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Title to Substances Determined to Be Minerals as a Matter of Law is Held by Owner of the Mineral Estate.

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MINES AND MINERALS—Title to Minerals—Title to Substances Determined To Be Minerals as a Matter of Law Is Held by Owner of the Mineral Estate.

Moser v. United States Steel Corp.
26 Tex. Sup. Ct. J. 427 (June 8, 1983).

In 1949, the Mosers' predecessors in title acquired a 6.77-acre tract in Live Oak County from Gefferts' predecessors.[1] The conveying deed expressly reserved all of the "oil, gas, and other minerals" in favor of the grantors.[2] When uranium was later discovered beneath the surface, the Mosers sued to establish title to the substance, contending that it was not one of the "other minerals" reserved for the mineral estate.[3] The trial court held that the uranium belonged to the mineral estate, and the court of civil appeals affirmed.[4] The Mosers perfected an appeal to the Texas

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1. *See* Moser v. United States Steel Corp., 601 S.W.2d 731, 733 (Tex. Civ. App.—Eastland 1980), *aff'd,* 26 Tex. Sup. Ct. J. 427 (June 8, 1983). Margaret and William Moser are the executors and trustees of the Catherine Lyne estate. *See id.* at 732. Defendants include twelve members of the Geffert family, the U.S. Steel Corporation (lessee), the N.M. Uranium Corporation (lessee), and the Atlantic Richfield Company (overriding royalty). *See id.* at 732.

2. *See* Moser v. United States Steel Corp., 26 Tex. Sup. Ct. J. 427, 427 (June 8, 1983). The 1949 deed conveying the land in question contained language reserving "[A]ll of the oil, gas, and other minerals of every kind and character, in, on, and under that may be produced from said tract of land." *Id.* at 427.

3. *See id.* at 427. The Mosers, however, leased a mineral interest that they had reserved in a 6.42-acre tract conveyed to the Gefferts' predecessors in exchange for the 6.77-acre tract at issue. *See id.* at 427. The deed conveying the 6.42-acre tract contained the identical language used in the deed reserving the minerals of the 6.77-acre tract. *See id.* at 427.

4. *See* Moser v. United States Steel Corp., 601 S.W.2d 731, 732 (Tex. Civ. App.—Eastland 1980), *aff'd,* 26 Tex. Sup. Ct. J. 427, 430 (June 8, 1983). At trial the issues were decided upon the surface destruction test enunciated in Acker v. Guinn, 464 S.W.2d 348, 352 (Tex. 1971) and modified in Reed v. Wylie, 554 S.W.2d 169, 172 (Tex. 1977) (Reed I). *See* Moser v. United States Steel Corp., 601 S.W.2d 731, 732 (Tex. Civ. App.—Eastland 1980), *aff'd,* 26 Tex. Sup. Ct. J. 427 (June 8, 1983). The surface destruction test, announced by the *Acker* court, is that if the minerals lying near the surface could be mined only with destruction to the surface, then the mineral belonged to the surface estate. *See* Acker v. Guinn, 464 S.W.2d 348, 352 (Tex. 1971). The court, however, in *Reed I* modified the *Acker* test by placing the burden upon the surface owner to show that "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 land surface." *See* Reed v. Wylie, 554 S.W.2d 169, 172 (Tex. 1977). Although the Eastland Court of Appeals affirmed the trial court's decision in *Moser,* it applied a modified version of the surface destruction test. This modification was announced in Reed v. Wylie, 597 S.W.2d 743, 747 (Tex. 1980) (*Reed II),* while

Supreme Court.[5] Held—*Affirmed.*[6] Title to substances determined to be minerals as a matter of law is held by the owner of the mineral estate.[7]

By 1900 severing mineral interests from a fee estate had become widely accepted.[8] This division, accomplished by grant or reservation, results in two distinct estates, each with "separate corporeal hereditaments . . . and all the rights incident to separate ownership."[9] Early in the development of this practice the mineral owner asserted his position of dominance by exercising his right to ingress and egress, to production of the minerals, and to reasonable use of the surface[10] to extract the minerals.[11]

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the Eastland court was in session hearing the *Moser* appeal. *See* Moser v. United States Steel Corp., 26 Tex. Sup. Ct. J. 427, 427 (June 8, 1983). The modified version of the test altered the measurement date "as of the date of the instrument" to a measurement at the time of the conveyance or thereafter. *See* Reed v. Wylie, 597 S.W.2d 743, 747 (Tex. 1980) (*Reed II*). Even though the Eastland court applied the modified version of the *Acker* test, it arrived at the same conclusion as the trial court; the uranium located near the surface could be extracted without causing substantial harm to the surface. *See* Moser v. United States Steel Corp., 601 S.W.2d 731, 734 (Tex. Civ. App.—Eastland 1980), *aff'd,* 26 Tex. Sup. Ct. J. 427 (June 8, 1983).

5. Moser v. United States Steel Corp., 26 Tex. Sup. Ct. J. 427, 427 (June 8, 1983).

6. *See id.* at 430. The court held that the Gefferts (appellees) were the owners of the uranium "as a matter of law." *Id.* at 430.

7. *See id.* at 428.

8. *See, e.g.,* Del Monte Mining Co. v. Last Chance Mining Co., 171 U.S. 55, 60 (1898) (at common law fee owner allowed to convey his interest in minerals); Delaware, L. & W.R. Co. v. Sanderson, 1 A. 394, 397 (Del. 1885) (severance of minerals from underlying strata created separate ownership from surface); Sanderson v. City of Scranton, 105 Pa. 469, 474 (1884) (divided ownership occurred from severance of minerals). *See generally* Lopez, *Upstairs/Downstairs: Conflicts Between Surface and Mineral Owners,* 26 ROCKY MTN. MIN. L. INST. 995, 997 (1980).

9. *See* Smith v. Jones, 60 P. 1104, 1106 (Utah 1900); 1 E. KUNTZ, A TREATISE ON THE LAW OF OIL & GAS 77 (1962). The court in *Smith v. Jones* held that there may be double ownership, by separate titles, "each having a fee or lesser estate in his respective part." *See* Smith v. Jones, 60 P. 1104, 1106 (Utah 1900). Since there were rights incident to separate ownership, this meant that "the surface land . . . may be partitioned the same as when there is no mineral underlying it." *Id.* at 1106.

10. *See* Warren Petroleum Corp. v. Monzingo, 157 Tex. 479, 481, 304 S.W.2d 362, 363 (1957) (reasonable use interpreted not to mean surface restoration); Harrie v. Currie, 142 Tex. 93, 99, 176 S.W.2d 302, 305 (1943) (delay rentals belong to mineral estate based on right to use surface to extract minerals); Broyles, *The Right to Mine Texas Uranium and Coal By Surface Methods: Acker v. Guinn Revisited,* 13 HOUS. L. REV. 451, 453 (1976) (mineral owner's implied right to use surface as reasonably necessary).

11. *See* Sun Oil Co. v. Whitaker, 483 S.W.2d 808, 810 (Tex. 1972) (lessee has implied grant of free use of part of land necessary to extract minerals); Getty Oil Co. v. Jones, 470 S.W.2d 618, 622 (Tex. 1971) (lessee has right to use surface regardless of damage, where only one method is available to extract minerals); Humble Oil & Ref. Co. v. Williams, 420 S.W.2d 133, 134 (Tex. 1967) (lessee's right to use surface dictated by terms of lease); Warren Petroleum Corp. v. Monzingo, 157 Tex. 479, 482, 304 S.W.2d 362, 363 (1957) (absent negligence, lessee has no implied duty to pay for damages to surface); Warren Petroleum Corp. v.

Nonetheless, the interest of the surface owner in protecting his property from destruction continuously competed with the rights of the mineral owner.[12] Whenever the courts dealt with this conflict, mineral owners were usually held liable for their negligence in causing injury to the surface.[13] Initially negligence was found whenever mineral owners had exceeded their rights to use the surface reasonably in extracting the minerals.[14] Later in *Getty Oil v. Jones,*[15] however, negligence was measured in terms of how much the mineral owner had interfered with the surface owner's rights to use the surface.[16] Moreover, the courts closely monitored the stress placed upon surface estates by strip mining; in trying to balance the competing interest, they closely scrutinized instruments that did not grant or reserve minerals specifically by name.[17] Those situations where mineral rights were granted or reserved by the term "other minerals" were among the ones often litigated as to title and damages.[18]

Martin, 153 Tex. 465, 469, 271 S.W.2d 410, 413 (1954) (oil lessee under no duty to protect property of subsequent surface lessee); Lomax v. Henderson, 559 S.W.2d 466, 467 (Tex. Civ. App.—Waco 1977, writ ref'd n.r.e.) (right of mineral owner to use surface estate based upon right to enforce and enjoy mineral estate).

12. *See, e.g.,* Smith v. Moore, 474 P.2d 794, 795 (Colo. 1970) (mineral owner defending rights in deed and surface owner defending against destruction of estate); Martin v. Kentucky Oak Mining Co., 429 S.W.2d 395, 396 (Ky. 1968) (surface owner seeking to deny lessee-operator right to strip or auger mine); Skivolocki v. East Ohio Gas Co., 313 N.E.2d 374, 376 (Ohio 1974) (mineral owner asserting right to strip mine coal and surface owner defending right to subjacent support).

13. *See* Lopez, *Upstairs/Downstairs: Conflicts Between Surface and Mineral Owners,* 26 ROCKY MTN. MIN. L. INST. 995, 1007 (1980). The author indicates that surface owners' suits based upon nuisances, breaches of duty imposed by regulations and statutes, and strict liability have been less successful than suits brought on grounds of negligence. *See id.* at 1007 n.44.

14. *See* Humble Oil & Ref. Co. v. Williams, 420 S.W.2d 133, 134-35 (Tex. 1967) (mineral lessee's construction and use of road held not to exceed reasonable use); General Crude Oil Co. v. Aiken, 162 Tex. 104, 109, 344 S.W.2d 668, 673 (1961) (mineral owner held negligent for method of salt water disposal that led to pollution of surface owner's fresh water supply); Brown v. Lundell, 162 Tex. 84, 95, 344 S.W.2d 863, 866 (1961) (lessee found negligent in disposal of salt water pollutants).

15. 470 S.W.2d 618 (Tex. 1971).

16. *See id.* at 623.

17. *See* Lopez, *Upstairs/Downstairs: Conflicts Between Surface and Mineral Owners,* 26 ROCKY MTN. MIN. L. INST. 995, 1002 (1980); *see also* Acker v. Guinn, 464 S.W.2d 348, 350 (Tex. 1971) (court gave close scrutiny to term "other minerals"); Zeppa v. Houston Oil Co., 113 S.W.2d 612, 614 (Tex. Civ. App.—Texarkana 1938, writ ref'd n.r.e.) (court considered entire instrument to ascertain intent of parties). *See generally* Ferguson, *Severed Surface and Mineral Estates—Right to Use, Damage or Destroy the Surface to Recover Minerals,* 19 ROCKY MTN. MIN. L. INST. 411, 418-19 (1974).

18. *See* Reed v. Wylie, 597 S.W.2d 743, 747 (Tex. 1980) (modification of *Acker* surface destruction test); Reed v. Wylie, 554 S.W.2d 169, 172 (Tex. 1977) (extraction standard based on date instrument executed severing estates); Acker v. Guinn, 464 S.W.2d 348, 352 (Tex.

Over the past fifty years, Texas courts have employed several approaches in construing the term "other minerals" in order to establish title to unnamed substances.[19] The earlier cases reflect the courts' attempts to define the term either by considering the scientific and technical definition of the substance itself or by considering the ordinary meaning of the term "mineral."[20] In another line of cases,[21] the courts applied or rejected the doctrine of *ejusdem generis,* wherein "an enumeration of specific things followed by some more general word or phrase . . . such general word or phrase is to be held to refer to things of the same kind."[22] In some cases before 1971, however, and in all cases thereafter, substances that would cause damage to the surface when extracted were held to belong to the surface estate.[23] To some extent, the courts also relied upon the general

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1971) (title determined by effects of extraction upon surface estate); Southland Royalty Co. v. Pan American Petroleum Corp., 378 S.W.2d 50, 54 (Tex. 1964) ("other minerals" determined by examining minerals named specifically in instrument).

19. *See* Acker v. Guinn, 464 S.W.2d 348, 352 (Tex. 1971) (court uses surface destruction test to determine title to minerals); Heinatz v. Allen, 147 Tex. 512, 517, 217 S.W.2d 994, 997 (1949) (scientific definition rejected as test to determine whether substance a mineral); Atwood v. Rodman, 355 S.W.2d 206, 216 (Tex. Civ. App.—El Paso 1962, writ ref'd n.r.e.) (limestone, caliche, and surface shale construed according to environment at time of execution); Cain v. Neumann, 316 S.W.2d 915, 922 (Tex. Civ. App.—San Antonio 1958, no writ) (rejection of *ejusdem generis* as method to determine whether substance is mineral). The *Acker* court also focused upon application of Professor Eugene Kuntz's theory that general intent should govern the construction of the term "other minerals." *See* Acker v. Guinn, 464 S.W.2d 348, 352 (Tex. 1971) (general intent of parties to sever mineral and surface estates); Comment, *Lignite: Surface or Mineral—The Surface Destruction Test and More,* 29 BAYLOR L. REV. 879, 882 (1977) (acknowledging need for uniform approach to determine title to substances). So varied were the approaches to determining title that Professors Williams and Meyers saw the need for a legal description of the term "mineral" which could be generally applied in any instrument. *See* 1 H. WILLIAMS & C. MEYERS, OIL AND GAS LAW § 219 (1975).

20. *See, e.g.,* Heinatz v. Allen, 147 Tex. 512, 517, 217 S.W.2d 994, 997 (1949) (rare and exceptional substances at issue held to be minerals); Psencik v. Wessels, 205 S.W.2d 658, 659 (Tex. Civ. App.—Austin 1947, writ ref'd n.r.e) (term "minerals" too broad to be used in a technical sense); Union Sulphur Co. v. Texas Gulf Sulphur Co., 42 S.W.2d 182, 188 (Tex. Civ. App.—Austin 1931, writ ref'd) (solid sulphur deposits not included in reservation).

21. *Compare* Southland Royalty Co. v. Pan American Petroleum Corp., 378 S.W.2d 50, 54 (Tex. 1964) (rejection of *ejusdem generis* in construing title to minerals) *and* Rio Bravo Oil Co. v. McEntire, 128 Tex. 124, 138, 95 S.W.2d 381, 388 (1936) (*ejusdem generis* not considered as method to determine title) *with* Anderson & Kerr Drilling Co. v. Bruhlmeyer, 134 Tex. 574, 582, 136 S.W.2d 800, 805 (1940) (*ejusdem generis* only an aid in interpreting deed) *and* Right of Way Oil Co. v. Gladys City Oil, Gas & Mfg. Co., 106 Tex. 94, 103, 157 S.W. 737, 739-40 (1913) (court upheld *ejusdem generis* in construing title to minerals).

22. Stevenson v. Record Pub. Co. 107 S.W.2d 462, 464 (Tex. Civ. App.—Eastland 1937, writ ref'd).

23. *See* Reed v. Wylie, 597 S.W.2d 743, 750-51 (Tex. 1980) (lignite, coal, or iron near surface retained by surface estate if extraction would damage surface); Reed v. Wylie, 554 S.W.2d 169, 172 (Tex. 1977) (coal and lignite not conveyed by oil, gas, and "other mineral"

intentions of the parties at the time of the making of the instrument in deciding the issue of title.[24] This lack of judicial uniformity resulted in uncertainty of title to minerals and impeded both conservation and development of the natural resources of this state.[25]

The Texas Supreme Court's first major departure from its traditional method of determining title by looking to the character of the substance itself came in 1971 in *Acker v. Guinn.*[26] This case presented the question

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provision); Acker v. Guinn, 464 S.W.2d 348, 353 (Tex. 1971) (iron ore held by surface estate if extraction would damage surface); Williford v. Spies, 530 S.W.2d 127, 131 (Tex. Civ. App.—Waco 1975, no writ) (coal and lignite excluded from mineral reservation when either could be removed only by open pit or strip mining methods); *see also* Atwood v. Rodman, 355 S.W.2d 206, 208 (Tex. Civ. App.—El Paso 1962, writ ref'd n.r.e.) (sand, clay, limestone, and caliche recovered by surface owner because removal possible only with surface damage); Elridge v. Edmondson, 252 S.W.2d 605, 607-08 (Tex. Civ. App.—Eastland 1952, writ ref'd n.r.e.) (destruction of surface a factor in determining whether limestone was reserved in conveyance of surface). The two *Reed* cases, noted above, were heard by the same court, initially in 1977 and again in 1980, after the substance at issue was accurately located. *See* Reed v. Wylie, 597 S.W.2d 743, 747 (Tex. 1980).

24. *See* Acker v. Guinn, 464 S.W.2d 348, 352 (Tex. 1971) (adopted Professor Kuntz's theory of general intent in construing implied grant). Professor Kuntz realized the nonexistence of a specific intent within the instrument and suggested that the courts should examine the instrument closely to determine the general intent of the parties. *See* Kuntz, *The Law Relating to Oil and Gas in Wyoming,* 3 WYO. L.J. 107, 112 (1949). He stated that this general intent was dependent upon the intended manner of enjoyment anticipated by the parties and further reasoned that, in the absence of specific intent, the parties' general intention to sever all substances of value should be the basis upon which all minerals of value could be included as having been granted or reserved when using the term "other minerals." *See id.* at 112-13; *see also* Comment, *Lignite—Surface or Mineral? The Single Test Causes Double Trouble,* 28 BAYLOR L. REV. 287, 293 (1976) (suggesting courts should initially identify all "legally cognizable" minerals which would pass to mineral estate, subject to mineral owners' liability for damages caused by extraction).

25. *See* Comment, *Lignite: Surface or Mineral—The Surface Destruction Test and More,* 29 BAYLOR L. REV. 879, 884-85 (1977). The Texas Constitution mandates that "[T]he conservation and development of all the natural resources of this state . . . are each and all hereby declared public rights and duties. . . ." TEX. CONST. art. XVI, § 59.

26. 464 S.W.2d 348 (Tex. 1971); *see* Broyles, *The Right to Mine Texas Uranium and Coal By Surface Methods: Acker v. Guinn Revisited,* 13 HOUS. L. REV. 451, 459-62 (1976). Caselaw prior to *Acker* approached the matter of title to minerals by looking to the substances and minerals themselves. *See, e.g.,* Heinatz v. Allen, 147 Tex. 512, 517, 217 S.W.2d 994, 997 (1949) (minerals viewed in accordance with their potential value as rare and exceptional); Fleming Found. v. Texaco, 337 S.W.2d 846, 850 (Tex. Civ. App.—Amarillo 1960, writ ref'd n.r.e.) (substance not mineral based on ordinary and natural meaning of term "mineral"); Psencik v. Wessels, 205 S.W.2d 658, 659 (Tex. Civ. App.—Austin 1947, writ ref'd n.r.e.) (sand and gravel not mineral in ordinary sense of term "mineral"). In *Acker,* however, the effects of extraction upon the surface became the test of title; henceforth, the issues of ownership of the substance and the issue of surface use became intertwined, leading to complexity and confusion. *See* Lopez, *Upstairs/Downstairs: Conflicts Between Surface and Mineral Owners,* 26 ROCKY MTN. MIN. L. INST. 995, 1015 (1980); Comment, *The Need for Certainty in Ownership of Minerals: Coal, Lignite, "And Other Minerals,"* 22 S. TEXAS

of whether iron ore was included in a grant of "other minerals."[27] The court, rather than using one of the usual tests, considered instead the damage that extraction of the substance would cause to the surface.[28] The outcome of this approach was the "single" or "surface destruction" test:[29] "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."[30] When applied, the test meant that any substance which could not be extracted without damage to the surface was deemed to belong to the surface owner.[31]

In 1977, the Texas Supreme Court in *Reed v. Wylie (Reed I)*[32] reaffirmed the *Acker* test and expanded the holding announced in that decision.[33]

L.J. 287, 306 (1982). The numerous modifictions made to *Reed I* in *Reed II* illustrate the degree of the complexity involved when the two issues are intermingled. *Compare* Reed v. Wylie, 554 S.W.2d 169, 172-73 (Tex. 1977) (*Reed I)* (application of the surface destruction test based upon extraction at time deed executed) *with* Reed v. Wylie, 597 S.W.2d 743, 750-52 (Tex. 1980) (Spears, J., concurring) (*Reed II)* (application of surface destruction test consistent with modifications made to *Acker* test in *Reed I).*

27. *See* Acker v. Guinn, 464 S.W.2d 348, 349 (Tex. 1971). The deed purported to convey a mineral interest in "an undivided ½ interest in and to all of the oil, gas, and other minerals in and under, and that may be produced from . . . [an 86-½-acre tract]." *Id.* at 349.

28. *See id.* at 351. The court admitted that the iron ore in Cherokee County had commercial value, because it had been used as a foundation in road construction. *See id.* at 351. The court referred in part to an English case, Hext v. Gill, L.R. 7 Ch. 699, 17 E.R.C. 429, 429 (1872), which held that clay had been conveyed by the instrument, but the court denied the owner the right to extract it because of the damage which extraction might cause to the surface. *See id.* at 351. The *Acker* court also pointed to Professor Kuntz's general intent theory as a basis for determining conveyance. *See id.* at 352 (citing Kuntz, *The Law Relating to Oil and Gas in Wyoming,* 3 WYO. L.J. 107, 112 (1949)).

29. *See* Goodrum, *Beneath The Surface-Destruction Test: The Dialectic of Intention and Policy,* 56 TEXAS L. REV. 99, 103 (1977); Comment, *Lignite: Surface or Mineral—The Surface Destruction Test and More,* 29 BAYLOR L. REV. 879, 885 (1977).

30. Acker v. Guinn, 464 S.W.2d 348, 352 (Tex. 1971) (citing Clark, *Uranium Problems,* 18 TEX. B.J. 505 (1955)). The court acknowledged that Professor Kuntz's approach was "entirely sound"; yet, it expanded upon his logic and held that the general intent of the parties meant that they were thinking of extracting valuable minerals by subsurface methods and had no intentions of destroying the surface. *See id.* at 352.

31. *See id.* at 352. The question to be decided was whether iron ore was conveyed by a deed executed in 1949. *See id.* at 349. The court recognized that iron ore was of commerical value but also pointed out that its extraction would destroy the surface. *See id.* at 351. The court concluded that the parties envisioned mine shafts or wells but did not contemplate impairing the surface owner's rights to use the surface for grazing or agricultural purposes. *See id.* at 352.

32. 554 S.W.2d 169 (Tex. 1977).

33. *See id.* at 172. The court stressed that its decision was not aimed at dividing the parties' rights to mine the substance. *See id.* at 172. The court stated that it was "construing the instrument . . . to ascertain the ownership of the substance." *Id.* at 172; *see* Note, *Own-*

The court held that a surface owner is entitled to the entire substance, regardless of the various depths at which it is found, if extraction of any portion of the substance would cause damage to the surface estate.[34] The court, however, decided that the surface owner must show that, "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 land surface."[35]

Three years later in *Reed II*,[36] the Texas Supreme Court reheard the *Reed* case after the actual location of the substance at issue had been determined.[37] In this case, the court overruled its holding in *Reed I* that the surface owner must prove that the mineral could be removed only by methods that resulted in harm to the surface.[38] The court also abandoned the *Reed I* requirement of proof of the extraction method measured *at the time the instrument was executed.*[39] Finally, the court declared that sub-

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ership of "Other Minerals": Reed v. Wylie Speaks Again, 18 HOUS. L. REV. 201, 203 (1980) (outlining changes made to *Reed I* by *Reed II).*

34. *See* Reed v. Wylie, 554 S.W.2d 169, 172 (Tex. 1977). The court explained that the intention of the parties to preserve the surface led to its decision to exclude the substance, regardless of the depth at which it is located throughout the property. *See id.* at 172. This rule, according to Professors Williams and Meyers, "would have a very unstabilizing effect upon land titles" because it creates a question of fact necessitating consideration of the state of the art of extracting the mineral. *See* 1 H. WILLIAMS & C. MEYERS, OIL AND GAS LAW § 219, at 262.1-262.9 (1981).

35. Reed v. Wylie, 554 S.W.2d 169, 172 (Tex. 1977). Chief Justice Greenhill indicated that the majority opinion of the court requiring the surface owner to prove that extraction of the substance would cause damage to the surface is an onerous burden. *See id.* at 172 (Greenhill, C.J., concurring). From the majority opinion, however, one may infer that this burden can easily be satisfied with a showing of the depth of the substance. *See id.* at 172. The majority said that "if the lignite lies at the surface of the land, no further proof would be required to establish [the surface owner's] title to the lignite. . . ." *Id.* at 172; *see also* Note, *Oil and Gas—The Surface Destruction Test As Applied In Reed v. Wylie and Its Possible Effect on Arkansas Law,* 33 ARK. L. REV. 422, 427 (1979) (suggesting *Reed I* was attempt to clarify shortcomings of *Acker). Reed I* recognized that the *Acker* rationale (that any substance which must be removed by methods that will destroy the surface is not a mineral), could potentially create situations where the grantee might take more than what was contemplated by the grantor. *See* Comment, *Lignite—Surface or Mineral? The Single Test Causes Double Trouble,* 28 BAYLOR L. REV. 287, 296 (1976). *Reed I* also broadened the *Acker* holding by including unnamed minerals at all depths. *See* Reed v. Wylie, 554 S.W.2d 169, 172 (Tex. 1977).

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

37. *See id.* at 744.

38. *See id.* at 747. The court reasoned that the "controlling factor [was] the close physical relationship of the substance to the surface itself." *Id.* at 747. It also stated that "that portion of *Reed* [requiring] that the near surface substance 'must' be removed by surface destruction methods is overruled." *Id.* at 747.

39. *See id.* at 747 (emphasis added). The court noted that *Acker* did not require that determination of the recovery be limited to the time the instrument was executed. *See id.* at

stances within two hundred feet of the surface belonged to the surface owner as a matter of law.[40]

In *Moser v. United States Steel Corp.,*[41] the Texas Supreme Court, recognizing the uncertainty of title to minerals that had been created by the *Acker* and the two *Reed* decisions,[42] held that title to a substance determined by the court to be a mineral belongs to the mineral estate.[43] The court explained that its decisions prior to *Acker* had been based upon a variety of construction aids, namely, *ejusdem generis,*[44] scientific and technical definitions,[45] the nature of the term "mineral,"[46] and the general intent theory propounded by Professor Kuntz.[47] Seeing a need for uniformity, the court declared that a substance would be determined to be

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747. Such a requirement would create a question of fact that would vary with the "state of the art of removal of the substance upon some particular date in the past." *Id.* at 747. The court recognized that other problems might result should it accept the requirement—problems of proof, problems of obtaining qualified experts, and problems of determining the state of the art of removal. *See id.* at 747.

40. *See id.* at 748. This decision apparently resulted from an examination of the *Acker* record where there appeared to be a question of title as to minerals found at varying depths on Acker's estate. *See id.* at 748.

41. 26 Tex. Sup. Ct. J. 427 (June 8, 1983).

42. *See id.* at 428. The court explained that title uncertainty resulted because application of the *Acker* test and its progeny has required resolution of fact issues to establish title to substances not specifically named in the conveying instrument. *See id.* at 428.

43. *See id.* at 428. The *Acker* and *Reed* approaches were "abandoned" by the court. *See id.* at 428.

44. *See id.* at 428. Although the court did not explain why it had refused to use the rule of *ejusdem generis* in determining whether hydrocarbons are minerals, the fact is that it had previously been used to construe the phrase "timber, earth, stone, and minerals" to exclude oil in a reservation. *See* Right of Way Oil Co. v. Gladys City Oil, Gas & Mfg. Co., 106 Tex. 94, 103, 157 S.W. 737, 740 (1913). A 1964 case best explains the court's rejection of the doctrine of *ejusdem generis. See* Southland Royalty Co. v. Pan American Petroleum Corp., 378 S.W.2d 50, 54 (Tex. 1964) (meaning of term "other minerals" determined by examination of minerals specifically named immediately preceding term).

45. *See* Moser v. United States Steel Corp., 26 Tex. Sup. Ct. J. 427, 428 (June 8, 1983). In 1949, the court was concerned that the term "other minerals" might even include the soil itself if the scientific or technical definition were applied to determine if a substance was a mineral. *See* Heinatz v. Allen, 147 Tex. 512, 513, 217 S.W.2d 994, 997 (1949).

46. *See* Moser v. United States Steel Corp., 26 Tex. Sup. Ct. J. 427, 428 (June 8, 1983). The courts in *Heinatz* and *Psencik* considered the nature of the substance when it discussed the validity of the term "mineral" in its ordinary and natural meaning. *See* Heinatz v. Allen, 147 Tex. 512, 517, 217 S.W.2d 994, 997 (1949); Psencik v. Wessels, 205 S.W.2d 658, 660-61 (Tex. Civ. App.—Austin 1947, writ ref'd).

47. *See* Moser v. United States Steel Corp., 26 Tex. Sup. Ct. J. 427, 428-29 (June 8, 1983). The general intent theory was accepted by the *Acker* court and acknowledged as a sound approach in the instant case. *Compare id.* at 428-29 (discussion of court's application of the Kuntz theory) *with* Broyles, *The Right to Mine Texas Uranium and Coal By Surface Methods: Acker v. Guinn Revisited,* 13 HOUS. L. REV. 451, 475 (1976) (suggesting that *Acker* court did exactly what Professor Kuntz warned court not to do).

a mineral, and thus belong to the mineral estate, "within the ordinary and natural meaning of the term 'mineral,' [regardless of whether its] presence or value is known at the time of extraction."[48] Uranium, the substance at issue in *Moser,* was held to be a mineral, and all substances declared non-minerals in prior decisions would continue to be regarded as non-minerals.[49] The court also addressed the rights and liabilities of the parties as to the use of the surface.[50] If the mineral is named in the instrument, the mineral owner is liable for his negligence in extracting the mineral; if the mineral is unnamed, he is strictly liable.[51] The court explained that this decision does not diminish the mineral owner's right to use the surface reasonably, but that such right must be exercised with "due regard" for the right of the surface owner to use his estate as he sees necessary.[52]

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48. *See* Moser v. United States Steel Corp., 26 Tex. Sup. Ct. J. 427, 429 (June 8, 1983). Among others, this approach was most notably used in two pre-*Acker* cases. *See* Heinatz v. Allen, 147 Tex. 512, 517-18, 217 S.W.2d 994, 997 (1949); Cain v. Neumann, 316 S.W.2d 915, 920 (Tex. Civ. App.—San Antonio 1958, no writ).

49. *See* Moser v. United States Steel Corp., 26 Tex. Sup. Ct. J. 427, 429 (June 8, 1983). Other substances had been declared non-minerals by the court. *See* Sun Oil Co. v. Whitaker, 483 S.W.2d 808, 821 (Tex. 1972) (water not included in reservation of "oil, gas, and other minerals"); Heinatz v. Allen, 147 Tex. 512, 523, 217 S.W.2d 994, 997 (1949) (commercial limestone and building stone not included in "mineral rights"); Atwood v. Rodman, 355 S.W.2d 206, 208 (Tex. Civ. App.—El Paso 1962, writ ref'd n.r.e.) (excluding limestone, caliche, sand, clay, and gravel removable by quarry or open pit methods from grant of oil, gas, and "other minerals"); Union Sulphur Co. v. Texas Gulf Sulphur Co., 42 S.W.2d 182, 186 (Tex. Civ. App.—Austin 1931, writ ref'd) (solid sulphur not conveyed in ordinary oil and gas lease); Praeletorian Diamond Oil Ass'n v. Garvey, 15 S.W.2d 698, 702 (Tex. Civ. App.—Beaumont 1929, writ ref'd) (gravel excluded in lease of oil, gas, and "other minerals"). Although the court listed what it has decided to be non-minerals, it did not include a list of substances that it has decided to be minerals. *See* Moser v. United States Steel Corp., 26 Tex. Sup. Ct. J. 427, 429 (June 8, 1983).

50. *See* Moser v. United States Steel Corp., 26 Tex. Sup. Ct. J. 427, 429 (June 8, 1983). Since *Acker,* the issue of surface use has been inextricably tied to the issue of title to minerals. *See* Reed v. Wylie, 597 S.W.2d 743, 747 (Tex. 1980) (surface damage basis for determination of title); Reed v. Wylie, 554 S.W.2d 169, 172 (Tex. 1977) (title based on surface destruction test). The *Acker* decision abandoned the approach of considering the nature of the substance as the basis of title and focused upon surface damage caused by extraction. *See* Acker v. Guinn, 464 S.W.2d 348, 352 (Tex. 1971).

51. *See* Moser v. United States Steel Corp., 26 Tex. Sup. Ct. J. 427, 429 (June 8, 1983). The court reasoned that the parties, at the time of conveyance, do not anticipate destruction of the surface, whether the mineral is intended to be granted or reserved. *See id.* at 429. The grantor has thus probably not determined the loss of value that the unnamed substance would have on his estate if damage were done during its extraction. *See id.* at 429.

52. *See id.* at 430. It is settled law that the mineral estate is dominant since the surface may be used to the extent reasonably necessary to extract minerals, but this right must be exercised with "due regard" for the rights of the owner of the servient estate. *See, e.g.,* Humble Oil & Ref. Co. v. Williams, 420 S.W.2d 133, 134 (Tex. 1967) (unreasonable use held not to be right of dominant estate); General Crude Oil Co. v. Aiken, 162 Tex. 104, 109, 344 S.W.2d 668, 671 (1961) (due regard test requires lessor prove lessee used more of surface

Although *Moser* is a relatively new decision and its effects may not be known for several years, it is clear that major consequences will flow from the court's decision that "minerals" belong to the mineral estate[53] and that the surface estate is entitled to protection from destruction.[54] While the uncertainty of title to minerals is substantially eliminated by this decision,[55] the remaining doubts of the mineral and surface owners as to exactly how the "mineral test" is to be applied will continue to kindle title suits.[56] The certainty of title resulting from the *Moser* decision, however, should expedite the production and development of needed energy resources.[57] Once title to unnamed minerals has been established by the

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than necessary); Brown v. Lundell, 162 Tex. 84, 95, 344 S.W.2d 863, 866 (1961) (negligence in use of surface and unreasonable use of surface are identical). As the court later said, "the due regard concept defines more fully what is to be considered . . . [as] reasonably necessary." Getty Oil Co. v. Jones, 470 S.W.2d 618, 622 (Tex. 1971). When there is only one method of using the surface in order to extract the minerals, the lessee has the right to use the surface regardless of the damage that results. *See id.* at 622. If there are alternative methods of extracting the minerals, the alternative may be necessary in order to give "due regard" to the surface owner's competing right to use the surface as he sees necessary. *See id.* at 622.

53. *See* Moser v. United States Steel Corp., 26 Tex. Sup. Ct. J. 427, 428 (June 8, 1983).

54. *See id.* at 429. The court's decision focused upon the two major aspects of the present controversy of mineral grants and reservations: title to the mineral, and its corollary, surface use. *See id.* at 428-29. The substance of the court's decision relating to the title may be summarized as follows: (1) the test of ownership is whether a substance is a mineral, (2) the mineral test is whether the substance is a mineral within the ordinary and natural meaning of the term "mineral", (3) uranium is a mineral, and (4) substances declared to be non-minerals in prior decisions continue to be non-minerals. *See id.* at 428-29. The court included the following points relating to surface use: (1) the mineral owner is liable for his negligence in extracting minerals specifically named, (2) the mineral owner is strictly liable in extracting minerals not specifically named, and (3) the surface owner has a right of due regard for his own uses. *See id.* at 429-30.

55. *See id.* at 428. The court admitted that its prior decisions had led to title uncertainty and specifically rejected *Acker* and *Reed* (I and II) for future decisions. *See id.* at 428; *see also* Comment, *Lignite: Surface or Mineral—The Surface Destruction Test and More,* 29 BAYLOR L. REV. 879, 884, 902-03 (1979) (uncertainty of title illustrated by methods of mining uranium); Broyles, *The Right to Mine Texas Uranium and Coal by Surface Methods: Acker v. Guinn Revisited,* 13 HOUS. L. REV. 451, 453-59 (1976) (relating issue of title to issue of surface use and uncertainties created by *Acker* decision).

56. *See* Moser v. United States Steel Corp., 26 Tex. Sup. Ct. J. 427, 429 (June 8, 1983). The determination of whether a substance is or is not a mineral will be made by considering whether the substance is a "mineral" within the ordinary and natural meaning of that word. *See id.* at 429. *Compare* WEBSTER'S NEW COLLEGIATE DICTIONARY 732 (1977) ("any of various naturally occurring homogeneous substances such as stone, coal, salt, sulfur, sand, petroleum, water, or natural gas obtained for man's use . . . from the ground") *with* Praeletorian Diamond Oil Ass'n v. Garvey, 15 S.W.2d 698, 702 (Tex. Civ. App.—Beaumont 1929, writ ref'd) (sand and gravel determined to be non-minerals).

57. *See* Moser v. United States Steel Corp., 26 Tex. Sup. Ct. J. 427, 428 (June 8, 1983). Admitting abandonment of the decisions of *Acker* and *Reed* (I and II), the court presumably

courts, ownership will be irrevocable; mineral owners should then employ efficient and economical extraction methods rather than use other methods just to maintain their titles simply because they will cause less destruction to the surface.[58]

Moser confirms the rights of both estates: first, it permits the mineral owner the reasonable use of the surface within the limits he has traditionally enjoyed once title was established;[59] second, it also deters destruction of the surface estate by providing compensation to the surface owner for injuries caused by removal of the mineral.[60] Although the court employs compensation to protect the surface from consumption or depletion, some surface owners will naturally recognize a potential for profit.[61] Moreover, the court's emphasis upon the mineral owner's liabilities, with no discussion of the surface owner's liabilities for interfering with this "rule of law,"[62] indicates that suits for surface damages will increase.[63] The lan-

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aimed to correct the problem of uncertainty by changing the test for determination of title. *See id.* at 428; *see also* Broyles, *The Right to Mine Texas Uranium and Coal By Surface Methods: Acker v. Guinn Revisited,* 13 HOUS. L. REV. 451, 479 (1976) (reexamination of *Acker* needed to minimize its adverse effects in order to prevent wasting energy resources); Comment, *Lignite: Surface or Mineral—The Surface Destruction Test and More,* 29 BAYLOR L. REV. 879, 905 (1977) (*Acker* decision created confusion and deterred development of natural resources); Comment, *The Need for Certainty in Ownership of Minerals: Coal, Lignite, "And Other Minerals",* 22 S. TEX. L.J. 287, 307 (1982) (suggesting that clearing up uncertainty of title would promote production of resources).

58. *See* Comment, *Lignite: Surface or Mineral—The Surface Destruction Test and More,* 29 BAYLOR L. REV. 879, 889-90 (1977). The author raises a very substantive issue: whether the ownership of minerals may change as technology precludes damages caused by extraction. *See id.* at 889.

59. *See* Moser v. United States Steel Corp., 26 Tex. Sup. Ct. J. 427, 429 (June 8, 1983); *see also* Sun Oil Co. v. Whitaker, 483 S.W.2d 808, 811 (Tex. 1972) (use of surface estate implied by law); Getty Oil Co. v. Jones, 470 S.W.2d 618, 621 (Tex. 1971) (mineral estate impliedly authorized to use surface); Humble Oil & Ref. Co. v. Williams, 420 S.W.2d 133, 134 (Tex. 1967) (extent of reasonable use determined by lease). *See generally* 1 E. KUNTZ, A TREATISE ON THE LAW OF OIL AND GAS § 3.2, at 79-81 (1962) (discussion of reasonable use permitted by surface owner).

60. *See* Moser v. United States Steel Corp., 26 Tex. Sup. Ct. J. 427, 429-30 (June 8, 1983).

61. *See id.* at 429. The court explained that the surface owner considers the value of all minerals when determining the consideration he will seek for mineral grants. *See id.* at 429. For this reason, the court held that strict liability is justifiable when the surface owner was not paid for unnamed substances. *See id.* at 429.

62. *See id.* at 429. The court refers to the right of the mineral owner to use the surface as incidental to the extraction of the minerals as "an imperative rule of mineral law." *Id.* at 429.

63. *See id.* at 429-30. Previous suits for surface damage have been based on the theories of negligence, nuisance, breach of a regulation or statute, and strict liability (in other jurisdictions). *See* 1 H. WILLIAMS & C. MEYERS, OIL AND GAS LAW § 217, at 186.13-.16 (1981). For damages based upon negligence, see Landers v. East Texas Salt Water Disposal

guage of the decision suggests that strict liability damages may be avoided by specifically naming the substance in the instrument.[64] Regardless, though, of any improvement that may result in the preparation of legal instruments, damage suits initially will be protracted until certain questions are resolved: what constitutes reasonable use?, what is the proper measure of damages?, and how far must the surface owner be accommodated?[65]

Moser also reflects the court's interest in protecting the surface, a prevalent concern in the *Acker* decision and its progeny,[66] is reaffirmed in *Moser.*[67] This same concern is also stated in the Texas Uranium Surface Mining & Reclamation Act (TUSMRA),[68] the purpose of which is to promote the development of the state's natural resources within the bounds of environmental constraints.[69] The limitations imposed by the *Moser* deci-

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Co., 151 Tex. 251, 255, 248 S.W.2d 731, 735 (1952) (negligent pollution of lake during extraction); Moran Corp. v. Murray, 381 S.W.2d 324, 325 (Tex. Civ. App.—Texarkana 1964, writ ref'd n.r.e.) (break in wall of salt water pit found to be act of negligence and not trespass). For damages based upon nuisance, see Mowrer v. Ashland Oil & Ref. Co., 518 F.2d 659, 662 (7th Cir. 1975) (recovery of damages sustained on theory that waterflood operation created private nuisance); Love Petroleum Co. v. Jones, 205 So. 2d 274, 275 (Miss. 1967) (stream pollution found a nuisance created by escaping oil and salt water). For damages based upon breach of regulation or statute, see Klokstad v. Ward, 131 N.W.2d 244, 249 (N.D. 1964) (overflow of brine pit held to be a nuisance); Murfee v. Phillips Petroleum Co., 492 S.W.2d 667, 675 (Tex. Civ. App.—El Paso 1973, writ ref'd n.r.e.) (violation of Railroad Commission Rule 20 based upon negligence). For damages based upon strict liability, see Langlinais v. Geophysical Serv. Inc., 111 So. 2d 781, 783 (La. 1959) (explosion causing break in levee); Pate v. Western Geophysical Co., 91 So.2d 431, 434 (La. App. 1956) (explosion resulting in damage to water wells and buildings). The doctrine of absolute or strict liability in general, however, has not been permitted in Texas. *See* Turner v. Big Lake Oil Co., 128 Tex. 155, 159, 96 S.W.2d 221, 225 (1936); Klosterman v. Houston Geophysical Co., 315 S.W.2d 664, 668 (Tex. Civ. App.—San Antonio 1958, writ ref'd n.r.e.).

64. *See* Moser v. United States Steel Corp., 26 Tex. Sup. Ct. J. 427, 429 (June 8, 1983).

65. *See id.* at 429-30. The problems arising from suits seeking redress for damages to the surface were problems not created by *Moser. See, e.g.,* Ball v. Dillard, 602 S.W.2d 521, 524 (Tex. 1980) (Spears, J., dissenting) (evidentiary problems in meeting burden of showing reasonable use of surface); Sun Oil Co. v. Whitaker, 483 S.W.2d 808, 811 (Tex. 1972) (problem of application of implied doctrine in showing reasonable use); Getty Oil Co. v. Jones, 470 S.W.2d 618, 626 (Tex. 1971) (McGee, J., dissenting) (problem of determining damages when applying "due regard" doctrine). *Moser,* by emphasizing the protection of the surface, the doctrine of "due regard", and the imposition of strict liability, adds to problems already creating turbulence in this area of the law. *See* Moser v. United States Steel Corp., 26 Tex. Sup. Ct. J. 427, 429-30 (June 8, 1983).

66. *See* Reed v. Wylie, 597 S.W.2d 743, 748 (Tex. 1980); Reed v. Wylie, 554 S.W.2d 169, 170 (Tex. 1977); Acker v. Guinn, 464 S.W.2d 348, 352 (Tex. 1971).

67. *See* Moser v. United States Steel Corp., 26 Tex. Sup. Ct. J. 427, 429 (June 8, 1983).

68. TEX. NAT. RES. CODE ANN. § 131.001-132.000. (Vernon 1978 & Vernon Supp. 1982-1983).

69. *See id.* § 131.003 (Vernon 1978). The code ensures that the rights of the surface

sion, and TUSMRA as well, do not degrade the mineral owner's rights to extract the mineral.[70] The legislature and the court simply will not permit surface destruction when minerals are removed.[71]

The *Moser* decision is also a blending of several methods used by past courts. First, pre-*Acker* courts established title to minerals by determining that substances were minerals, based upon various tests.[72] *Moser* is a return to that approach, but the test of whether or not a substance is a mineral is to be based exclusively upon the "ordinary and natural meaning" test.[73] Second, the court has consistently allowed surface owners recovery for damages arising from negligence, in both the pre-*Acker* and post-*Acker* periods.[74] *Moser* continues this practice, but it goes further by providing for strict liability when substances are not named in the instrument.[75] Whereas negligence in the past was viewed in terms of unreasonableness based on the degree of harm to the surface,[76] *Moser* incorporates the "due regard" doctrine as an additional basis for determining unreasonableness.[77]

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landowner and other persons with a legal interest in the land are protected from unregulated surface mining operations. *See id.* § 131.003(2). The code also prevents unreasonable degradation of the land and water resources by requiring that mining operations also include reclamation procedures in the event of damage. *See id.* § 131.003(5).

70. *See* Moser v. United States Steel Corp., 26 Tex. Sup. Ct. J. 427, 430 (June 8, 1983).

71. *See id.* at 428-30; *see also* TEX. NAT. RES. CODE ANN. § 131.002 (Vernon Supp. 1982-1983) (declaration of policy expressly provides for surface restoration).

72. *See, e.g.,* Heinatz v. Allen, 147 Tex. 512, 523, 217 S.W.2d 994, 997 (1949) (use of ordinary and natural meaning of term "mineral" to determine substance not a mineral); Psencik v. Wessels, 205 S.W.2d 658, 660-61 (Tex. Civ. App.—Austin 1947, writ ref'd) (chemical composition of the substance at issue determines whether a mineral); Praeletorian Diamond Oil Ass'n v. Garvey, 15 S.W.2d 698, 702 (Tex. Civ. App.—Beaumont 1929, writ ref'd n.r.e) (whether gravel a mineral is immaterial absent intent to convey the substance).

73. *See* Moser v. United States Steel Corp., 26 Tex. Sup. Ct. J. 427, 429 (June 8, 1983). According to the court in *Heinatz,* the use of the ordinary and natural meaning expresses the intent of the parties because they are "presumed to have been familiar with the ordinary and natural meaning of the word. . . ." Heinatz v. Allen, 147 Tex. 512, 517, 217 S.W.2d 994, 997 (1949). The use of the "ordinary and natural" test has been widespread throughout the United States. *See, e.g.,* Burke v. Southern Pac. R.R., 234 U.S. 669, 711 (1914) (petroleum and mineral oil a mineral within meaning of word "mineral"); Rudd v. Hayden, 97 S.W.2d 35, 37 (Ky. Ct. App. 1936) (cement not ordinarily mineral in ordinary and natural sense of that term); Beury v. Shelton, 144 S.E. 629, 633 (Va. 1928) (limestone not reserved by ordinary and natural meaning of term "mineral").

74. *See* Sheffield v. Gibbs Bros. & Co., 596 S.W.2d 227, 230 (Tex. Civ. App.—Houston [1st Dist.] 1980, no writ); Kenny v. Texas Gulf Sulphur Co., 351 S.W.2d 612, 614 (Tex. Civ. App.—Waco 1961, writ ref'd); Fleming Found. v. Texaco, 337 S.W.2d 846, 852 (Tex. Civ. App.—Amarillo 1960, writ ref'd n.r.e.).

75. *See* Moser v. United States Steel Corp., 26 Tex. Sup. Ct. J. 427, 429 (June 8, 1983).

76. *See id.* at 430.

77. *See id.* at 430.

The adoption of strict liability in awarding damages to the surface owner apparently was inserted as an equitable measure and one to encourage protection of the surface estate.[78] This is a bold decision, since Texas has historically repudiated in strong language the doctrine of strict liability.[79] Many commentators argue that strict liability, even when used in blasting cases, is a reversion to outmoded law and that its adoption is a step backward to primitive concepts.[80]

The *Moser* decision is also not retroactive for the period between *Acker* and *Moser.*[81] The court's attempt at equity, though, does not add to the problems of those who contracted during this period; the *Moser* decision is simply not applicable to them.[82] *Moser* neither disturbs the law of this period nor adds to the ambiguities attending the *Acker* and *Reed* decisions; the controlling law for this period is that which was "in effect at the time the [instrument] was executed."[83] Although the court did not categorically state whether *Moser* applies to the pre-*Acker* period, it appears that it does apply since the *Moser* approach to determining title generally parallels that used by the courts of the pre-*Acker* period.[84]

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78. *See id.* at 429. The court does not specifically refer to the term "strict" or "absolute" liability; rather, it infers that damages should not be restricted to negligently inflicted damages when the mineral is not specifically named in the instrument. *See id.* at 429.

79. *See* Turner v. Big Lake Oil Co., 128 Tex. 155, 166, 96 S.W.2d 221, 226 (1936) (oil lessee held not liable unless showing of negligence); Galveston, H. & S.A. Ry. v. Currie, 100 Tex. 136, 140, 96 S.W. 1073, 1074 (1906) (wrongful death liability of employer based upon negligence instead of absolute liability); Gulf, C. & S.F. Ry. v. Oakes, 94 Tex. 155, 159, 58 S.W. 999, 1001 (1900) (absent negligence, defendant who planted grass not liable for damages caused by its spreading); Cosden Oil Co. v. Sides, 35 S.W.2d 815, 818 (Tex. Civ. App.—Eastland 1931, no writ) (recovery allowed only when defendant found negligent in performance of lawful acts).

80. *See* 4 W. SUMMERS, THE LAW OF OIL & GAS § 661 (1927); Smith, *Liability for Substantial Physical Damage to Land By Blasting—The Rule of the Future,* 33 HARV. L. REV. 542, 550-52 (1919); *see also* Prosser, *Nuisance Without Fault,* 20 TEXAS L. REV. 399, 426 (1942).

81. *See* Moser v. United States Steel Corp., 26 Tex. Sup. Ct. J. 427, 430 (June 8, 1983).

82. *See id.* at 430. It is inapplicable because the *Moser* decision applies only to contracts, leases, and deeds contracted before *Acker* and beginning with the *Moser* decision in 1983. *See id.* at 430. As the leases of the *Acker* to *Moser* period expire, however, owners may seek methods to circumvent the secondary terms of the leases of the *Acker* to *Moser* period.

83. *See id.* at 430.

84. *See id.* at 428-30. The court discusses at length the various construction aids it used to determine title in past cases. *See id.* at 428. Before *Acker,* the determination of title was based upon whether the substance was a mineral. *See id.* at 428-29. Since *Acker* and its progeny significantly departed from this approach and thereby created title uncertainties, the court abandoned the surface destruction test and returned to the pre-*Acker* system which relied upon the test of ordinary and natural meaning to classify the substance. *See id.* at 428.

To some degree, the three major pronouncements of *Moser* counter each other: title litigation will decrease, but damage litigation will increase; title certainty will promote the production of minerals, but the fear of causing damage may lead to the abandonment of more efficient and economical methods of extraction; the surface estate is not to be consumed or depleted, but it may be severely damaged should surface owners bargain to waive their rights.[85] However one may view the prospective gains and losses from the decision, *Moser* does not purport to be the ultimate solution to all of the problems which have saturated this area of the law for a half century. This landmark is indeed a giant step in the evolution of the processes applied to balance two continually competing and changing interests.[86] It does not answer many of the questions it poses, but in its treatment of the substantive rights of the two estates, the court has displayed the parameters of its future decisions, and in so doing, has provided some degree of stability that the estates have lost since *Acker*. Most of all, the rights of the competing parties have been addressed in a manner that promotes the development of critically needed natural resources. This return, alone, will far outweigh any shortcomings that will initially be experienced in this turbulent area of the law.

Harry Skeins

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85. *See id.* at 429. The court concedes that the parties recognize the value of the minerals they grant or reserve. *See id.* at 430. It is presumed they also know that they can bargain to waive the right to demand compliance with their rights.

86. *See id.* at 430. The court discusses these competing interests as they relate to the "due regard" doctrine. *See id.* at 430.