," but that *Acker* mandated consideration of the surface destruction test. *See* Reed v. Wylie, 554 S.W.2d 169, 172 (Tex. 1977) (rev'd on other grounds 597 S.W.2d 743, 747 (Tex. 1980)).

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to extract minerals, if there is only one available manner of use of the surface.[111] It has been advocated that strip mining is a reasonably necessary use of the surface when no alternative exists.[112] An additional concern is presented, however, by the underlying rationale of *Acker* that upon a severance of minerals from his tract the surface owner does not normally intend conveying the right to destroy the surface.[113] By affirming the *Acker* rationale,[114] the Texas Supreme Court has failed to distinguish affirmatively between determination of ownership of minerals and reasonable use of the surface by the mineral estate.[115] *Getty* and *Sun Oil* applied the surface destruction test in interpreting reasonably necessary use of the surface after ownership had been established; whereas, *Acker, Reed I,* and *Reed II* determined ownership based upon methods of production, such as surface destruction.[116] One commentator has indicated the court in *Reed I,* rather than limiting the implied easements in the conveyance of a substance, limited the conveyance of the substance, if extraction of the substance required surface destructive methods.[117] The decision in *Reed II* reaches a substantially identical conclusion.[118] *Reed II,* therefore, impliedly treats ownership of minerals and reasonable use of the surface as interwoven and integrated issues.[119]

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111. Getty Oil Co. v. Jones, 470 S.W.2d 618, 622 (Tex. 1971).

112. *See* Martin v. Kentucky Oak Mining Co., 429 S.W.2d 395, 398-99 (Ky. 1968); Comment, *Is Coal Included in a Grant Reservation of "Oil, Gas, or Other Minerals"?*, 30 Sw. L.J. 481, 498 (1976). *But see* Kuntz, *The Law Relating to Oil and Gas in Wyoming,* 3 Wyo. L.J. 107, 115 (1949) (strip mining an unreasonable use entitling surface owner to compensation); *cf.* Smith v. Moore, 474 P.2d 794, 795 (Colo. 1970) (en banc) (absent expression to contrary, mineral estate may not injure or destroy surface).

113. *See* Acker v. Guinn, 464 S.W.2d 348, 352 (Tex. 1971). The *Acker* court failed to discuss what operations would be considered destructive of the surface. *See id.* at 352.

114. *See id.* at 352.

115. *Cf.* Reed v. Wylie, 597 S.W.2d 743, 747 (Tex. 1980) (not addressing issue); Reed v. Wylie, 554 S.W.2d 169, 172 (Tex. 1977) (dispensing with issue of ownership versus use because *Acker* did not address it) (rev'd on other grounds 597 S.W.2d 743, 747 (Tex. 1980)).

116. *Compare* Reed v. Wylie, 597 S.W.2d 743, 747 (Tex. 1980) (ownership dependent on effect of reasonable extraction methods upon surface) *and* Acker v. Guinn, 464 S.W.2d 348, 352 (Tex. 1971) (ownership extended to substances whose removal must destroy surface) *with* Sun Oil Co. v. Whitaker, 483 S.W.2d 808, 810-11 (Tex. 1972) (reasonable use of surface when no reasonable alternative existed) *and* Getty Oil Co. v. Jones, 470 S.W.2d 618, 622 (Tex. 1971) (unreasonable use of surface when surface rights not given due regard).

117. Comment, *Lignite: Surface or Mineral—The Surface Destruction Test and More,* 29 Baylor L. Rev. 879, 894-95 (1977); *see* Reed v. Wylie, 554 S.W.2d 169, 172 (Tex. 1977) (rev'd on other grounds 597 S.W.2d 743, 747 (Tex. 1980)).

118. *See* Reed v. Wylie, 597 S.W.2d 743, 747 (Tex. 1980).

119. *Compare id.* at 747 (surface ownership includes substances whose removal involves destruction of surface by any reasonable method) *and* Reed v. Wylie, 554 S.W.2d 169, 172 (Tex. 1977) (surface ownership includes substance whose removal necessarily involves surface destruction) (rev'd 597 S.W.2d 743, 747 (Tex. 1980)) *and* Acker v. Guinn, 464 S.W.2d

The need for the Texas Supreme Court to expressly state whether ownership and reasonable use are integral or separate issues is manifested in the holding of *Riddlesperger v. Creslenn Ranch Co.* The *Riddlesperger* court attempted to follow *Reed I* and *Acker* but was unable to discern the implied holding in *Reed I* that ownership and use are integral.[120] The *Riddlesperger* rationale, distinguishing mineral ownership from reasonable use of the surface, was correct.[121] Furthermore, had the *Riddlesperger* court applied the natural meaning factor of *Heinatz* to coal and lignite, as it did to gravel,[122] the court would have found coal and lignite to be minerals and then would have mandated the mineral estate reasonably use the surface estate in the extraction of the coal.[123] Negotiations between the parties and the purchase of the right to strip mine, if underground mining was neither feasible nor reasonable, would aid in preventing unwanted or unnecessary surface damage.[124]

Another dilemna created by the *Reed II* opinion's failure to distinguish

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348, 352 (Tex. 1971) (a substance which must be removed by surface destruction is part of surface ownership) *with* Sun Oil Co. v. Whitaker, 483 S.W.2d 808, 811-12 (Tex. 1972) (when using surface mineral owner need not consider alternatives available on adjacent land) *and* Getty Oil Co. v. Jones, 470 S.W.2d 618, 622 (Tex. 1971) (mineral owner must use reasonably necessary methods to carry out purpose of mineral conveyance).

120. *Compare* Riddlesperger v. Creslenn Ranch Co., 595 S.W.2d 193, 198 (Tex. Civ. App.—Tyler 1980, writ ref'd n.r.e.) (simply because a reasonable use of the surface in extracting an expressly reserved mineral would destroy surface does not mean ownership of an unnamed substance is based on reasonable use of the expressly reserved mineral) *with* Reed v. Wylie, 597 S.W.2d 743, 747 (Tex. 1980) (surface ownership includes near surface substances whose removal destroys surface by any reasonable method) *and* Reed v. Wylie, 554 S.W.2d 169, 172 (Tex. 1977) (surface ownership includes near surface substances whose removal necessarily destroys surface) (rev'd 597 S.W.2d 743, 744 (Tex. 1980)).

121. *Cf.* Sun Oil Co. v. Whitaker, 483 S.W.2d 808, 811-12 (Tex. 1972) (determining reasonable use of surface *after* ownership had been established); Getty Oil Co. v. Jones, 470 S.W.2d 618, 622 (Tex. 1971) (determining reasonable use of surface when ownership not at issue).

122. Riddlesperger v. Creslenn Ranch Co., 595 S.W.2d 193, 197 (Tex. Civ. App.—Tyler 1980, writ ref'd n.r.e.).

123. *Cf.* Getty Oil Co. v. Jones, 470 S.W.2d 618, 622 (Tex. 1971) (mineral owner must use reasonably necessary methods to carry out purpose of mineral ownership).

124. *Cf.* Sun Oil Co. v. Whitaker, 483 S.W.2d 808, 811-12 (Tex. 1972) (mineral owner justified in using surface estate as reasonably necessary to carry out mineral lease purposes when no reasonable alternative exists); Getty Oil Co. v. Jones, 470 S.W.2d 618, 622 (Tex. 1971) (mineral owner must reasonably use surface with due regard for rights of surface owner). Because the mineral owner must comply with rigid standards of land restoration in accordance with the Texas Surface Mining and Reclamation Act, the interests of the surface owner in preserving the surface are met. *See* TEX. REV. CIV. STAT. ANN. art. 5920-11 (Vernon Supp. 1980). One commentator has stated the mineral owner should reimburse the surface owner for the fair market rental value of the property from the time surface mining starts until reclamation is accomplished. *See* Comment, *Is Coal Included in a Grant or Reservation of "Oil, Gas, or Other Minerals"?*, 30 Sw. L.J. 481, 504 (1976).

between ownership and reasonable use is the mineral owner's loss of deep-basin lignite from tracts having near surface coal deposits.[125] Apparently, unconsidered by the Texas Supreme Court in both *Reed* opinions was the potential for production of deep-basin lignite by *in situ* gasification methods presently employed by the Soviet Union.[126] It is doubtful deep-basin lignite will be mined in the near future due to high costs;[127] however, the country's need for energy independence mandates a rule of law allowing production of deep-basin coal irrespective of ownership of near surface coal.[128] One commentator has stated that whether deep-basin lignite is included under "oil, gas, and other minerals" conveyances should be decided by a separate rule, rather than by one developed to determine ownership of near surface lignite.[129]

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125. *Cf.* Reed v. Wylie, 597 S.W.2d 743, 748 (Tex. 1980) (once surface owner establishes ownership of at surface or near surface substances, he owns lignite, coal or ore at whatever depth it may be found); Reed v. Wylie, 554 S.W.2d 169, 172 (Tex. 1977) (once instrument is construed to give surface estate near surface substances, the particular substance at whatever depth, is not a mineral) (aff'd 597 S.W.2d 743, 748 (Tex. 1980)). Lignite is deposited near the surface and in deep-basin deposits throughout the Texas Gulf Coast. Comment, *Is Coal Included in a Grant or Reservation of "Oil, Gas, or Other Minerals"?*, 30 Sw. L.J. 481, 492 (1976). The most prevelant deep-basin lignites are situated in Bastrop, Fayette, Houston, Lee, Leon, and Madison Counties. *Id.* at 492.

126. *See* Edgar, *The Potential of in Situ Gasification for Texas Lignite*, in PROCEEDINGS, GULF COAST LIGNITE CONFERENCE: GEOLOGY, UTILIZATION, AND ENVIRONMENTAL ASPECTS 131, 137 (W. Kaiser ed. 1978). A geometric pattern of vertical bores spaced 50 to 100 feet apart or long horizontal boreholes tap the deposit seam. Gasification occurs between the boreholes, and offtake holes bring the deep coal to surface. *Id.* at 132.

> Underground coal gasification (UCG) has as its objective the recovery of the energetic and chemical content of coal without mining. A gaseous mixture composed of nitrogen, oxygen, steam and carbon dioxide in variable proportions is introduced in a coal seam prepared for gasification: combustion and gasification reactions occur in situ. The products carbon monoxide, carbon dioxide, hydrogen, water, vapor, methane, nitrogen, and other hydrocarbons are obtained in a readily usable form for the production of electric power or the manufacture of chemicals.

Id. at 131.

127. Mintz, *Strip Mining: A Policy Evaluation*, 5 ECOLOGY L.Q. 461, 472-77 (1976). The average cost differential "between surface and underground coal mining occurring in Central U.S. and Appalachia are in the range of $3.00 to $5.00 per ton." *Id.* at 473. The total savings from surface mining coal rather than by other methods may increase by two-thirds in the next decade, since the higher underground mining labor costs "increase at a higher rate than capital and material costs." *Id.* at 476-77.

128. PRESIDENT'S COMM'N ON COAL, ACCEPTABLE WAYS TO HASTEN THE SUBSTITUTION OF COAL FOR OIL: AN INTERIM REPORT OF THE PRESIDENT'S COMM'N ON COAL (1979). The commission urges the reconversion of coal-capable electrical boilers now burning oil and gas to burn coal. *Id.* at 7. *See also* Brownell, *Energy Independence — The Return to Coal, Constraints on Production and Utilization of Our Most Abundant National Energy Resource*, 11 ST. MARY'S L.J. 677, 679 (1980).

129. 15 HOUS. L. REV. 187, 198 (1977).

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Texas lignite resources capable of being extracted by surface mining have been estimated at 10.3 billion tons, the equivalent of 28 billion barrels of oil in BTU output.[130] There may be up to 100 billion tons of deep-basin lignite in Texas — equivalent to 277 billion barrels of oil in BTU output.[131] In addition, Texas has been ranked third behind New Mexico and Wyoming in uranium reserves.[132] The need, therefore, for a uniform, easily applied rule of construction to effectuate the intent of the parties in a conveyance of "minerals" cries out. Furthermore, a revival of the natural meaning and unique value tests in addition to consideration of the surface destruction and relation to the surface tests, would classify many substances, particularly coal and lignite, as minerals, as a matter of law. Ownership should not be determined by methods of production.[133] To the contrary, ownership should be determined as a matter of law without tract by tract factual determinations.[134] Once ownership is established, the determination of whether a reasonable method of extracting the substances is destructive of the surface can be made through the reasonable use and accomodation of estates doctrines of *Getty* and *Sun Oil.*[135] As demonstrated by *Riddlesperger,* the Texas appellate courts are involved in overburdening factual determinations which must be construed in light of perplexing law.[136] The Supreme Court of Texas has yet to establish an uncomplicated test to determine mineral ownership which

130. Brummett & O'Donovan, *Technology and Economics of Mining Texas Lignite,* in PROCEEDINGS, GULF COAST LIGNITE CONFERENCE: GEOLOGY, UTILIZATION, AND ENVIRONMENTAL ASPECTS 84 (W. Kaiser ed. 1978); W. KAISER, TEXAS LIGNITE: NEAR SURFACE AND DEEP BASIN RESOURCES 3 (1974) (Bureau of Economic Geology, University of Texas at Austin, Report of Investigations No. 79).

131. W. KAISER, TEXAS LIGNITE: NEAR SURFACE AND DEEP BASIS RESOURCES 3 (1974) (Bureau of Economic Geology, University of Texas at Austin, Report of Investigations No. 79). *See also* Fisher, *Texas Energy Reserves and Resources,* 52 TEXAS BUS. REV. 145, 148 (1978).

132. U.S. ENERGY RESEARCH AND DEV. ADMINISTRATION, STATISTICAL DATA OF THE URANIUM INDUSTRY 47 (1975) (Grand Junction, Colo.).

133. *But see* Reed v. Wylie, 597 S.W.2d 743, 751 (Tex. 1980) (Spears, J., concurring).

134. *Cf.* Kuntz, *The Law Relating to Oil and Gas in Wyoming,* 3 WYO. L.J. 107, 114 (1949) (admonishing against requiring title examiners to inquire into folklore of area in question).

135. *See* Sun Oil Co. v. Whitaker, 483 S.W.2d 808, 811 (Tex. 1972); Getty Oil Co. v. Jones, 470 S.W.2d 618, 622 (Tex. 1971).

136. *See* Sheffield v. Gibbs Bros. & Co., 596 S.W.2d 227, 230 (Tex. Civ. App.—Houston [1st Dist.] 1980, no writ); Riddlesperger v. Creslenn Ranch Co., 595 S.W.2d 193, 197 (Tex. Civ. App.—Tyler 1980, writ ref'd n.r.e.). A recent Texas civil appeals court has found the holding in *Reed II* is retroactive. *See* Moser v. U.S. Steel Corp., 601 S.W.2d 731, 734 (Tex. Civ. App.—Eastland 1980, no writ).

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