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Determining Mineral Ownership in Texas After *Moser v. United States Steel Corp.* — The Surface Destruction Nightmare Continues

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I. INTRODUCTION

Many instruments which grant or reserve mineral rights in Texas contain the words "other minerals."[1] When the instrument does not specifically list

1. *See, e.g.,* Acker v. Guinn, 464 S.W.2d 348, 350 (Tex. 1971) ("oil, gas and other minerals" often used in Texas deeds); STATE BAR OF TEXAS, LEGAL FORM MANUAL FOR REAL ESTATE TRANSACTIONS 4.8 (1982) ("oil, gas and other minerals" form for mineral reservation); Comment, *Lignite: Surface or Mineral — The Surface Destruction Test and More,* 29 BAYLOR L. REV. 879, 879 (1977) (many instruments contain "other minerals" catch-all

substances which are to be included as minerals, a dispute often arises between the owner of the surface estate and the owner of the mineral estate as to ownership of the unspecified substances.[2] To resolve ownership disputes, Texas courts adopted a rule of construction focusing on the destructive effects that removal of a particular substance would have on the surface of the land.[3] The original surface destruction test[4] and modified versions of the test[5] yielded unpredictable results causing uncertainty in mineral titles.[6]

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phrase). When the fee simple owner of land grants, conveys, reserves, or excepts minerals, two separate estates are created: a surface estate and a mineral estate. *See* Acker v. Guinn, 464 S.W.2d 348, 352 (Tex. 1971); Texas Co. v. Daugherty, 107 Tex. 226, 235, 176 S.W. 717, 719 (1915) (horizontal division of surface and mineral title); *see also* Walker, *Fee Simple Ownership of Oil and Gas in Texas,* 6 TEXAS L. REV. 125, 128-29 (1928) (landowner effects horizontal severance of mineral and surface estates by granting mineral rights or by conveying surface and reserving mineral rights).

2. *See, e.g.,* Moser v. United States Steel Corp., 676 S.W.2d 99, 100 (Tex. 1984) (uranium included in "oil, gas and other minerals"); Schwarz v. State, 658 S.W.2d 822, 823 (Tex. App.—Austin 1983) (coal and lignite included in "all the minerals"), *rev'd,* 28 Tex. Sup. Ct. J. 488 (June 12, 1985); Psencik v. Wessels, 205 S.W.2d 658, 659 (Tex. Civ. App.—Austin 1947, writ ref'd) (sand and gravel not included in "all minerals"). Judicial solutions to ownership disputes involve the balancing of the need for mineral development against the need to protect the surface estate. *See* Moser v. United States Steel Corp., 676 S.W.2d 99, 101 (Tex. 1984); *see also* Comment, *Lignite: Surface or Mineral — The Surface Destruction Test and More,* 29 BAYLOR L. REV. 879, 888 (1977) (courts attempt to accommodate rights of surface and mineral estate owners); Recent Development, 19 TULSA L.J. 448, 448 (1984) (courts balance parties' intentions, need for title certainty, and resource development). Justice Price Daniel of the Supreme Court of Texas captured the difficulty and the importance of devising a uniform and comprehensive ownership test when he stated:

> Minerals have been a blessing to Texas, but the term has plagued our courts in efforts to determine what is covered by the term in various leases, reservations and conveyances. Much of this is because of the *failure to enumerate specific minerals* intended to be dealt with, especially when the parties probably had no subjective intent at all concerning minerals known or unknown to them at the time of their dealings.

Reed v. Wylie, 554 S.W.2d 169, 177 (Tex. 1977) (Daniel, J., dissenting) (emphasis added). The easiest way to prevent ownership disputes over unnamed substances is to specifically list all substances that will belong to the mineral estate in the instrument which severs the mineral and surface estates. *See* Reed v. Wylie, 597 S.W.2d 743, 751-52 (Tex. 1980) (Spears, J., concurring) (specifically naming substances in grant or reservation expresses clear intent); Reed v. Wylie, 554 S.W.2d 169, 172 (Tex. 1977) (clear intent expressed where substances specifically reserved), *modified,* 597 S.W.2d 743 (Tex. 1980).

3. *See* Acker v. Guinn, 464 S.W.2d 348, 352 (Tex. 1971) (original surface destruction test enunciated).

4. *See id.* at 352. Under the original surface destruction test, a substance that would cause surface destruction when removed was considered part of the surface estate. *See id.* at 352.

5. *See* Reed v. Wylie, 554 S.W.2d 169, 172 (Tex. 1977) (interprets original surface destruction test), *modified,* 597 S.W.2d 743, 747-48 (Tex. 1980) (overrules portions of first opinion). The first *Reed v. Wylie* decision added two factors to the original surface destruction test, giving consideration to the location of the substance in the ground, and the time frame to apply when determining the extent of technological advancement in removal methods. *Compare*

In an effort to stabilize mineral titles, the Supreme Court of Texas, in *Moser v. United States Steel Corp. (Moser I),*[7] partially abandoned the surface destruction test and applied an ordinary and natural meaning test.[8] The court, however, withdrew *Moser I* and issued a second opinion which greatly restricts the applicability of the ordinary meaning test (*Moser II*).[9] *Moser II* allows the surface destruction test to remain an operative force in Texas mineral law.[10] Consequently, instead of eliminating title instability, *Moser*

Reed v. Wylie, 554 S.W.2d 169, 172 (Tex. 1977)(near-surface substance not mineral if removal by all methods existing at time instrument executed would destroy surface), *modified,* 597 S.W.2d 743 (Tex. 1980) *with* Acker v. Guinn, 464 S.W.2d 348, 352 (Tex. 1971) (if removal of substance causes surface destruction, then substance is not part of mineral estate). The second *Reed v. Wylie* decision modified the technology and timing factors of *Reed I,* emphasizing that the surface estate owner should try to show that any reasonable removal method would destroy the surface. *Compare* Reed v. Wylie, 597 S.W.2d 743, 747-48 (Tex. 1980) (near-surface iron ore, coal, or lignite not mineral if removal by any reasonable method existing at time instrument executed or at time of decision would destroy surface) *with* Reed v. Wylie, 554 S.W.2d 169, 172 (Tex. 1977) (near-surface substance not mineral if removal by all methods existing at time instrument executed would destroy surface), *modified,* 597 S.W.2d 743 (Tex. 1980).

6. *See, e.g.,* Moser v. United States Steel Corp., 676 S.W.2d 99, 101 (Tex. 1984) ("determining . . . ownership of minerals in [surface destruction] manner has resulted in title uncertainty"); Comment, *The Need for Certainty in Ownership of Minerals: Coal, Lignite, "and Other Minerals",* 22 S. TEX. L.J. 287, 306 (1982) (surface destruction rule causes uncertainty in land titles); Note, *Determination of Ownership of Near-Surface Minerals as a Matter of Law: Moser v. U. S. Steel,* 36 BAYLOR L. REV. 715, 719 (1984) (insurmountable title problems presented by *Acker v. Guinn* and *Reed v. Wylie* decisions).

7. 26 Tex. Sup. Ct. J. 427 (June 8, 1983), *opinion withdrawn,* 676 S.W.2d 99 (Tex. 1984).

8. *See id.* at 428-29. The surface destruction test was only partially displaced because it would continue to control instruments executed during the twelve-year time frame between *Acker v. Guinn* and the date of *Moser I. See id.* at 430. Stated briefly, the *Moser* test vests title to a substance in the mineral estate owner if the ordinary and natural meaning of the word "minerals" includes the particular substance. *See* Moser v. United States Steel Corp., 676 S.W.2d 99, 102 (Tex. 1984). Before *Acker v. Guinn* was decided, Texas courts had followed an ordinary and natural meaning test announced by the supreme court in 1949. *See* Heinatz v. Allen, 147 Tex. 512, 517, 217 S.W.2d 994, 997 (1949).

9. *See* Moser v. United States Steel Corp., 676 S.W.2d 99, 103 (Tex. 1984) (ordinary meaning rule applies only prospectively from June 8, 1983); *see also* Friedman v. Texaco, Inc., 28 Tex. Sup. Ct. J. 455, 455 (June 5, 1985) (*Moser II* rules apply only to "other minerals" severances occurring after June 8, 1983); *compare* Moser v. United States Steel Corp., 676 S.W.2d 99, 101 (Tex. 1984) (surface destruction approach abandoned "in the case of uranium") *with* Moser v. United States Steel Corp., 26 Tex. Sup. Ct. J. 427, 428 (June 8, 1983) (surface destruction approach abandoned), *opinion withdrawn,* 676 S.W.2d 99 (Tex. 1984). *See generally* 1 H. WILLIAM & C. MEYERS, OIL AND GAS LAW § 219, at 266.9-266.11 (1984) (tracks minor wording differences between *Moser I* and *Moser II* and concludes that the changes greatly restrict *Moser II's* impact on the surface destruction holdings).

10. *Compare* Moser v. United States Steel Corp., 676 S.W.2d 99, 103 (Tex. 1984) (rules announced apply only prospectively from June 8, 1983) *with* Friedman v. Texaco, Inc., 691 S.W.2d 586, 588 (Tex. 1985) (*Moser II* rules apply only to severances after June 8, 1983 and *Acker* and *Reed* surface destruction rules apply to severances before June 8, 1983 where title to

II actually compounds the problem by perpetuating the source of mineral title uncertainty.[11]

This comment will trace the development of Texas mineral ownership law from the roots of the surface destruction test through the resurgence of the ordinary meaning test in *Moser I* and *II*. Three possible restrictions on the applicability of the *Moser II* test will be discussed: (1) the limitation of *Moser II* to a prospective application;[12] (2) the exclusion of specific substances from the application of the ordinary meaning test;[13] and (3) the limitation of the ordinary meaning test based on the wording used to grant or reserve minerals.[14] The effect of the three restrictions on Texas mineral jurisprudence will be analyzed in light of the supreme court's recent decisions in *Friedman v. Texaco, Inc.*[15] and *Schwarz v. State.*[16] Finally, this comment will suggest a solution to the problem of mineral title instability since title stability is the primary goal pursued by Texas courts.

II. THE EMERGENCE OF THE SURFACE DESTRUCTION FACTOR

In 1949 the Supreme Court of Texas held that the word "minerals" should be construed according to its "ordinary and natural meaning."[17] The

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uranium is concerned); *see also* Schwarz v. State, 28 Tex. Sup. Ct. J. 488, 489 (June 12, 1985) (court reaffirms *Acker* and *Reed* application for future ownership disputes); Note, *Determination of Ownership of Near-Surface Minerals as a Matter of Law: Moser v. U. S. Steel,* 36 BAYLOR L. REV. 715, 725-26 (1984) (discussing *Moser II* prospective language and correctly predicting that surface destruction test would continue to apply to "other minerals" conveyances made before June 8, 1983).

11. *Compare* Moser v. United States Steel Corp., 676 S.W.2d 99, 101 (Tex. 1984) (application of surface destruction rule caused title uncertainty) *with* Friedman v. Texaco, Inc., 691 S.W.2d 586, 589 (Tex. 1985) (under prospective language in *Moser II, Acker* and *Reed* surface destruction rules apply to all "other minerals" severances made before June 8, 1983 for determining title to uranium); *see also* Schwarz v. State, 28 Tex. Sup. Ct. J. 488, 489 (June 12, 1985) (*Moser II* did not abandon surface destruction test for near-surface coal, lignite, and iron ore, and application of *Acker* and *Reed* is reaffirmed for determining title to these substances); Friedman v. Texaco, Inc., 691 S.W.2d 586, 589 (Tex. 1985) (Ray, J., dissenting) (*Moser II* cited in line of irreconcilable cases compounding Texas mineral title problems).

12. *See* Moser v. United States Steel Corp., 676 S.W.2d 99, 103 (Tex. 1984).

13. *See id.* at 102 (list of substances from prior decisions belonging to surface estate as a matter of law).

14. *See id.* at 102 ("a severance of minerals *in an oil, gas and other minerals clause* includes all substances within the ordinary and natural meaning of that word") (emphasis added).

15. 691 S.W.2d 586 (Tex. 1985).

16. 28 Tex. Sup. Ct. J. 488 (June 12, 1985).

17. *See* Heinatz v. Allen, 147 Tex. 512, 517, 217 S.W.2d 994, 997 (1949). The court distinguished the ordinary meaning of minerals from the technical or scientific meaning because parties are presumed to be familiar with the ordinary rather than the technical sense of the word. *See id.* at 517, 217 S.W.2d at 997. The technical definition of the word "minerals" encompasses many substances, including the soil itself. *See id.* at 517, 217 S.W.2d at 997; *see*

court identified four factors for determining whether a substance was within the ordinary and natural meaning of minerals: the nature of the substance, its relation to the soil, its use and value, and the effect of its removal upon the surface of the land.[18] The court refused to give the surface destruction factor more weight than any of the other three factors.[19] Twenty-two years later, with the supreme court's decision in *Acker v. Guinn,*[20] surface destruction emerged as the controlling factor in deciding ownership of unspecified substances.[21] *Acker* states that a substance which must be removed by surface-destructive methods is not a mineral (general intention) unless the instrument of conveyance affirmatively expresses an intention to include the substance as a mineral (specific intention).[22]

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also Moser v. United States Steel Corp., 676 S.W.2d 99, 101-02 (Tex. 1984) (technical construction of "minerals" destroys surface/mineral estate distinction).

18. *See* Heinatz v. Allen, 147 Tex. 512, 515, 217 S.W.2d 994, 995-96 (1949). A substance was not within the ordinary meaning of minerals if it was not rare or valuable. *See id.* at 518, 217 S.W.2d at 997; *see also* Eldridge v. Edmondson, 252 S.W.2d 605, 607-08 (Tex. Civ. App.—Eastland 1952, writ ref'd n.r.e.) (limestone not within "all oil, gas, casinghead gas and other minerals" reservation as determined by application of *Heinatz* factors); Watkins v. Certain-Teed Products Corp., 231 S.W.2d 981, 985 (Tex. Civ. App.—Amarillo 1950, no writ) (*Heinatz* factors applied where sand and gravel, with no peculiar value, held not minerals).

19. *See* Heinatz v. Allen, 147 Tex. 512, 518, 217 S.W.2d 994, 998 (1949). The fact that a substance could be removed only by a "method which destroys the surface for agricultural and grazing purposes" was not decisive of whether it was a mineral. *See id.* at 518, 217 S.W.2d at 998; *see also* Eldridge v. Edmondson, 252 S.W.2d 605, 608 (Tex. Civ. App.—Eastland 1952, writ ref'd n.r.e.) (*Heinatz* surface destruction factor not conclusive).

20. 464 S.W.2d 348 (Tex. 1971). The court was confronted with the question of whether iron ore was included in a conveyance of "all of the oil, gas and other minerals." *See id.* at 349.

21. *See id.* at 352; *see also* Recent Development, 19 TULSA L.J. 448, 449 (1984) (*Acker* elevates surface destruction factor to conclusive test). Although the surface destruction factor was de-emphasized in *Heinatz,* the supreme court has recently identified the *Heinatz* surface destruction factor as the origin of the *Acker v. Guinn* surface destruction test. *See* Friedman v. Texaco, Inc., 691 S.W.2d 586, 588 & n.1 (Tex. 1985).

22. *See* Acker v. Guinn, 464 S.W.2d 348, 352 (Tex. 1971); *see also* Storm Assocs., Inc. v. Texaco, Inc., 645 S.W.2d 579, 585 (Tex. App.—1982 San Antonio) (*Acker* refers to general intent unless a specific intent is expressed in the instrument), *aff'd sub nom.,* Friedman v. Texaco, Inc., 691 S.W.2d 586 (Tex. 1985). In developing the general intent test, the court reasoned that contracting parties do not ordinarily contemplate "that the utility of the surface for agricultural or grazing purposes will be destroyed or substantially impaired." *See* Acker v. Guinn, 464 S.W.2d 348, 352 (Tex. 1971). Iron ore was held to belong to the surface estate in *Acker* because the ore was deposited very near the surface and outcropped on the surface; it could only be removed by strip-mining which would destroy the surface; and there was no affirmative expression in the deed of any right to destroy the land. *See id.* at 351-53; *see also* Martin v. Schneider, 622 S.W.2d 620, 621 (Tex. Civ. App.—Corpus Christi 1981, writ ref'd n.r.e.) (discussing *Acker* ownership criteria and *Acker* holding). For two cases applying the principles enunciated in *Acker,* see *DuBois v. Jacobs,* 551 S.W.2d 147, 149-50 (Tex. Civ. App.—Austin 1977, no writ) (surface estate includes all surface destructible substances when no clear intent to permit surface destruction expressed), and *Williford v. Spies,* 530 S.W.2d

The judicial trend toward greater protection for the surface estate by using the surface destruction test to define "other minerals" continued with the *Reed v. Wylie* decisions.[23] The court initially interpreted the *Acker* general intention test to mean that a near-surface substance was not a mineral, and therefore belonged to the surface estate, if the owner of the surface estate proved that only surface-destructive methods of removing the substance existed at the time the instrument in question was executed *(Reed I).*[24] *Reed I,* unlike *Acker,* allowed the surface estate owner to establish title to an unnamed substance merely by proving that the substance was deposited "at the surface" of the land.[25]

Three years later, the supreme court reexamined the rationale behind the *Acker* surface destruction test and issued a second opinion in *Reed v. Wylie (Reed II).*[26] The court concluded that if the general intent of the mineral

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127, 130-31 (Tex. Civ. App.—Waco 1975, no writ) ("all minerals, oil, gas and other minerals" reservation excludes coal and lignite which must be removed by strip-mining). Efforts made by the mineral estate owner to restore the surface by replacing soil and planting grass and trees were viewed as irrelevant in the application of the *Acker* surface destruction test. *See* Williford v. Spies, 530 S.W.2d 127, 131 (Tex. Civ. App.—Waco 1975, no writ).

23. *See* Reed v. Wylie, 554 S.W.2d 169 (1977), *modified,* 597 S.W.2d 743 (Tex. 1980); *see also* Note, *Mines and Minerals — Title to Minerals — Moser v. United States Steel Corp.,* 15 ST. MARY'S L.J. 477, 488 & n. 66 (1984) (*Acker* and both *Reed v. Wylie* decisions reflect court's concern for surface protection). In *Reed v. Wylie,* the owner of the mineral estate contended that he was entitled to coal and lignite under a deed reservation of "all oil, gas and other minerals." *See* Reed v. Wylie, 554 S.W.2d 169, 170 (1977), *modified,* 597 S.W.2d 743 (Tex. 1980).

24. *See* Reed v. Wylie, 554 S.W.2d 169, 172 (Tex. 1977), *modified,* 597 S.W.2d 743 (Tex. 1980). The *Reed I* rule was criticized because it required proof of the removal-method technology existing at various times in the past. *See* Reed v. Wylie, 554 S.W.2d 169, 181-82 (1977) (Daniel, J., dissenting) (difficult or impossible burden where ancient instruments involved); *see also* Note, *Mines and Minerals — Mineral Reservation — Reed v. Wylie,* 9 ST. MARY'S L.J. 624, 628, 632 (1978) (onerous burden leading to uncertainty because title depends upon expert testimony and jury findings of facts at distant dates). This rule was also questioned because it overlooked the possibility that a surface-destructive and a non-surface-destructive method of removing a particular substance might have existed at the same time in the past. *See* Reed v. Wylie, 554 S.W.2d 169, 174 (Tex. 1977) (Greenhill, C. J., concurring). A strong judicial affinity for surface protection is reflected in two cases which applied *Reed I. Compare* Sheffield v. Gibbs Bros. & Co., 596 S.W.2d 227, 229-30 (Tex. Civ. App.—Houston [1st Dist.] 1980, no writ) (coal and lignite not minerals because exception of sand, gravel, and stone from reservation of "all of the minerals and mineral rights" does not show clear intent to include other substances removable by surface-destructive methods) *with* Riddlesperger v. Creslenn Ranch Co., 595 S.W.2d 193, 196-98 (Tex. Civ. App.—Tyler 1980, writ ref'd n.r.e.) (coal and lignite not within "all of the oil, gas, uranium, and other minerals and gravel" even though this reservation specifically includes substances which could be extracted only by strip-mining).

25. *See* Reed v. Wylie, 554 S.W.2d 169, 173 (Tex. 1977) (proof required for summary judgment on ownership issue), *modified,* 597 S.W.2d 743 (Tex. 1980); *see also* Reed v. Wylie, 597 S.W.2d 743, 745-46 (Tex. 1980) (discussing *Reed I* "at the surface" language).

26. *See* Reed v. Wylie, 597 S.W.2d 743, 746-48 (Tex. 1980). In *Reed I,* the supreme court

estate and surface estate owners, at the time the estates were severed, was to preserve the surface of the land, then they intended to preserve the surface in the future as well.[27] Accordingly, a new rule was announced vesting title to near-surface coal, lignite, or iron ore in the surface estate owner if the surface estate owner proves that *any reasonable* removal method will result in the destruction of the surface.[28] Under *Reed II,* the surface estate owner can avoid the application of the above test, and establish title, by summary judgment proof that the substance is deposited at the surface of his tract of land.[29]

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remanded the case to the trial court because the record did not contain the location of the lignite. *See* Reed v. Wylie, 554 S.W.2d 169, 173 (Tex. 1977), *modified,* 597 S.W.2d 743 (Tex. 1980).

27. *See* Reed v. Wylie, 597 S.W.2d 743, 747 (Tex. 1980). This conclusion was in response to the holding in *Reed I* that the critical time for deciding if the surface would have been destroyed was the date on which the instrument was executed. *See id.* at 747. The court reasoned that the *Reed I* rule might yield inconsistent outcomes based on the quality of expert testimony concerning past removal methods. *See id.* at 747.

28. *See id.* at 747. Unlike *Reed I, Reed II* does not require that the degree of technological development be ascertained at any specific point in time. *Compare id.* at 747 (removal methods evaluated as of time of conveyance or later) *with* Reed v. Wylie, 554 S.W.2d 169, 172 (Tex. 1977) (removal methods at date of conveyance evaluated), *modified,* 597 S.W.2d 743 (Tex. 1980); *see also* Moser v. United States Steel Corp., 676 S.W.2d 99, 101 n.3 (Tex. 1984) (*Reed II* time frame for evaluating removal methods is conveyance date or thereafter). *Reed II* overrules the portion of *Reed I* which required the surface estate owner to prove that the substance could only be removed by surface-destructive methods. *See* Reed v. Wylie, 597 S.W.2d 743, 747 (Tex. 1980). The modifications in *Reed II* favored the surface estate owner because they lessened the burden of proof needed to exclude a particular substance from a grant of minerals. *Compare id.* at 747 (substance belongs to surface estate if any reasonable surface-destructive removal method exists at date of execution or thereafter) *with* Reed v. Wylie, 554 S.W.2d 169, 172 (Tex. 1977) (substance belongs to surface estate if only surface-destructive methods of removal exist at date of execution), *modified,* 597 S.W.2d 743 (Tex. 1980). *Reed II* clarifies the *Reed I* requirement that the substance be deposited near the surface. *See* Reed v. Wylie, 597 S.W.2d 743, 748 (Tex. 1980) (substance is near-surface as matter of law if within 200 feet of surface). Additionally, the court indicates that the surface destruction test can be applied if the surface estate owner proves that the substance is deposited at or near the surface of either his tract of land or adjacent land located within the "reasonably immediate vicinity." *See id.* at 748. Under *Reed II,* if the surface estate owner establishes ownership of a substance near the surface, then he owns that substance at all depths under the land. *See id.* at 748. The *Reed II* formulation of the surface destruction test has been applied in three cases. *See* Schwarz v. State, 28 Tex. Sup. Ct. J. 488, 491 (June 12, 1985) (coal and lignite held to belong to surface estate owner); Friedman v. Texaco, Inc., 691 S.W.2d 586, 589 (Tex. 1985) (uranium not included in "oil, gas and other minerals"); Moser v. United States Steel Corp., 601 S.W.2d 731, 733-34 (Tex. Civ. App.—Eastland 1980) (uranium included in "oil, gas and other minerals" because only reasonable method shown was solution mining which did not destroy surface), *aff'd on other grounds,* 676 S.W.2d 99 (Tex. 1984).

29. *See* Reed v. Wylie, 597 S.W.2d 743, 746 (Tex. 1980). The court defined "at the surface" as on the surface or at a shallow depth beneath the surface. *See id.* at 746. Applying the definition, the court found as a matter of law that the surface estate owner in *Reed* had estab-

While the supreme court focused on maintaining the integrity of the surface estate,[30] concern for the stabilization of Texas mineral titles grew with continued use of the surface destruction test.[31] One supreme court justice warned that the surface destruction test spawned tract-by-tract litigation which would lead to uncertainties in title ownership.[32] Another justice feared that the factual inquiries accompanying the surface destruction test would destabilize land titles and impede the development of crucial energy sources.[33] Both justices urged that ownership disputes be resolved by examining the instrument alone, without reference to factual investigations.[34]

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lished that the lignite was deposited at the surface. *See id.* at 746. Therefore, the surface estate owner owned the lignite without application of the surface destruction test. *See id.* at 746. A surface estate owner satisfying the summary judgment test owns the substance at all depths under the land. *See id.* at 748.

30. *See, e.g.,* Moser v. United States Steel Corp., 676 S.W.2d 99, 101 (Tex. 1984) (*Acker, Reed I, Reed II* part of court's attempt to protect surface estate); Friendswood Dev. Co. v. Smith-Southwest Indus., Inc. 576 S.W.2d 21, 33 (Tex. 1978) (Pope, J., dissenting) (*Acker* part of trend to avoid destruction of surface estate); Note, *Mines and Minerals — Title to Minerals — Moser v. United States Steel Corp.,* 15 ST. MARY'S L.J. 477, 488 & n.66 (1984) (*Acker, Reed I, Reed II* reflect concern for surface owner).

31. *See, e.g.,* Moser v. United States Steel Corp., 676 S.W.2d 99, 101 (Tex. 1984) (application of surface destruction rule caused title uncertainty); Reed v. Wylie, 597 S.W.2d 743, 747 (Tex. 1980) (*Reed I* rule had unstabilizing effect on land titles); *id.* at 750 (Spears, J., concurring) (ownership uncertainty existed under *Acker* and *Reed I* decisions).

32. *See* Reed v. Wylie, 554 S.W.2d 169, 178 (Tex. 1977) (Daniel, J., dissenting). The following statement epitomizes Justice Daniel's opposition to the surface destruction test: "[l]and titles will be decided more by inspection for near-surface out-croppings and proof of the necessary method of producing the substance at the time of the deed or lease than by reading the instruments of conveyance or lease." *See id.* at 178. Justice Daniel recommended that "other minerals" should not include coal and lignite. *See id.* at 175; *see also* Reed v. Wylie, 597 S.W.2d 743, 750-51 (Tex. 1980) (Spears, J., concurring) (discusses merits of Justice Daniel's recommendation). However, Justice Daniel limited his reasoning to situations where the phrase "oil, gas and other minerals" is used. *See* Reed v. Wylie, 554 S.W.2d 169, 177 (Tex. 1977) (Daniel, J., dissenting).

33. *See* Reed v. Wylie, 597 S.W.2d 743, 750 (Tex. 1980) (Spears, J., concurring). Justice Spears identified several fact findings that would have to be made before ownership could be determined under the surface destruction test, including whether the removal method is reasonable and whether the substance lies near the surface. *See id.* at 750. For an example of the numerous special issues and jury findings involved in the application of the surface destruction test, see *Storm Assocs., Inc. v. Texaco, Inc.,* 645 S.W.2d 579, 582 & n. 1 (Tex. App.—San Antonio 1982), *aff'd sub nom., Friedman v. Texaco, Inc.,* 691 S.W.2d 586 (Tex. 1985).

34. *See* Reed v. Wylie, 597 S.W.2d 743, 750, 751 (Tex. 1980) (Spears, J., concurring); Reed v. Wylie, 554 S.W.2d 169, 179 (Tex. 1977) (Daniel, J., dissenting); *see also* Comment, *The Need for Certainty in Ownership of Minerals: Coal, Lignite, "and Other Minerals",* 22 S. TEX. L.J. 287, 288 (1982) (determining title from instrument alone imperative for efficient development of resources). Justice Spears discussed four alternative methods for determining ownership of unnamed substances, all of which would lend more certainty to Texas mineral titles in his opinion. *See* Reed v. Wylie, 597 S.W.2d 743, 750-51 (Tex. 1980) (Spears, J., concurring). The four alternatives include: (1) separate the issues of ownership and reasonable

III. *MOSER V. UNITED STATES STEEL CORP.*

In *Moser v. United States Steel Corp. (Moser II),*[35] the Supreme Court of Texas was confronted with a fact situation which demanded that the emerging conflict between title certainty and surface protection be addressed.[36] In *Moser II,* the mineral and surface estates were severed by a 1949 deed reserving "all of the oil, gas, and other minerals."[37] The owners of the mineral estate claimed that uranium was included in the reservation of "other minerals."[38] Recognizing that the surface destruction test had caused title uncertainty,[39] the court redefined minerals as "all substances within the ordinary and natural meaning of that word, whether their presence or value is known at the time of severance."[40] The court then applied this test and concluded

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surface use and construe "minerals" according to its normal meaning; (2) coal and lignite at all depths belong to surface estate unless the instrument affirmatively expresses a contrary intention; (3) coal and lignite not included in "other minerals;" and (4) mineral owner only entitled to substances extractible by wells or shafts. *See id.* at 750-51 (Spears, J., concurring). For a brief evaluation of each alternative, see generally Note, *Ownership of "Other Minerals": Reed v. Wylie Speaks Again,* 18 HOUS. L. REV. 201, 208-09 (1980).

35. 676 S.W.2d 99 (Tex. 1984). The supreme court issued an earlier opinion in this case which was withdrawn. *See* Moser v. United States Steel Corp., 26 Tex. Sup. Ct. J. 427 (June 8, 1983), *opinion withdrawn,* 676 S.W.2d 99 (Tex. 1984).

36. *See* Moser v. United States Steel Corp., 676 S.W.2d 99, 100 (Tex. 1984) (court construing "oil, gas and other minerals" reservation to determine uranium ownership).

37. *See id.* at 100.

38. *See id.* at 100.

39. *See id.* at 101. The court also recognized that the factual resolutions required in the application of the surface destruction test made it impossible to determine ownership of an unspecified substance from the language of the instrument alone. *See id.* at 101.

40. *See id.* at 102. It should be noted that the *Moser* ordinary meaning test is different than the *Heinatz v. Allen* ordinary meaning test. *Compare id.* at 102 (knowledge of presence or value of substance at time of severance irrelevant) *with* Heinatz v. Allen, 147 Tex. 512, 518, 217 S.W.2d 994, 997 (1949) (substance not within ordinary meaning unless rare or peculiarly valuable); *see also* Note, *Abandonment of the Surface Destruction Test in Determining Ownership of Unnamed Minerals: Moser v. United States Steel Corp.,* 15 TEX. TECH L. REV. 699, 711 (1984) (*Heinatz* substantive value factor irrelevant to *Moser* ordinary meaning test). Early Texas courts had used the constructional aid *ejusdem generis* to limit the general word "minerals" to substances of the same physical character as those specifically listed before the general word "minerals" in the grant or reservation clause. *See* Guinn v. Acker, 451 S.W.2d 549, 552-56 (Tex. Civ. App.—Tyler 1970) (discussing history of *ejusdem generis* doctrine in Texas), *aff'd on other grounds sub nom.,* Acker v. Guinn, 464 S.W.2d 348, 350 (Tex. 1971) (supreme court refuses to apply *ejusdem generis* doctrine). While the supreme court did not expressly abolish the *ejusdem generis* rule, the rule is implicitly rejected by the ordinary meaning test adopted in *Moser. Compare* Moser v. United States Steel Corp., 676 S.W.2d 99, 102 (Tex. 1984) (hard substance uranium within ordinary meaning of minerals from an "oil, gas and other minerals" clause) *with* Right of Way Oil Co. v. Gladys City Oil, Gas & Mfg. Co., 106 Tex. 94, 103, 157 S.W. 737, 739-40 (1913) (oil excluded because specific words "timber, earth, and stone" restrict general word "mineral" that follows to substances similar to timber, earth, and stone).

that uranium is within the ordinary and natural meaning of minerals.[41] Therefore, title to uranium was held to belong to the owners of the mineral estate as a matter of law.[42]

The *Moser II* decision represents a compromise between two major goals: (1) providing mineral title certainty;[43] and (2) protecting those who had relied on the surface destruction tests.[44] Although a departure from the surface destruction era was essential to achieve mineral title certainty,[45] the court believed equity and the principle of *stare decisis* dictated that parties relying on the *Acker* and *Reed* holdings be protected.[46] As a solution to the dilemma, the supreme court adopted the ordinary meaning test to eliminate title uncertainty,[47] but limited the ordinary meaning test to a prospective

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41. *See* Moser v. United States Steel Corp., 676 S.W.2d 99, 102 (Tex. 1984).

42. *See id.* at 101-02.

43. *See id.* at 101 (court recognizes need to depart from surface destruction ownership approach which caused title uncertainty). Devising a test which would facilitate mineral ownership determinations from the instrument alone was a subgoal which is closely related and essential to providing mineral title certainty. *See id.* at 101 (citing *Reed v. Wylie*, 597 S.W.2d 743, 750 (Tex. 1980) (Spears, J., concurring)).

44. *See id.* at 103; *see also* Moser v. United States Steel Corp., 26 Tex. Sup. Ct. J. 427, 430 (June 8, 1983) (rights acquired under surface destruction holdings should be respected), *opinion withdrawn,* 676 S.W.2d 99 (Tex. 1984). *Moser II* reflects a stronger desire than *Moser I* to protect parties who relied on the *Acker* and *Reed* decisions. *Compare* Moser v. United States Steel Corp., 676 S.W.2d 99, 103 (Tex. 1984) ("[b]ecause of the *extent of public reliance"* on *Acker* and *Reed)* (emphasis added) *and id.* at 103 (ordinary meaning rule limited to prospective application) *with* Moser v. United States Steel Corp., 26 Tex. Sup. Ct. J. 427, 430 (June 8, 1983) ("[b]ecause contracting parties *reasonably could have relied"* on *Acker* and *Reed)* (emphasis added), *opinion withdrawn,* 676 S.W.2d 99 (Tex. 1984) *and id.* at 430 (surface destruction tests apply only to instruments executed between *Acker* and June 8, 1983).

45. *See* Moser v. United States Steel Corp., 676 S.W.2d 99, 101 (Tex. 1984).

46. *See id.* at 103; *see also* Moser v. United States Steel Corp., 26 Tex. Sup. Ct. J. 427, 430 (June 8, 1983) (equity compels holding that surface destruction tests apply to instruments executed between *Acker* and June 8, 1983), *opinion withdrawn,* 676 S.W.2d 99 (Tex. 1984); Friendswood Dev. Co. v. Smith-Southwest Indus., Inc., 576 S.W.2d 21, 28-29 (Tex. 1978) (*stare decisis* doctrine mandates respect for prior decisions which established rules involving property rights). The dilemma faced by the supreme court in *Moser* is closely analogous to the situation which faced the court in *Friendswood Dev. Co. v. Smith-Southwest Indus., Inc.* In *Friendswood,* the court recognized that the common law rule, which afforded producers immunity for subsidence caused by the negligent withdrawal of groundwater, was outmoded and contrary to public interests because it provided no incentive to conserve water or to avoid damaging neighboring land. *See* Friendswood Dev. Co. v. Smith-Southwest Indus., Inc., 576 S.W.2d 21, 28-29 (Tex. 1978). However, many citizens had acquired property rights and drilled water wells under the established rule which imposed liability only for malicious water withdrawal. *See id.* at 29. Consequently, the court announced a new rule which expanded the old rules of liability to include negligently caused subsidence, but the new rule would only apply prospectively to groundwater withdrawals from wells drilled or produced after the date of the opinion. *See id.* at 30.

47. *See* Moser v. United States Steel Corp., 676 S.W.2d 99, 101-102 (Tex. 1984).

application.[48] This element of compromise, however, has undermined the court's goal of promoting title certainty.

IV. THE FUTURE APPLICATION OF *MOSER*

Although the supreme court recites that the surface destruction test is abandoned,[49] the language of *Moser II* indicates that this test is still operative.[50] *Moser II* contains sources for restricting the application of the ordinary meaning test in three areas: time,[51] substances,[52] and the wording of the clause being construed.[53]

A. *When to Apply the Ordinary Meaning Test: The Timing Limitation*

1. Prospective Application

In *Moser II,* the supreme court announced that the ordinary meaning test is "to be applied only *prospectively* from . . . June 8, 1983."[54] The word "prospectively" created a chronological division in Texas mineral ownership

48. *See id.* at 103 (ordinary meaning rule applies only prospectively because of public reliance on *Acker* and *Reed).* As additional justification for limiting the holding to a prospective application, the court reasoned that the public could not foresee this sudden change in ownership tests. *See id.* at 103; *see also* Sanchez v. Schindler, 651 S.W.2d 249, 254 (Tex. 1983) (noting exception to general rule of retrospective operation of supreme court decisions based upon extent of public reliance on old rule and inability to foresee adoption of new rule).

49. *See* Moser v. United States Steel Corp., 676 S.W.2d 99, 101 (Tex. 1984).

50. *See id.* at 101 ("[w]e now abandon, *in the case of uranium,* the *Acker* and *Reed* approach to determining ownership of 'other minerals' ") (emphasis added); *id.* at 102 ("[w]e continue to adhere . . . to . . .[*Reed II]"); id.* at 103 (ordinary meaning rule limited to prospective application because of "extent of public reliance on . . .[*Acker* and *Reed* holdings]"); *see also* Note, *Determination of Ownership of Near-Surface Minerals as a Matter of Law: Moser v. U. S. Steel,* 36 BAYLOR L. REV. 715, 725-26 (1984) (examines *Moser II* language and concludes that surface destruction test still applicable to conveyances made before June 8, 1983).

51. *See* Moser v. United States Steel Corp., 676 S.W.2d 99, 103 (Tex. 1984) (ordinary meaning rule applies *only prospectively* from June 8, 1983) (emphasis added).

52. *See id.* at 102 (list of substances from prior decisions will belong to surface estate even when *Moser II* applies); *see also* Recent Development, 19 TULSA L.J. 448, 455 (1984) (certain substances belong to surface estate without application of *Moser* ordinary meaning test).

53. *See* Moser v. United States Steel Corp., 676 S.W.2d 99, 102 (Tex. 1984) ("a severance of minerals *in an oil, gas and other minerals clause* includes all substances within the ordinary and natural meaning of that word") (emphasis added).

54. *See id.* at 103. It should be noted that the prospective operation of a newly announced rule may have significantly different meanings and consequences in tort actions than in cases involving property rights. *See* Friendswood Dev. Co. v. Smith-Southwest Indus., Inc., 576 S.W.2d 21, 30-31 (Tex. 1978) (distinctions due to importance of precedent in property law). The supreme court has reached different results on whether to apply a new rule of property law to the case which announces the rule. *Compare* Moser v. United States Steel Corp., 676 S.W.2d 99, 102 (Tex. 1984) (ordinary meaning rule announced and applied) *with* Friendswood Dev. Co. v. Smith-Southwest Indus., Inc., 576 S.W.2d 21, 30 (Tex. 1978) (rule for subsidence caused by ground water withdrawal announced but not applied).

law.[55] However, *Moser II* did not specify what event must occur after June 8, 1983 to trigger the application of the ordinary meaning test.[56] Three possible events which might have activated the *Moser II* ordinary meaning test were: (1) a severance of "oil, gas and other minerals" occurring after June 8, 1983;[57] (2) a mineral transaction entered into after June 8, 1983 by a mineral estate owner relying upon *Moser II's* classification of uranium as a mineral;[58] or (3) a trial beginning after June 8, 1983.[59]

The supreme court clarified the "prospectively" language from *Moser II* in *Friedman v. Texaco, Inc.*[60] In *Friedman,* Justice Spears stated that the new *Moser II* rules will only be triggered by severances of "other minerals" which occur after June 8, 1983.[61] The *Moser II* rules affecting only post-

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55. *Cf.* Friendswood Dev. Co. v. Smith-Southwest Indus., Inc. 576 S.W.2d 21, 30 (Tex. 1978) (chronological division in ground water subsidence law created because court adhered to common law immunity rule for subsidence occurring before decision date and announced new rule which would be triggered by subsidence occurring after decision date).

56. *See* Moser v. United States Steel Corp., 676 S.W.2d 99, 103 (Tex. 1984) (court merely announces new rules apply prospectively from June 8, 1983).

57. *Compare* Moser v. United States Steel Corp., 676 S.W.2d 99, 102 (Tex. 1984) ("a *severance* of minerals in an oil, gas and other minerals clause includes all substances within the ordinary and natural meaning of that word") (emphasis added) *with id.* at 103 ("rules announced in this case . . . [apply] only prospectively from . . . June 8, 1983").

58. *Cf.* Southland Royalty Co. v. Humble Oil & Ref. Co., 151 Tex. 324, 328-29, 249 S.W.2d 914, 915-16 (1952) (supreme court applied law existing at time of reliance on decisions concerning pooled lease production to extend original mineral interest grant).

59. *See* Thornal v. Cargill, Inc., 573 S.W.2d 845, 848 (Tex. Civ. App.—Beaumont 1978) (Keith, J., dissenting) (prospective means application "to trials held after the announcement of the decision"), *aff'd in part and rev'd in part per curiam,* 587 S.W.2d 384, 384 (Tex. 1979) (agreeing with Justice Keith that new supreme court rule does not control disposition because trial arose before decision announcing new rule).

60. *See* Friedman v. Texaco, Inc., 691 S.W.2d 586, 588 (Tex. 1985).

61. *See id.* at 589. Announcing that the *Moser II* rules apply only to severances made after June 8, 1983 is inconsistent with the court's application of the ordinary meaning test in *Moser II. Compare id.* at 589 (*Moser II* rules apply to "other minerals" severances made after June 8, 1983) *with* Moser v. United States Steel Corp., 676 S.W.2d 99, 102 (Tex. 1984) (court applied ordinary meaning rule to 1949 severance of "other minerals"); *see also* Note, *Determination of Ownership of Near-Surface Minerals as a Matter of Law: Moser v. U. S. Steel,* 36 BAYLOR L. REV. 715, 729 (1984) (notes *Moser II* court applied ordinary meaning test to 1949 conveyance and concludes ordinary meaning test applies to uranium in all conveyances of "other minerals"). One explanation for the inconsistency is that the prospective limitation did not apply in *Moser II* because the court was simply applying the new rule to the parties in the present cause. *See* Linkletter v. Walker, 381 U.S. 618, 621-22 (1964) (application of new rule to present cause just precludes pure prospectivity); Friendswood Dev. Co. v. Smith-Southwest Indus., Inc., 576 S.W.2d 21, 35 (Tex. 1978) (Pope, J., dissenting) (noting prior Texas decisions where a new rule was announced and applied, and arguing new prospective subsidence rule should apply to parties before court). *But see* Friendswood Dev. Co. v. Smith-Southwest Indus., Inc., 576 S.W.2d 21, 30 (Tex. 1978) (new property rule rarely applied in case announcing new rule); Moser v. United States Steel Corp., 676 S.W.2d 99, 104 (Tex. 1984) (Ray, J., dis-

June 8, 1983 severances include the ordinary meaning test,[62] and the rule requiring the mineral owner to compensate the surface owner for any surface destruction.[63]

2. Retrospective Application

In *Moser II,* the supreme court gave no indication of the law that should be applied retrospectively when the ordinary meaning test is not triggered.[64] *Friedman,* however, clearly establishes that *Moser II* rules will not apply to severances made before June 8, 1983.[65]

After *Friedman,* June 8, 1983 becomes the critical dividing line in Texas mineral ownership jurisprudence with respect to uranium.[66] For uranium, the *Moser II* ordinary meaning test controls severances of "other minerals" occurring after June 8, 1983, and *Acker* and *Reed* govern severances of

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senting) (court announced new rule requiring compensation for surface destruction but did not apply it).

62. *See* Moser v. United States Steel Corp., 676 S.W.2d 99, 102 (Tex. 1984).

63. *See id.* at 103 (mineral owner acquiring title to an unnamed substance under a severance of "other minerals" must compensate surface owner for surface damage caused during removal of the substance).

64. *See id.* at 103 (court merely announces that the ordinary meaning test applies only prospectively because of public reliance on the *Acker* and *Reed* holdings). Therefore, it was possible that the common law ownership approaches would remain intact so that the exact law in effect at the time of the severance or at the time of reliance on a subsequent change in the law could be applied. *Cf.* Friendswood Dev. Co. v. Smith-Southwest Indus., Inc., 576 S.W.2d 21, 22 (Tex. 1978) (new property rule adopted prospectively, but old common law rule applies to actions taken before the announcement of the new rule); Note, *Determination of Ownership of Near-Surface Minerals as a Matter of Law: Moser v. U. S. Steel,* 36 BAYLOR L. REV. 715, 725-26 (1984) (discussing *Moser II* prospective language and stating that arguably a test other than the surface destruction test should control pre-*Acker* conveyances). The *Moser II* prospective language could also have been interpreted as meaning that the ordinary meaning test would apply in cases which did not involve reliance on *Acker* and *Reed. See* Moser v. United States Steel Corp., 676 S.W.2d 99, 103 (Tex. 1984) (ordinary meaning test applies prospectively because of public reliance on the *Acker* and *Reed* holdings); *see also* Note, *Determination of Ownership of Near-Surface Minerals as a Matter of Law: Moser v. U. S. Steel,* 36 BAYLOR L. REV. 715, 726 (1984) (*Moser II* prospective language could create a twelve-year surface destruction "window" because parties to pre-*Acker* conveyances did not rely on *Acker* and *Reed).* Finally, it was possible that the law in effect retroactively immediately prior to June 8, 1983 would continue to control ownership disputes arising from conveyances made before June 8, 1983. *See* Note, *Determination of Ownership of Near-Surface Minerals as a Matter of Law: Moser v. U. S. Steel,* 36 BAYLOR L. REV. 715, 726 (1984); *cf.* Friendswood Dev. Co. v. Smith-Southwest Indus., Inc., 576 S.W.2d 21, 22 (Tex. 1978) (old common law rule applies to actions taken before new rule announced).

65. *See* Friedman v. Texaco, Inc., 691 S.W.2d 586, 588 (Tex. 1985) (*Moser II* rules apply only to severances made after June 8, 1983).

66. *See id.* at 589 (ordinary meaning test applies to post-June 8, 1983 severances and surface destruction test applies to pre-June 8, 1983 severances when title to uranium is involved).

"other minerals" occurring before June 8, 1983.[67] Consequently, many years of "other minerals" severances are locked in time[68] so that title to uranium for all pre-June 8, 1983 severances can be safely determined only in the courtroom and not by an examination of the language in the severing instrument.[69] Furthermore, depending upon the severance date, two definitions of the word "minerals" will be applied to uranium.[70] Applying more than one definition clearly creates further title uncertainty since uranium is encompassed by one definition yet may not be covered by the other.[71]

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67. *See id.* at 589. The decision to apply *Acker* and *Reed* to uranium for all pre-June 8, 1983 severances was prompted by three considerations: (1) the court concluded that Texas law for determining uranium ownership was unsettled prior to *Acker;* (2) the court viewed *Heinatz* as the origin of the surface destruction test; and (3) the *Acker* and *Reed* holdings were not limited to a prospective application. *See id.* at 588-89. *But see* Heinatz v. Allen, 147 Tex. 512, 517-18, 217 S.W.2d 994, 997-98 (1949) ("mineral rights" given an ordinary and natural construction and the surface destruction factor de-emphasized); Note, *Determination of Ownership of Near-Surface Minerals as a Matter of Law: Moser v. U. S. Steel,* 36 BAYLOR L. REV. 715, 725 (1984) (surface destruction test created in *Acker);* Note, *Mines and Minerals — Mineral Reservation — Reed v. Wylie,* 12 ST. MARY'S L.J. 580, 595 (1980) (*Acker* disregarded the *Heinatz* natural meaning and value factors). In *Friedman,* the mineral estate owner argued that the applicable law should be the law that was in effect when she made a conveyance after the severance. *See* Friedman v. Texaco, Inc., 691 S.W.2d 586, 588 (Tex. 1985). The court rejected the reliance argument concluding that no clear rule existed for uranium prior to *Acker. See id.* at 589. The language in *Friedman* indicates that a similar reliance argument might prevail for substances other than uranium if the relying party can establish that a clear rule existed at the time of the reliance. *Cf. id.* at 589 (reliance argument rejected because no clear rule for uranium existed at the time of the reliance).

68. *See* Friedman v. Texaco, Inc., 691 S.W.2d 586, 589 (Tex. 1985) (*Acker* and *Reed* apply to all "other minerals" severances occurring before June 8, 1983). The time lock can be avoided if the mineral and surface estates severed before June 8, 1983 are merged and then re-severed after June 8, 1983. *See id.* at 589; *see also* Humphreys-Mexia Co. v. Gammon, 113 Tex. 247, 260-62, 254 S.W. 296, 301-02 (1923) (discussing principles of merger for severed mineral and surface estates).

69. *See* Friedman v. Texaco, Inc., 691 S.W.2d 586, 590 (Tex. 1985) (Ray, J., dissenting); *see also* Reed v. Wylie, 597 S.W.2d 743, 750 (Tex. 1980) (Spears, J., concurring) (*Reed II* rule does not facilitate title determinations from instrument alone, but guarantees decades of litigation).

70. *Compare* Friedman v. Texaco, Inc., 691 S.W.2d 586, 588 (Tex. 1985) (*Moser II* applies to severances made after June 8, 1983) *and id.* at 589 (*Acker* and *Reed* control severances made before June 8, 1983) *with* Moser v. United States Steel Corp., 676 S.W.2d 99, 102 (Tex. 1984) (mineral defined as a substance within natural and ordinary meaning of the word "minerals") *and* Acker v. Guinn, 464 S.W.2d 348, 352 (Tex. 1971) (mineral defined as a substance removable without substantial adverse effect on surface); *see also* Friedman v. Texaco, Inc., 691 S.W.2d 586, 589-90 (Tex. 1985) (Ray, J., dissenting) (opposing majority's rule because uranium ownership depends upon severance date).

71. *Compare* Moser v. United States Steel Corp., 676 S.W.2d 99, 102 (Tex. 1984) (uranium a mineral within natural and ordinary meaning of "minerals") *with* Friedman v. Texaco, Inc., 691 S.W.2d 586, 588 (Tex. 1985) (uranium not a mineral based on application of *Acker* and *Reed* rules).

The supreme court's recent opinion in *Schwarz v. State*[72] also indicates that the ordinary and natural meaning test is further restricted since the surface destruction test was not abandoned in *Moser II* for near-surface coal, lignite, and iron ore.[73] The *Acker* and *Reed* surface destruction rules will continue to apply to severances of "other minerals" made before *and* after June 8, 1983 where the ownership of near-surface coal, lignite, or iron ore is disputed.[74]

Friedman and *Schwarz* guarantee that the surface destruction test survives to haunt contracting parties, title examiners, and courts, with its unpredictable maze of factual inquiries, where title to uranium, near-surface coal, near-surface lignite, or near-surface iron ore is concerned.[75] However, the applicable retrospective law for substances other than uranium, near-surface coal, near-surface lignite, and near-surface iron ore is still not clear.[76] As an example, a future dispute may arise out of a pre-June 8, 1983 severance over unnamed substance X. Presumably, the rules of *Acker* and *Reed* will determine the ownership of substance X since the *Moser II* timing limitation prevents the application of the ordinary meaning test.[77] Arguably, however, Texas courts may follow a *clear* classifying rule for substance X, which existed when a mineral conveyance was made before June 8, 1983, rather than

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72. 28 Tex. Sup. Ct. J. 488 (June 12, 1985).

73. *See id.* at 489; *see also* Moser v. United States Steel Corp., 676 S.W.2d 99, 101 (Tex. 1984) (*Acker* and *Reed* abandoned "in the case of uranium").

74. *See* Schwarz v. State, 28 Tex. Sup. Ct. J. 488, 489 (June 12, 1985) (stating that *Moser II* abandoned *Acker* and *Reed* for uranium, and reaffirming the application of *Acker* and *Reed* for near-surface lignite, iron, and coal).

75. *See id.* at 489 (*Acker* and *Reed* reaffirmed for near-surface coal, lignite, and iron ore); Friedman v. Texaco, Inc., 691 S.W.2d 586, 589 (Tex. 1985) (*Acker* and *Reed* apply to uranium for severances occurring before June 8, 1983); *see also* Reed v. Wylie, 597 S.W.2d 743, 752 (Tex. 1980) (Spears, J., concurring) (characterizing the surface destruction test as a "mire of factual differences" promoting tract-by-tract ownership determinations).

76. *See* Schwarz v. State, 28 Tex. Sup. Ct. J. 488, 489 (June 12, 1985) (establishing the applicable law only for near-surface coal, lignite, and iron ore); Friedman v. Texaco, Inc., 691 S.W.2d 586, 589 (Tex. 1985) (establishing the applicable law only for uranium). It should be noted, however, that *Moser II* vests title to sand, gravel, water, caliche, surface shale, limestone, and building stone in the surface estate owner as a matter of law, regardless of when the severance occurred. *See* Moser v. United States Steel Corp., 676 S.W.2d 99, 102 (Tex. 1984); *see also* Schwarz v. State, 28 Tex. Sup. Ct. J. 488, 489 (June 12, 1985) (under *Moser II,* certain substances part of surface estate as a matter of law). *Moser II* also vests title to solid sulphur in the mineral estate owner as a matter of law. *See* Moser v. United States Steel Corp., 676 S.W.2d 99, 101 (Tex. 1984) (solid sulphur catalogued mineral as a matter of law).

77. *See* Friedman v. Texaco, Inc., 691 S.W.2d 586, 589 (Tex. 1985) (*Acker* and *Reed* had retroactive operation); *id.* at 489 (*Moser II* applies only to severances occurring after June 8, 1983, *Acker* and *Reed* apply to all other severances where title to uranium involved); Moser v. United States Steel Corp., 676 S.W.2d 99, 101 (Tex. 1984) (ordinary meaning test applies only prospectively because of public reliance on *Acker* and *Reed).*

the surface destruction test.[78]

B. *Substances Limitation*

1. Substances Belonging to the Surface Estate as a Matter of Law

Although all substances are potentially subject to classification under the *Moser II* ordinary meaning test,[79] the supreme court has at least temporarily removed certain substances from the spectrum of substances which can be classified by the test.[80] As a matter of law, limestone, building stone, caliche, surface shale, water, sand, and gravel belong to the surface estate under all severances of "other minerals."[81] Apparently, the statements in *Moser II* that near-surface coal, lignite, and iron ore are included in the surface estate

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78. *Cf.* Great N. Ry. Co. v. Sunburst Oil & Ref. Co., 287 U.S. 358, 364 (1932) (state may adhere to precedent so that overruled decisions remain the law for past transactions); Moser v. United States Steel Corp., 26 Tex. Sup. Ct. J. 427, 430 (June 8, 1983) (rights acquired under previously existing law should be respected by applying the effective law at the time of reliance), *opinion withdrawn,* 676 S.W.2d 99 (Tex. 1984); Friendswood Dev. Co. v. Smith-Southwest Indus., Inc., 576 S.W.2d 21, 30-31 (Tex. 1978) (for property transactions, "parties should be able to rely on the law which existed at the time of their actions"). Where property rights have accrued under a settled state rule, federal courts may apply the settled rule to those rights even if the state court changes the law after the rights accrued. *See* Kuhn v. Fairmont Coal Co., 215 U.S. 349, 360 (1910). The argument to apply a rule existing at the time of reliance prior to *Acker* has only been foreclosed by the supreme court for uranium. *See* Friedman v. Texaco, Inc., 28 Tex. Sup. Ct. J. 455, 456 (June 5, 1985) (no settled rule existed for uranium before *Acker).*

79. *See* Moser v. United States Steel Corp., 676 S.W.2d 99, 102 (Tex. 1984) (minerals "includes *all substances* within the ordinary and natural meaning of that word") (emphasis added). *But see* Note, *Determination of Ownership of Near-Surface Minerals as a Matter of Law: Moser v. U. S. Steel,* 36 BAYLOR L. REV. 715, 727, 729, 731 (1984) (ordinary meaning test applies only to uranium).

80. *See* Moser v. United States Steel Corp., 676 S.W.2d 99, 102 (Tex. 1984) (court will continue to adhere to list of prior decisions holding certain substances part of surface estate as matter of law). The court's list of previous decisions includes: *Reed v. Wylie,* 597 S.W.2d 743 (Tex. 1980) (near-surface lignite, coal, and iron); *Heinatz v. Allen,* 147 Tex. 512, 217 S.W.2d 994 (1949) (limestone and building stone); *Atwood v. Rodman,* 355 S.W.2d 206 (Tex. Civ. App.—El Paso 1962, writ ref'd n.r.e.) (surface shale, limestone, and caliche); *Fleming Found. v. Texaco, Inc.,* 337 S.W.2d 846 (Tex. Civ. App.—Amarillo 1960, writ ref'd n.r.e.) (water); *Psencik v. Wessels,* 205 S.W.2d 658 (Tex. Civ. App.—Austin 1947, writ ref'd) (sand and gravel).

81. *See* Moser v. United States Steel Corp., 676 S.W.2d 99, 102 (Tex. 1984); *see also* Schwarz v. State, 28 Tex. Sup. Ct. J. 488, 489 (June 12, 1985) (*Moser II* vests title to certain substances in surface estate owner as a matter of law). By adhering to prior holdings which classified particular substances as "surface," the supreme court has effectively adopted a construction of "the ordinary and natural meaning" of minerals very similar to that advocated by Justice Daniel in his dissenting opinion in *Reed I. Compare* Moser v. United States Steel Corp., 676 S.W.2d 99, 102 (Tex. 1984) (near surface lignite, coal, and iron, limestone, shale, caliche, water, sand, and gravel belong to surface estate) *with* Reed v. Wylie, 554 S.W.2d 169, 182 (Tex. 1977) (Daniel, J., dissenting) (near surface lignite, iron ore, limestone, sand, and

as a matter of law were not meant to be literally interpreted.[82] Rather, the court was merely emphasizing that the *Acker* and *Reed* rules would continue to be applied in determining title to near-surface coal, lignite, and iron ore.[83]

2. Substances Belonging to the Mineral Estate as a Matter of Law

As a matter of law, solid sulphur is a mineral under all severances of "other minerals."[84] Uranium is a mineral as a matter of law only for "other minerals" severances occurring after June 8, 1983.[85]

3. Substances Included in the Ordinary Meaning of Minerals

Uranium is the only substance which has been classified as a matter of law under the *Moser II* ordinary meaning test.[86] Therefore, the supreme court has at least temporarily created a separate body of law for uranium.[87] When Texas courts apply the *Moser II* ordinary meaning test to substances other

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gravel not within ordinary and natural meaning of minerals because of their close physical relationship to the soil).

82. *Compare* Schwarz v. State, 28 Tex. Sup. Ct. J. 488, 491 (June 12, 1985) (the coal and lignite was near-surface, but the court still applied the *Reed II* surface destruction test) *with* Moser v. United States Steel Corp., 676 S.W.2d 99, 101, 102 (Tex. 1984) (near-surface coal, lignite, and iron ore are included in surface estate as a matter of law).

83. *See* Schwarz v. State, 28 Tex. Sup. Ct. J. 488, 489 (June 12, 1985).

84. *See* Moser v. United States Steel Corp., 676 S.W.2d 99, 101 (Tex. 1984) (indicating that solid sulphur has already been catalogued a mineral as a matter of law).

85. *Compare* Friedman v. Texaco, Inc., 691 S.W.2d 586, 589 (Tex. 1985) (*Moser II* rules only apply to severances made after June 8, 1983) *with* Moser v. United States Steel Corp., 676 S.W.2d 99, 101-02 (Tex. 1984) (uranium within natural meaning of minerals and is owned by mineral estate owner as a matter of law).

86. *See* Moser v. United States Steel Corp., 676 S.W.2d 99, 101-02 (Tex. 1984).

87. Interview with James N. Castleberry, Jr., Dean of the St. Mary's University School of Law, in San Antonio, Texas (May 27, 1985) (court has probably created separate body of law for uranium because of restrictions on ordinary meaning test); *see also* Schwarz v. State, 28 Tex. Sup. Ct. J. 488, 489 (June 12, 1985) (*Moser II* abandoned *Acker* and *Reed* for uranium title determinations); Moser v. United States Steel Corp., 676 S.W.2d 99, 101 (Tex. 1984) ("we now abandon, *in the case of uranium,* the *Acker* and *Reed* [ownership] approach") (emphasis added); 1 H. WILLIAMS & C. MEYERS, OIL AND GAS LAW § 219, at 266.11 (1984) (*Acker* and *Reed* intact for substances other than uranium after *Moser II).* Justice Campbell, who wrote the *Moser* opinion, indicated in another case that rules governing hard minerals should be different from rules governing substances related to oil and gas because the mining of hard minerals involves different problems. *See* Dallas Power & Light Co. v. Cleghorn, 623 S.W.2d 310, 312 (Tex. 1981) (Campbell, J., concurring) (implied oil and gas lease covenants not applicable to hard minerals). The supreme court may have perceived a greater need to protect the surface estate when coal and lignite are involved than when uranium is involved even though all three substances are hard minerals. *Compare* Schwarz v. State, 658 S.W.2d 822, 823 (Tex. App.—Austin 1983) (coal and lignite strip-mining destroyed surface), *rev'd on other grounds,* 28 Tex. Sup. Ct. J. 488 (June 12, 1985) *with* Moser v. United States Steel Corp., 601 S.W.2d 731, 733-34 (Tex. Civ. App.—Eastland 1980) (uranium solution mining does not destroy surface), *aff'd on other grounds,* 676 S.W.2d 99 (Tex. 1984).

than uranium, the inclusion or exclusion of unnamed substances in the word "minerals" will be determined according to the "ordinary and natural meaning of that word."[88] Prior case law may offer some guidance in determining what substances are within the ordinary and natural meaning of minerals.[89] Oil, gas, coal, and lignite are all substances that have been determined to be included in a conveyance or reservation of minerals.[90]

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88. *See* Moser v. United States Steel Corp., 676 S.W.2d 99, 102 (Tex. 1984) (minerals "includes all substances within the ordinary and natural meaning of that word"). Several courts have attempted to capture a standard of knowledge to be used for the ordinary meaning of the word "minerals." *See, e.g.,* New Mexico & Ariz. Land Co. v. Elkins, 137 F. Supp. 767, 771 (D.N.M. 1956) ("scientific, geological and practical meanings"), *dism'd sub nom.,* Elkins v. New Mexico & Ariz. Land Co., 239 F.2d 645 (10th Cir. 1958); Fleming Found. v. Texaco, Inc., 337 S.W.2d 846, 852 (Tex. Civ. App.—Amarillo 1960, writ ref'd n.r.e.) ("true test is what that word means in the vernacular of mining and mineral industry, the commercial world, and the land owners"); Psencik v. Wessels, 205 S.W.2d 658, 660-61 (Tex. Civ. App.—Austin 1947, writ ref'd) (substances "commonly regarded as minerals" within "common vernacular of those dealing in farm lands and mineral rights"). At the trial court level, the "ordinary and natural meaning" of the word "minerals" will probably be a fact question. *See* Recent Development, 19 TULSA L.J. 448, 453 (1984) (ordinary meaning a question of fact requiring expert testimony in mining, commercial, and agricultural fields); *see also* Reed v. Wylie, 554 S.W.2d 169, 182 (Tex. 1977) (Daniel, J., dissenting) (ordinary and natural meaning depends upon substance location, removal methods, and production effects on surface); Heinatz v. Allen, 147 Tex. 512, 518, 217 S.W.2d 994, 997-98 (1949) (ordinary and natural meaning depends upon substance value, location, removal methods, and surface-destructive effects). It has been suggested that the key factor for determining whether a substance is ordinarily considered part of the surface or part of the mineral estate is the substance's close physical relationship with the soil. *See* Reed v. Wylie, 554 S.W.2d 169, 181-82 (Tex. 1977) (Daniel, J., dissenting); *see also* Robinson v. Robbins Petroleum Corp., Inc., 501 S.W.2d 865, 866-67 (Tex. 1973) (water closely related to surface and ordinarily considered part of surface estate); Heinatz v. Allen, 147 Tex. 512, 518, 217 S.W.2d 994, 997 (1949) (limestone ordinarily considered part of soil because of close relation to soil).

89. *See* Schwarz v. State, 658 S.W.2d 822, 823 (Tex. App.—Austin 1983) (court considered prior case and statute in determining that coal and lignite within ordinary meaning of minerals), *rev'd,* 28 Tex. Sup. Ct. J. 488 (June 12, 1985); Recent Development, 19 TULSA L.J. 448, 453 (1984) (suggesting that decisions between *Heinatz* and *Acker* offer best indication of *Moser* ordinary meaning test application). While prior holdings may be helpful, it should be noted that substances included within the *Moser II* ordinary meaning test may not have been included within the *Heinatz* ordinary meaning test. *Compare* Moser v. United States Steel Corp., 676 S.W.2d 99, 102 (Tex. 1984) (knowledge of value of substance at time of severance irrelevant) *with* Heinatz v. Allen, 147 Tex. 512, 518, 217 S.W.2d 994, 997 (1949) (substance not within ordinary meaning unless rare or peculiarly valuable). In *Moser II,* the court announced adherence to five prior decisions. *See* Moser v. United States Steel Corp., 676 S.W.2d 99, 102 (Tex. 1984). Of the five decisions, *Reed II* is the only one in which the court did not consider whether the substance is commonly viewed as a mineral. *See* Heinatz v. Allen, 147 Tex. 512, 518, 217 S.W.2d 994, 997 (1949); Atwood v. Rodman, 355 S.W.2d 206, 213 (Tex. Civ. App.—El Paso 1962, writ ref'd n.r.e.); Fleming Found. v. Texaco, Inc., 337 S.W.2d 846, 852 (Tex. Civ. App.—Amarillo 1960, writ ref'd n.r.e.); Psencik v. Wessels, 205 S.W.2d 658, 660-61 (Tex. Civ. App.—Austin 1947, writ ref'd).

90. *See* Schwarz v. State, 658 S.W.2d 822, 823 (Tex. App.—Austin, 1983) (coal and lig-

The supreme court, therefore, may decide to apply the *Moser II* ordinary meaning test to coal and lignite in the future.[91] Mineral estate owners would have a strong argument if the ordinary meaning test is applied to coal and lignite, because the weight of Texas authority supports the view that coal and lignite are encompassed within the ordinary meaning of minerals.[92] In fact, the supreme court has recognized that coal and lignite would belong to the mineral estate under a reservation of "oil, gas and other minerals" if not for the application of the surface destruction test.[93] If the court does classify coal and lignite as minerals under the ordinary meaning test, another chronological division in Texas mineral ownership law will arise for coal and lignite.[94]

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nite within ordinary meaning of minerals), *rev'd on other grounds,* 28 Tex. Sup. Ct. J. 488, 491 (June 12, 1985) (coal and lignite not minerals based on application of surface destruction test); Carminati v. Fenoglio, 267 S.W.2d 449, 452 (Tex. Civ. App.—Fort Worth 1954, writ ref'd n.r.e.) (oil and gas within "all minerals" reservation); Luse v. Boatman, 217 S.W. 1096, 1096 (Tex. Civ. App.—Fort Worth 1919, writ ref'd) ("all the coal and mineral" reservation covers oil and gas). Texas courts have at different times split as to whether salt water is part of the mineral estate. *See* Robinson v. Robbins Petroleum Corp., Inc., 501 S.W.2d 865, 867 (Tex. 1973) (all salt and fresh water belongs to surface estate); Ambassador Oil Corp. v. Robertson, 384 S.W.2d 752, 763 (Tex. Civ. App.—Austin 1964, writ ref'd n.r.e.) (salt water included as mineral within "oil, gas and other minerals" lease).

91. *See* Note, *Determination of Ownership of Near-Surface Minerals as a Matter of Law: Moser v. U. S. Steel,* 36 BAYLOR L. REV. 715, 730 (1984); *see also* Moser v. United States Steel Corp., 676 S.W.2d 99, 103 (Tex. 1984) (ordinary meaning rule applies prospectively from June 8, 1983). However, the court has already declined to apply the ordinary meaning test in a case involving coal and lignite decided after *Moser II. See* Schwarz v. State, 28 Tex. Sup. Ct. J. 488, 491 (June 12, 1985) (court applied surface destruction test).

92. *See, e.g.,* Schwarz v. State, 658 S.W.2d 822, 823 (Tex. App.—Austin 1983) (coal and lignite within ordinary meaning of minerals), *rev'd on other grounds,* 28 Tex. Sup. Ct. J. 488, 491 (June 12, 1985) (coal and lignite not minerals based on application of *Reed II);* Cline v. Henry, 239 S.W.2d 205, 209 (Tex. Civ. App.—Dallas 1951, writ ref'd n.r.e.) (coal and lignite are minerals); Comment, *Lignite: Surface or Mineral — The Surface Destruction Test and More,* 29 BAYLOR L. REV. 879, 904 (1977) (ordinary and normal meaning of minerals would include coal). All of the judicial authority in Texas that coal and lignite are not minerals is based upon applications of the surface destruction test. *See* Schwarz v. State, 28 Tex. Sup. Ct. J. 488, 491 (June 12, 1985); Reed v. Wylie, 597 S.W.2d 743, 744-46 (Tex. 1980); 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, 198 (Tex. Civ. App.—Tyler 1980, writ ref'd n.r.e.); DuBois v. Jacobs, 551 S.W.2d 147, 150 (Tex. Civ. App.—Austin, 1977, no writ); Williford v. Spies, 530 S.W.2d 127, 130-31 (Tex. Civ. App.—Waco 1975, no writ).

93. *See* Reed v. Wylie, 554 S.W.2d 169, 172 (Tex. 1977), *modified,* 597 S.W.2d 743 (Tex. 1980); *see also* Riddlesperger v. Creslenn Ranch Co., 595 S.W.2d 193, 195-96 (Tex. Civ. App.—Tyler 1980, writ ref'd n.r.e.) (coal and lignite generally recognized as minerals within "other minerals" without surface destruction rule application). Similarly, the supreme court recognized that iron ore is a mineral, but it belongs to the surface estate under the surface destruction test because its removal would destroy the surface of the land. *See* Acker v. Guinn, 464 S.W.2d 348, 351 (Tex. 1971).

94. *Compare* Schwarz v. State, 28 Tex. Sup. Ct. J. 488, 489 (June 12, 1985) (*Acker* and

C. *The Limitation Based on Wording Used to Grant or Reserve Minerals*

The "oil, gas and other minerals" clause is most commonly used to grant or reserve minerals in Texas.[95] Many instruments, however, contain mineral clauses that are worded differently.[96] Literally interpreted, *Moser II* limits the application of the ordinary meaning test to cases construing the word "minerals" from an "oil, gas and other minerals" clause.[97] Historically, Texas courts have considered the exact language used when adjusting the scope of the mineral estate.[98] One supreme court justice has even suggested

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Reed reaffirmed for near-surface coal and lignite) *with* Moser v. United States Steel Corp., 676 S.W.2d 99, 101-03 (Tex. 1984) (because of reliance on *Acker* and *Reed*, surface destruction test abandoned for uranium only prospectively from June 8, 1983); *see also* Note, *Determination of Ownership of Near-Surface Minerals as a Matter of Law: Moser v. U. S. Steel,* 36 BAYLOR L. REV. 715, 730 (1984) (if ordinary meaning test is applied to coal and lignite in future, court will again face problem of how to protect reliance on surface destruction tests).

95. *See, e.g.,* Acker v. Guinn, 464 S.W.2d 348, 350 (Tex. 1971) ("oil, gas and other minerals" reservation widely used in Texas deeds); Note, *Abandonment of the Surface Destruction Test in Determining Ownership of Unnamed Minerals: Moser v. United States Steel Corp.,* 15 TEX. TECH L. REV. 699, 701 (1984) (mineral and surface estates usually severed by "oil, gas and other minerals" clause); Note, *Ownership of "Other Minerals": Reed v. Wylie Speaks Again,* 18 HOUS. L. REV. 201, 201 (1980) (most mineral transactions use "oil, gas and other minerals").

96. *See, e.g.,* Heinatz v. Allen, 147 Tex. 512, 515, 217 S.W.2d 994, 995 (1949) ("the mineral rights"); Anderson & Kerr Drilling Co. v. Bruhlmeyer, 134 Tex. 574, 575, 136 S.W.2d 800, 802 (1940) ("all Minerells Paint Rock, &c"); Watkins v. Certain-Teed Prod. Corp., 231 S.W.2d 981, 982 (Tex. Civ. App.—Amarillo 1950, no writ) ("all of the gypsum, gypsum plaster and gypsum stone and all other minerals").

97. *See* Moser v. United States Steel Corp., 676 S.W.2d 99, 102 (Tex. 1984) ("a severance of minerals *in an oil, gas and other minerals clause* includes all substances within the ordinary and natural meaning of that word") (emphasis added). In *Acker, Reed,* and *Moser,* the supreme court construed the phrase "oil, gas and other minerals." *See* id. at 100; Reed v. Wylie, 597 S.W.2d 743, 744 (Tex. 1980); Acker v. Guinn, 464 S.W.2d 348, 349 (Tex. 1971). It should be noted, however, that the rule announced in *Acker* was clearly not restricted to the specific phrase "oil, gas and other minerals." *See* Acker v. Guinn, 464 S.W.2d 348, 352 (Tex. 1971) (rule applies to construction of "minerals" or "mineral rights"). Arguably, the ordinary meaning test is not limited to the specific phrase "oil, gas and other minerals" because neither of the cases that the court cites as support for the new test construed the phrase. *See* Moser v. United States Steel Corp., 676 S.W.2d 99, 102 (Tex. 1984) (citing *Heinatz* and *Cain* below the statement of the ordinary meaning test); *see also* Heinatz v. Allen, 147 Tex. 512, 517, 217 S.W.2d 994, 997 (1949) ("the mineral rights" construed); Cain v. Neumann, 316 S.W.2d 915, 922 (Tex. Civ. App.—San Antonio 1958, no writ) ("all of the oil, gas, coal and other minerals" construed).

98. *See, e.g.,* Riddlesperger v. Creslenn Ranch Co., 595 S.W.2d 193, 198 (Tex. Civ. App.—Tyler 1980, writ ref'd n.r.e.) (discussing instruments which reserve "oil, gas, a dissimilar mineral, and other minerals"); Fleming Found. v. Texaco, Inc., 337 S.W.2d 846, 852 (Tex. Civ. App.—Amarillo 1960, writ ref'd n.r.e.) (named substances oil and gas not similar to water, so water not part of mineral estate); Cain v. Neumann, 316 S.W.2d 915, 922 (Tex. Civ. App.—San Antonio 1958, no writ) (emphasizing word "all" in a grant of "all of the oil, gas, coal and other minerals" reveals intent to make an unrestricted grant of all minerals).

that a broad, unrestricted mineral clause may encompass more substances than an "oil, gas and other minerals" clause.[99] Future judicial applications of *Moser II* should indicate whether the supreme court has made a further division in Texas mineral ownership law based on semantical differences in mineral clauses.[100] A broad application of the ordinary meaning test to clauses worded differently than "oil, gas and other minerals" will however best serve the policy of mineral title certainty.

V. THE LAW TO APPLY WHEN *MOSER* IS NOT APPLICABLE

The supreme court's decisions in *Friedman* and *Schwarz* establish that the *Acker* and *Reed* rules apply, at least in certain instances, when the ordinary meaning test is not applicable.[101] But what are the exact "rules" from *Acker* and *Reed* that should be applied?

Four guidelines emerge from an examination of the *Moser II, Friedman* and *Schwarz* opinions. First, *Reed II* is viewed as the final evolved statement of the surface destruction test.[102] Second, the court will apparently give the *Reed II* surface destruction test blanket application without making exceptions for specific reliance on other versions of the test.[103] Third, the scope of *Reed II* is not limited to near-surface coal, lignite, and iron ore;[104] rather,

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99. *See* Reed v. Wylie, 554 S.W.2d 169, 177 (Tex. 1977) (Daniel, J., dissenting).

100. *Cf.* Schwarz v. State, 658 S.W.2d 822, 823 (Tex. App.—Austin 1983) (court applied *Moser* ordinary meaning test to "all the minerals" reservation), *rev'd on other grounds,* 28 Tex. Sup. Ct. J. 488, 491 (June 12, 1985) (court applied surface destruction test in construing "all the minerals").

101. *See* Schwarz v. State, 28 Tex. Sup. Ct. J. 488, 489 (June 12, 1985) (*Acker* and *Reed* reaffirmed for determining title to near-surface coal, lignite, and iron ore since *Moser II* is not yet applicable to those substances); Friedman v. Texaco, Inc., 691 S.W.2d 586, 589 (Tex. 1985) (*Acker* and *Reed* determine title to uranium for severances before June 8, 1983 since *Moser II* is only applicable to severances after June 8, 1983).

102. *See* Friedman v. Texaco, Inc., 691 S.W.2d 586, 589 (Tex. 1985) (*Reed II* is an extension of the *Acker* surface destruction rule).

103. *See* Schwarz v. State, 28 Tex. Sup. Ct. J. 488, 489-91 (June 12, 1985) (*Reed II* applied even though surface estate owner specifically leased coal and lignite mining rights in 1978 when *Reed I* was operative); Friedman v. Texaco, Inc., 691 S.W.2d 586, 588-89 (Tex. 1985) (court followed jury findings based on *Reed II* even though surface estate owner had specifically leased uranium mining rights in 1977 when *Reed I* was in effect). The language in *Moser II* also indicates that the *Reed I* surface destruction test should not be applied. *See* Moser v. United States Steel Corp., 676 S.W.2d 99, 103 (Tex. 1984) (*Reed I* not cited as part of rationale for limiting ordinary meaning test to prospective application).

104. *See* Friedman v. Texaco, Inc., 691 S.W.2d 586, 588 (Tex. 1985) (court follows jury findings based on *Reed II* in determining title to uranium); *see also* Moser v. United States Steel Corp., 601 S.W.2d 731, 733-34 (Tex. Civ. App.—Eastland 1980) (applying *Reed II* to uranium deposits within 200 feet of the surface), *aff'd on other grounds,* 676 S.W.2d 99 (Tex. 1984).

the scope may approach the "any substance" breadth of *Acker.*[105] Finally, the "contrary intention" rule from *Acker* will continue to be applied.[106]

Following these guidelines, the severing instrument should initially be examined to determine if the language discloses a fair, specific, and affirmative intention to include the surface-destructible substance as a mineral.[107] If this specific intention is expressed by the language of the severing instrument, then the mineral estate owner owns the substance without the application of a surface destruction test.[108] Conversely, if no specific intention is found in the severing instrument, the presumed general intention to preserve the surface of the land will be effectuated by an application of the *Reed II* surface destruction test.[109] *Reed II,* however, is limited to determining the

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105. *Compare* Friedman v. Texaco, Inc., 691 S.W.2d 586, 588 (Tex. 1985) (*Reed II* is an extension of *Acker) with* Acker v. Guinn, 464 S.W.2d 348, 352 (Tex. 1971) (*a substance* which must be extracted by surface-destructive methods is not a mineral) (emphasis added); *see also* DuBois v. Jacobs, 551 S.W.2d 147, 150 (Tex. Civ. App.—Austin 1977, no writ) (under *Acker, any substance* which must be removed by surface-destructive methods is not a mineral) (emphasis added).

106. *See* Schwarz v. State, 28 Tex. Sup. Ct. J. 488, 491 (June 12, 1985) (court applied the rule); *see also* Acker v. Guinn, 464 S.W.2d 348, 352 (Tex. 1971) (substance removable by surface-destructive methods not a mineral unless contrary intention is fairly expressed by the language in the severing instrument).

107. *See* Schwarz v. State, 28 Tex. Sup. Ct. J. 488, 491 (June 12, 1985). An instrument may manifest a specific intention in either of two ways: (1) the particular substance is listed in the grant or reservation of minerals; or (2) the language used affirmatively expresses that the mineral estate owner may destroy the surface when extracting minerals. *See id.* at 491; Reed v. Wylie, 554 S.W.2d 169, 172 (Tex. 1977), *modified,* 597 S.W.2d 743 (Tex. 1980). Several Texas courts have discussed language that is or is not sufficient to fairly express an intention to allow surface destruction. *See, e.g.,* Reed v. Wylie, 554 S.W.2d 169, 172 (Tex. 1977) (expressly reserving minerals at all depths including those extractible by strip-mining clearly expresses intent to allow surface destruction), *modified,* 597 S.W.2d 743 (Tex. 1980); Storm Assocs., Inc. v. Texaco, Inc., 645 S.W.2d 579, 585 (Tex. App.—San Antonio, 1982) (mere clause providing payment for some surface damage does not express specific intent to allow surface destruction), *aff'd sub nom.,* Friedman v. Texaco, Inc., 691 S.W.2d 586 (Tex. 1985); Sheffield v. Gibbs Bros. & Co., 596 S.W.2d 227, 229-30 (Tex. Civ. App.—Houston [1st Dist.] 1980, no writ) (exclusion of sand, gravel, and stone from mineral reservation does not clearly express intention to include coal and lignite removable by surface-destructive methods). A specific intention to include one surface-destructible substance as a mineral does not necessarily reveal a specific intention to include another. *See* Riddlesperger v. Creslenn Ranch Co., 595 S.W.2d 193, 196-98 (Tex. Civ. App.—Tyler 1980, writ ref'd n.r.e.) (coal and lignite not within "all of the oil, gas, uranium, and other minerals and gravel" even though the reservation specifically includes substances extractible only by strip-mining). *But see* Reed v. Wylie, 554 S.W.2d 169, 172 (Tex. 1977) (including minerals extractible by strip-mining would express clear intent), *modified,* 597 S.W.2d 743 (Tex. 1980).

108. *See* Schwarz v. State, 28 Tex. Sup. Ct. J. 488, 491 (June 12, 1985); *see also* Acker v. Guinn, 464 S.W.2d 348, 352 (Tex. 1971) (if a fairly expressed intention is found, a substance removable by surface-destructive methods should be included as a mineral).

109. *See* Schwarz v. State, 28 Tex. Sup. Ct. J. 488, 491 (June 12, 1985) (court applied *Reed II* to near-surface coal and lignite after finding no specific intent to include the substances

ownership of a substance found near the surface.[110] Therefore, what is the applicable law for determining the ownership of a substance deposited only below the near-surface level? Vesting title to coal, lignite, iron ore, and uranium in the mineral estate owner, when these substances are only deposited more than two hundred feet below the surface, would not conflict with the surface-preservation principle underlying *Acker* and *Reed*.[111]

VI. *SCHWARZ V. STATE*

The first judicial application of the *Moser* ordinary meaning test occurred in the case of *Schwarz v. State*.[112] The State of Texas issued a patent in 1907 to Schwarz' predecessors in title which reserved to the State "all the minerals."[113] In 1978, apparently relying upon the *Acker* and *Reed I* holdings, Schwarz leased the rights to the coal and lignite in the tract to a company which subsequently strip-mined the land removing the two substances.[114] The Austin Court of Appeals applied *Moser I* and held that the State, as the

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as minerals); *see also* Friedman v. Texaco, Inc., 691 S.W.2d 586, 589 (Tex. 1985) (court follows jury findings based on *Reed II* in determining ownership of near-surface uranium). Accordingly, the surface estate owner will own a near-surface substance upon proof that any reasonable method of removing the substance will destroy the surface. *See* Reed v. Wylie, 597 S.W.2d 743, 747 (Tex. 1980).

110. *See* Reed v. Wylie, 597 S.W.2d 743, 748 (Tex. 1980) (court states that tests announced establish ownership of at or near surface substances). Similarly, the *Reed I* surface destruction test determines ownership of near-surface substances. *See* Reed v. Wylie, 554 S.W.2d 169, 172 (Tex. 1977), *modified*, 597 S.W.2d 743 (Tex. 1980). The *Acker* surface destruction test, however, was not dependent upon the exact location of the substance. *See* Acker v. Guinn, 464 S.W.2d 348, 352 (Tex. 1971) (location of the substance not mentioned in the statement of the surface destruction test); *see also* Note, *Abandonment of the Surface Destruction Test in Determining Ownership of Unnamed Minerals: Moser v. United States Steel Corp.*, 15 TEX. TECH L. REV. 699, 717 (1984) (location of substance irrelevant to application of *Acker*).

111. *Cf.* Reed v. Wylie, 554 S.W.2d 169, 180 (Tex. 1977) (Daniel, J., dissenting) (maximum depth for strip-mining is 200 feet below surface). Substances deposited only below two hundred feet, and which can be extracted by wells or shafts, should belong to the mineral estate owner. *See* Kuntz, *The Law Relating to Oil and Gas in Wyoming*, 3 WYO. L.J. 107, 113 (1949) (mineral owner has right of access to valuable substances removable without unreasonable interference with surface uses); *see also* Reed v. Wylie, 597 S.W.2d 743, 751 (Tex. 1980) (Spears, J., concurring) (discussing rule which would entitle mineral owner to substances extractible by wells or shafts). *But see* Reed v. Wylie, 554 S.W.2d 169, 175 & n.2 (Tex. 1977) (Daniel, J., dissenting) (shallow and deep coal and lignite deposits should belong to surface estate because shaft mining unreasonably burdens the surface).

112. 658 S.W.2d 822 (Tex. App.—Austin 1983), *rev'd*, 28 Tex. Sup. Ct. J. 488 (June 12, 1985).

113. *See id.* at 823. The reservation of "all the minerals" severed the mineral and surface estates, and the State owns the mineral estate while Schwarz owns the surface estate. *See id.* at 823.

114. *See id.* at 823.

owner of the mineral estate, owned the coal and lignite since these substances are within the ordinary and natural meaning of the term "minerals."[115] After issuing *Moser II,* the Supreme Court of Texas granted a writ of error to hear *Schwarz.*[116]

The supreme court rejected the State's argument that early Texas statutes governing the sale of public land specifically reserved coal and lignite to the State.[117] Concluding that the legislature made only a general reservation of minerals in the statutes, the court proceeded to construe the word "minerals" in the 1907 severing instrument.[118] The court decided that *Acker* and *Reed* should be used in construing a general reservation of minerals by the State from a conveyance of the surface to a private individual.[119] Accord-

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115. *See id.* at 823. The court relied upon the statement in *Moser I* that the *Acker* and *Reed* approach was abandoned. *See id.* at 823. Under one interpretation of *Moser I,* the court could have applied the *Reed I* surface destruction test since that was the law in effect when Schwarz executed the coal and lignite lease in 1978. *See* Moser v. United States Steel Corp., 26 Tex. Sup. Ct. J. 427, 430 (June 8, 1983) (law in effect at execution controls for leases executed between February 10, 1971 and June 8, 1983), *opinion withdrawn,* 676 S.W.2d 99 (Tex. 1984). One explanation for the court's application of the *Moser* ordinary meaning test to the *Schwarz* facts is that the instrument being construed was the 1907 patent, and this instrument was not executed between February 10, 1971 and June 8, 1983. *See* Note, *Mines and Minerals — Title to Minerals — Moser v. United States Steel Corp.,* 15 ST. MARY'S L.J. 477, 490 (1984) (*Moser* applies to time period before *Acker); Note, Abandonment of the Surface Destruction Test in Determining Ownership of Unnamed Minerals: Moser v. United States Steel Corp.,* 15 TEX. TECH L. REV. 699, 718 (1984) (instruments executed before February 10, 1971 controlled by ordinary meaning test). The appellate court's manipulation of the language from *Moser I* illustrates the need for specific guidelines from the supreme court when a newly announced rule is not given full retroactive operation. *Cf.* Newman v. Minyard Food Stores, Inc., 601 S.W.2d 754, 757 (Tex. Civ. App.—Dallas 1980) (court decided how new rule applied because supreme court did not provide specific guidelines), *aff'd in part and rev'd in part per curiam,* 612 S.W.2d 198, 198 (Tex. 1980) (court of appeals should not have applied new rule because cause of action arose before decision announcing new rule).

116. *Compare* Schwarz v. State, 28 Tex. Sup. Ct. J. 22 (October 10, 1984) (granting writ) *with* Moser v. United States Steel Corp., 676 S.W.2d 99 (Tex. 1984) (decided June 27, 1984). The supreme court granted writ of error on two points: (1) the court of appeals' holding is in conflict with the *Acker* and *Reed* decisions; and (2) the *Moser* ordinary meaning test should not have been applied because the lease was executed during the period when the surface destruction test was in effect. *See* Schwarz v. State, 28 Tex. Sup. Ct. J. 22, 22 (October 10, 1984) (granting writ).

117. *See* Schwarz v. State, 28 Tex. Sup. Ct. J. 488, 490-91 (June 12, 1985). The court also rejected the argument that the 1907 Land Sales Act reserved all minerals to the State and allowed surface destruction by the State. *See id.* at 489-90.

118. *See id.* at 491. Although the legislature had not specifically reserved coal when the 1907 patent was issued, the opinion indicates that patents issued under the 1919 Land Sales Act do specifically reserve coal to the State. *See id.* at 490-91.

119. *See id.* at 491. Earlier in the opinion, the court noted that *Moser II* did not abandon *Acker* and *Reed* for determining the ownership of near-surface coal, lignite, and iron in disputes between private parties. *See id.* at 489. The court decided that the surface-preservation principle underlying *Acker* and *Reed* applies with equal force to a conveyance of the surface by

ingly, the ownership of the coal and lignite was determined by applying a two-step approach: (1) the 1907 patent was examined, and no fairly expressed specific intention to include coal and lignite as minerals was found;[120] (2) the court concluded that Schwarz had satisfied the proof requirements of the *Reed II* surface destruction test.[121] Reversing the court of appeals' judgment, the court held that the coal and lignite belonged to Schwarz.[122]

Schwarz is significant because it illustrates the very minimal impact that *Moser II* has on Texas mineral ownership law.[123] In *Moser II,* the supreme court identified the surface destruction test as the source of mineral title uncertainty.[124] Yet one year later, in *Schwarz,* the court reaffirms the application of the surface destruction test for near-surface coal, lignite, and iron ore.[125] Since Acker was decided, coal and lignite titles have been the most often litigated mineral titles in Texas courts.[126] *Schwarz* ensures that more coal and lignite title suits will inevitably arise.[127] Therefore, *Schwarz* marks a continued retreat from the overall purpose of *Moser II* — title certainty.[128]

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the State to a private individual. *See id.* at 491. Justice McGee reasoned that an individual purchasing land early in Texas' history would not expect the surface of the land to be destroyed thereby promoting family and agricultural uses. *See id.* at 491.

120. *See id.* at 491. The court noted that the instrument did not specifically list coal and lignite, nor did the language in the instrument fairly express an intention to allow the mineral estate owner to destroy the surface when removing minerals. *See id.* at 491.

121. *See id.* at 491. *Compare id.* at 491 (coal and lignite near-surface and surface of Schwarz' land destroyed by strip-mining) *with* Reed v. Wylie, 597 S.W.2d 743, 747 (Tex. 1980) (near-surface coal and lignite belong to surface estate owner if reasonable removal method, such as strip-mining, would destroy surface).

122. *See* Schwarz v. State, 28 Tex. Sup. Ct. J. 488, 491 (June 12, 1985).

123. *Cf. id.* at 489 (*Moser II* did not abandon *Acker* and *Reed* for determining ownership of near-surface coal, lignite, and iron ore); Friedman v. Texaco, Inc., 691 S.W.2d 586, 588 (Tex. 1985) (*Moser II* applies only to severances occurring after June 8, 1983).

124. *See* Moser v. United States Steel Corp., 676 S.W.2d 99, 101 (Tex. 1984).

125. *See* Schwarz v. State, 28 Tex. Sup. Ct. J. 488, 489 (June 12, 1985).

126. *See, e.g.,* Schwarz v. State, 28 Tex. Sup. Ct. J. 488, 488 (June 12, 1985) (ownership of coal and lignite disputed); Riddlesperger v. Creslenn Ranch Co., 595 S.W.2d 193, 194 (Tex. Civ. App.—Tyler 1980, writ ref'd n.r.e.) (coal and lignite title suit); Williford v. Spies, 530 S.W.2d 127, 128 (Tex. Civ. App.—Waco 1975, no writ) (ownership of coal and lignite disputed).

127. *Compare* Schwarz v. State, 28 Tex. Sup. Ct. J. 488, 489 (June 12, 1985) (reaffirms application of surface destruction test for near-surface coal and lignite) *with* Reed v. Wylie, 597 S.W.2d 743, 750 (Tex. 1980) (Spears, J., concurring) (*Reed II* rule guarantees decades of litigation narrowing fact issues); *see also* Friedman v. Texaco, Inc., 691 S.W.2d 586, 590 (Tex. 1985) (Ray, J., dissenting) (titles cannot be safely determined under *Acker* and *Reed* without litigation).

128. *Compare* Schwarz v. State, 28 Tex. Sup. Ct. J. 488, 489 (June 12, 1985) (application of surface destruction test reaffirmed) *with* Moser v. United States Steel Corp., 676 S.W.2d 99, 101 (Tex. 1984) (application of surface destruction test causes title uncertainty).

VII. Recent Expansion of the Surface Destruction Test

While the scope of the ordinary meaning test has been progressively narrowed since *Moser I*,[129] the parameters of the surface destruction test have steadily expanded.[130] In *Friedman*, the court contributed to this unfortunate expansion by applying the surface destruction test to uranium even though neither *Acker* nor *Reed* involved title to uranium.[131] The trend was furthered in both *Friedman* and *Schwarz*; the surface destruction test was applied by the supreme court for the first time in determining ownership of substances which did not outcrop on the surface.[132]

In *Schwarz*, the supreme court faced the task of construing wording other than "oil, gas and other minerals" in a mineral ownership case for the first time in over thirty years.[133] The application of *Acker* and *Reed* to the "all

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129. *Compare* Moser v. United States Steel Corp., 26 Tex. Sup. Ct. J. 427, 428 (June 8, 1983) (surface destruction test abandoned), *withdrawn*, 676 S.W.2d 99 (Tex. 1984) *with* Moser v. United States Steel Corp., 676 S.W.2d 99, 101 (Tex. 1984) (surface destruction test abandoned only *"in the case of uranium")* (emphasis added) *and* Friedman v. Texaco, Inc., 691 S.W.2d 586, 589 (Tex. 1985) (*Moser II* ordinary meaning test applies only to severances made after June 8, 1983).

130. *Compare* Moser v. United States Steel Corp., 26 Tex. Sup. Ct. J. 427, 430 (June 8, 1983) (surface destruction test controls only instruments executed between February 10, 1971 and June 8, 1983), *withdrawn*, 676 S.W.2d 99 (Tex. 1984) *with* Friedman v. Texaco, Inc., 691 S.W.2d 586, 589 (Tex. 1985) (for uranium, surface destruction test governs all severances made before June 8, 1983); *see also* Schwarz v. State, 28 Tex. Sup. Ct. J. 488, 489-91 (June 12, 1985) (court applies surface destruction test to broad "all the minerals" reservation, and to a conveyance involving the State of Texas).

131. *See* Friedman v. Texaco, Inc., 691 S.W.2d 586, 590 (Tex. 1985) (Ray, J., dissenting) (opposing expansion of surface destruction test to uranium and noting that *Acker* and *Reed* did not involve title to uranium); *see also* Reed v. Wylie, 597 S.W.2d 743, 744 (Tex. 1980) (title to lignite disputed); Acker v. Guinn, 464 S.W.2d 348, 349 (Tex. 1971) (title to iron ore disputed). Furthermore, although the court applied the *Reed II* surface destruction test, the statement of the test in *Reed II* does not mention uranium. *Compare* Friedman v. Texaco, Inc., 691 S.W.2d 586, 589 (Tex. 1985) (court follows jury findings made under *Reed II) with* Reed v. Wylie, 597 S.W.2d 743, 747 (Tex. 1980) (only coal, lignite, and iron ore listed with the test).

132. *Compare* Schwarz v. State, 28 Tex. Sup. Ct. J. 488, 491 (June 12, 1985) (coal located 50 feet below surface) *and* Friedman v. Texaco, Inc., 691 S.W.2d 586, 587 (Tex. 1985) (uranium located 29 feet below surface) *with* Reed v. Wylie, 597 S.W.2d 743, 745 (Tex. 1980) (lignite outcropped on the surface of the surface owner's land) *and* Acker v. Guinn, 464 S.W.2d 348, 351 (Tex. 1971) (iron ore outcropped on the surface of the land). The substance deposits involved in both *Friedman* and *Schwarz* meet the *Reed II* definition of near-surface. *Compare* Friedman v. Texaco, Inc., 691 S.W.2d 586, 587 (Tex. 1985) (uranium deposited within 29 feet of surface) *and* Schwarz v. State, 28 Tex. Sup. Ct. J. 488, 491 (June 12, 1985) (coal deposited within 50 feet of surface) *with* Reed v. Wylie, 597 S.W.2d 743, 748 (Tex. 1980) (as a matter of law, deposit within 200 feet of surface is near-surface).

133. *See* Schwarz v. State, 28 Tex. Sup. Ct. J. 488, 489 (June 12, 1985) ("all the minerals" construed to determine coal and lignite ownership); *see also* Friedman v. Texaco, Inc., 691 S.W.2d 586, 587 (Tex. 1985) ("oil, gas and other minerals" construed to determine uranium ownership); Moser v. United States Steel Corp., 676 S.W.2d 99, 100 (Tex. 1984) ("oil, gas and

the minerals" clause in *Schwarz* indicates that the surface destruction test will extend to broad mineral conveyances as well as to general conveyances of "other minerals."[134] Finally, in *Schwarz,* the court has broadened the surface destruction test by applying that test, for the first time, to a mineral transaction between the State and a private party.[135]

VIII. SUGGESTED SOLUTION

The *Moser II* - *Friedman* - *Schwarz* trilogy of decisions evidences a desire by the Supreme Court of Texas to protect rights acquired by those relying upon the *Acker* and *Reed* surface destruction holdings.[136] The current status of mineral ownership law provides blanket protection for public reliance on *Acker* and *Reed.*[137] However, the goals of eliminating title uncertainty and determining ownership of unnamed substances from the language in the severing instrument alone are frustrated because of a continued allegiance to the surface destruction test.[138] This author's solution is premised upon the

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other minerals" construed to determine uranium ownership); Reed v. Wylie, 597 S.W.2d 743, 744 (Tex. 1980) ("oil, gas and other minerals" construed to determine coal and lignite ownership); Robinson v. Robbins Petroleum Corp., Inc., 501 S.W.2d 865, 866 (Tex. 1973) ("oil, gas and other minerals" construed to determine salt water ownership); Acker v. Guinn, 464 S.W.2d 348, 349 (Tex. 1971) ("oil, gas and other minerals" construed to determine iron ore ownership); Heinatz v. Allen, 147 Tex. 512, 514, 217 S.W.2d 994, 995 (1949) ("the mineral rights" construed to determine limestone ownership).

134. *Compare* Schwarz v. State, 28 Tex. Sup. Ct. J. 488, 489-91 (June 12, 1985) (*Acker* and *Reed* rules used to construe "all the minerals") *with* Friedman v. Texaco, Inc., 691 S.W.2d 586, 588 (Tex. 1985) (for uranium, *Acker* and *Reed* rules apply to *"other minerals"* severances made before June 8, 1983) (emphasis added).

135. *See* Schwarz v. State, 28 Tex. Sup. Ct. J. 488, 489-91 (June 12, 1985) (court notes that *Acker* and *Reed* involved ownership disputes between private parties yet applies surface destruction test in dispute between State of Texas and a private party).

136. *See, e.g.,* Schwarz v. State, 28 Tex. Sup. Ct. J. 488, 489-91 (June 12, 1985) (surface destruction test applied in case where surface estate owner executed coal and lignite mining lease in 1978); Friedman v. Texaco, Inc., 691 S.W.2d 586, 588 (Tex. 1985) (surface destruction test applied where uranium mining lease executed by surface estate owner in 1977); Moser v. United States Steel Corp., 676 S.W.2d 99, 103 (Tex. 1984) (public reliance on *Acker* and *Reed* cited as justification for limiting *Moser II* to prospective application).

137. *See, e.g.,* Schwarz v. State, 28 Tex. Sup. Ct. J. 488, 489 (June 12, 1985) (application of *Acker* and *Reed* reaffirmed for near-surface coal, lignite, and iron ore); Friedman v. Texaco, Inc., 691 S.W.2d 586, 588-89 (Tex. 1985) (*Acker* and *Reed* apply to uranium for all severances made before June 8, 1983); Moser v. United States Steel Corp., 676 S.W.2d 99, 103 (Tex. 1984) (ordinary meaning rule operates only prospectively because of public reliance on *Acker* and *Reed).*

138. *Compare* Schwarz v. State, 28 Tex. Sup. Ct. J. 488, 489 (June 12, 1985) (application of surface destruction test recognized and reaffirmed) *with* Moser v. United States Steel Corp., 676 S.W.2d 99, 101 (Tex. 1984) (application of surface destruction test causes title uncertainty and title determinations cannot be made from instrument alone); *see also* Friedman v. Texaco, Inc., 691 S.W.2d 586, 589 (Tex. 1985) (Ray, J., dissenting) (uranium ownership for all severances made before June 8, 1983 is uncertain and title cannot be determined from instrument

realization that a total abandonment of the surface destruction test is essential for achieving mineral title certainty in Texas.[139]

Justice Ray, in his dissenting opinion in *Friedman,* persuasively argues that title to uranium for all pre-June 8, 1983 severances of "other minerals" will depend upon future findings of fact conducted in Texas courtrooms.[140] Justice Ray suggests that the *Moser II* time limitation be dissolved, thus allowing uranium to belong to the mineral estate under all severances of "other minerals."[141]

There are seven major reasons which support an extension of Justice Ray's suggestion so that the *Moser II* ordinary meaning test would be applied to *all severances* of "minerals" in Texas instruments. First, the *Moser II* ordinary meaning test accurately reflects the general intent of the parties in a general mineral conveyance: to include valuable substances as minerals.[142] Second, coal, lignite, iron ore, and uranium have always been miner-

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alone); Reed v. Wylie, 597 S.W.2d 743, 750-51 (Spears, J., concurring) (certainty not provided by *Reed II* rule because ownership cannot be determined from instrument alone).

139. *Accord* Reed v. Wylie, 597 S.W.2d 743, 752 (Texas 1980) (Spears, J., concurring) (urging total abandonment of surface destruction rule); *accord also* Friedman v. Texaco, Inc., 691 S.W.2d 586, 590-91 (Tex. 1985) (Ray, J., dissenting) (opposing extension of surface destruction test to uranium because *Acker* and *Reed* fact issues cause title uncertainty). Justice Spears has stressed that: "[t]his court should totally abandon the mire of factual differences requiring a tract-by-tract determination of mineral ownership by extrinsic evidence and move to higher solid ground. The expeditious development of Texas lignite as a vitally needed source of energy in the immediate future is at stake." Reed v. Wylie, 597 S.W.2d 743, 752 (Tex. 1980) (Spears, J., concurring).

140. *See* Friedman v. Texaco, Inc., 691 S.W.2d 586, 589 (Tex. 1985) (Ray, J., dissenting).

141. *See id.* at 590 (arguing uranium has always been a mineral and severance date should not change mineral status); *see also* Moser v. United States Steel Corp., 676 S.W.2d 99, 101-03 (Tex. 1984) (classifying uranium as mineral as matter of law, but limiting opinion to prospective operation).

142. *Compare* Moser v. United States Steel Corp., 676 S.W.2d 99, 103 (Tex. 1984) (minerals "include all substances within the ordinary and natural meaning of that word, whether their presence or value is known at the time of severance") *with* Kuntz, *The Law Relating to Oil and Gas in Wyoming,* 3 WYO. L.J. 107, 112-13 (1949) (when "minerals" are severed, general intent is for mineral estate to include all substances presently valuable and all substances which become valuable in future); *see also* Heinatz v. Allen, 147 Tex. 512, 517-18, 217 S.W.2d 994, 997 (1949) (ordinary and natural meaning contemplates valuable substances and presumptively effectuates intent because parties are familiar with natural meaning of words they use). If a specific intent to include or to exclude a particular substance is expressed by the language in the severing instrument, however, that intent should always control. *See* Kuntz, *The Law Relating to Oil and Gas in Wyoming,* 3 WYO. L.J. 107, 114 (1949); *see also* Acker v. Guinn, 464 S.W.2d 348, 352 (Tex. 1971) (fairly expressed intention will include a surface-destructible substance as a mineral); Heinatz v. Allen, 147 Tex. 512, 517, 217 S.W.2d 994, 997 (1949) (clear indication of scope of "minerals" may expand or restrict ordinary and natural meaning). The Supreme Court of Texas has often looked to Professor Kuntz' article for guidance in determining what substances are minerals. *See* Moser v. United States Steel Corp., 676 S.W.2d 99, 102 (Tex. 1984); Acker v. Guinn, 464 S.W.2d 348, 352 (Tex. 1971). However,

als within the ordinary meaning of the word, and *Acker* and *Reed* did not purport to state an absolute rule that these substances would always belong to the surface estate.[143] Third, the present *Moser II - Friedman - Schwarz* approach does not confine future title litigation to uranium.[144] Fourth, as Justice Spears pointed out in his *Reed II* concurrence, parties reasonably relying upon *Acker* and *Reed* should not be harmed by a new rule since they should have taken certain precautions to safeguard their own rights through contractual agreements.[145] Fifth, current Texas mineral ownership law presents a unique situation; while the policy of land title stability is usually

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the surface destruction approach is not consistent with Professor Kuntz' suggestions. *Compare* Schwarz v. State, 28 Tex. Sup. Ct. J. 488, 491 (June 12, 1985) (no specific intent found, so ownership of valuable substances coal and lignite depends upon application of surface destruction test) *with* Kuntz, *The Law Relating to Oil and Gas in Wyoming,* 3 WYO. L.J. 107, 112-14 (1949) (if no specific intent found, general intent should be that all valuable substances belong to mineral estate).

143. *See* Storm Assocs., Inc. v. Texaco, Inc., 645 S.W.2d 579, 584 (Tex. App.—San Antonio 1982), *aff'd sub nom.,* Friedman v. Texaco, Inc., 691 S.W.2d 586 (1985); *see also* Friedman v. Texaco, Inc., 691 S.W.2d 586, 590 (Tex. 1985) (Ray, J., dissenting) (uranium always a mineral); Reed v. Wylie, 554 S.W.2d 169, 172 (Tex. 1977) (ores, coal, and lignite ordinarily minerals without application of surface destruction test), *modified,* 597 S.W.2d 743 (Tex. 1980); Acker v. Guinn, 464 S.W.2d 348, 351-53 (Tex. 1971) (iron ore is a mineral, but belongs to surface estate under surface destruction test). One Texas court stated:

> We do not read *Acker* and the *Reed* cases to mean that iron ore, coal, and lignite are not minerals in scientific, geological, and practical terms. We understand the court to say that because of the proximity to the surface of those substances, and the general intention of a surface estate owner not to have his land destroyed, those substances were not a part of the mineral estate *in those particular cases.*

Storm Assocs., Inc. v. Texaco, Inc., 645 S.W.2d 579, 584 (Tex. App.—San Antonio 1982) (emphasis added), *aff'd sub nom.,* Friedman v. Texaco, Inc., 691 S.W.2d 586 (Tex. 1985).

144. *Compare* Schwarz v. State, 28 Tex. Sup. Ct. J. 488, 489 (June 12, 1985) (reaffirming application of *Acker* and *Reed* to near-surface coal, lignite, and iron ore) *and* Moser v. United States Steel Corp., 676 S.W.2d 99, 102 (Tex. 1984) (continued adherence to *Reed II) with* Friedman v. Texaco, Inc., 691 S.W.2d 586, 590 (Tex. 1985) (Ray, J., dissenting) (title determinations cannot be safely made under *Acker* and *Reed* without litigation) *and* Reed v. Wylie, 597 S.W.2d 743, 750 (Tex. 1980) (Spears, J., concurring) (*Reed II* rule will require decades of litigation narrowing fact issues).

145. *See* Reed v. Wylie, 597 S.W.2d 743, 751-52 (Tex. 1984) (Spears, J., concurring); *see also* Currier, *Time and Change in Judge-Made Law: Prospective Overruling,* 51 VA. L. REV. 201, 243 (1965) (discrimination against one who does not ascertain a current property rule is reasonable). Fee simple owners of a tract of land should have specifically granted or reserved coal, lignite, and iron ore. *See* Reed v. Wylie, 597 S.W.2d 743, 751-52 (Tex. 1980) (Spears, J., concurring); *see also* STATE BAR OF TEXAS, LEGAL FORM MANUAL FOR REAL ESTATE TRANSACTIONS 4.8 (1982) (warns contracting parties to specify coal, lignite, iron, and uranium in mineral reservation). People who wished to develop coal, lignite, or iron ore under a severance of "other minerals" should have purchased mining rights from both the mineral estate owner and the surface estate owner. *See* Reed v. Wylie, 597 S.W.2d 743, 752 (Tex. 1980) (Spears, J., concurring).

promoted by adherence to property law precedents,[146] adherence to *Acker* and *Reed* actually promotes title instability.[147] Sixth, the legal topography in Texas invites an abandonment of the surface destruction test because existing case law, existing statutes, and additional legislation can adequately protect the surface estate.[148] Finally, the *Moser II* ordinary meaning test should not be applied only prospectively because it does not represent a new legal principle.[149]

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146. *See* Friendswood Dev. Co. v. Smith-Southwest Indus., Inc., 576 S.W.2d 21, 30-31 (Tex. 1978) (precedent very important where property transactions involved); Currier, *Time and Change in Judge-Made Law: Prospective Overruling,* 51 VA. L. REV. 201, 242 (1965) (societal interest in land title stability dictates and contracting parties expect that property transactions will be governed by rules effective at time of reliance).

147. *See* Moser v. United States Steel Corp., 676 S.W.2d 99, 101 (Tex. 1984) (*Acker* and *Reed* approach causes title uncertainty).

148. *See id.* at 103 (creates economic barrier which will deter destruction of surface because mineral estate owner is strictly liable for surface destruction caused by removal of substance owned under conveyance or reservation of "other minerals"); Sun Oil Co. v. Whitaker, 483 S.W.2d 808, 810-11 (Tex. 1972) (mineral owner restricted to reasonably necessary use of surface for mineral development); Getty Oil Co. v. Jones, 470 S.W.2d 618, 621-22 (Tex. 1971) (mineral owner must show due regard for rights of surface owner which requires adoption of reasonable alternatives to avoid impairment of and interference with existing surface uses); TEX. NAT. RES. CODE ANN. §§ 131.001-132.000 (Vernon 1978 & Supp. 1985) (Uranium Surface Mining and Reclamation Act protects surface estate by requiring mining operator to adopt surface restoration plan); TEX. REV. CIV. STAT. ANN. art. 5920-11, §§ 1-38 (Vernon Supp. 1985) (Texas Surface Coal Mining and Reclamation Act requires coal and lignite operators to restore surface after conducting surface mining operations and provides penalities for non-compliance). Statutory and judicial safeguards against surface destruction greatly influenced the court's decision to classify uranium as a mineral in *Moser II. See* Moser v. United States Steel Corp., 676 S.W.2d 99, 103 & n.4 (Tex. 1984) (court recognizes that reasonable use doctrine, due regard doctrine, and Texas Uranium Surface Mining and Reclamation Act provide deterrent to surface destruction). Similar safeguards for coal provide ample protection for public environmental interests and the interests of the surface estate owner, while encouraging responsible coal production by the mineral estate owner. *See* Comment, *The Right to Mine Texas Uranium and Coal by Surface Methods: Acker v. Guinn Revisited,* 13 HOUS. L. REV. 451, 462-79 (1976). Abandoning the surface destruction test would enable the supreme court to encourage compliance with the present legislative policy to deter unreasonable surface use by mineral operators, even though additional legislation concerning surface use is inevitable. *Cf.* Friendswood Dev. Co. v. Smith-Southwest Indus., Inc., 576 S.W.2d 21, 30 (Tex. 1978) (court, in adopting new subsidence liability rule, recognized that future legislative action in subsidence area was inevitable).

149. *Compare* Chevron Oil Co. v. Huson, 404 U.S. 97, 106 (1971) (decision to be limited to prospective application must establish new legal principle by overruling clear precedent or by deciding question of first impression) *with* Reed v. Wylie, 597 S.W.2d 743, 752 (Tex. 1980) (Spears, J., concurring) (urging adoption of new rule because surface destruction, general intent rule is not clear); *see also* Friedman v. Texaco, Inc., 691 S.W.2d 586, 588 (*Acker* and *Reed* set out *factual,* not legal, guidelines) (emphasis added); Moser v. United States Steel Corp., 676 S.W.2d 99, 101 (Tex. 1984) (noting that "other minerals" has been construed many times by Texas courts). The ordinary meaning test was already an established rule of construction in property law when the supreme court formally adopted the test for determining mineral own-

If the *Moser II* ordinary meaning test is applied both prospectively and retrospectively, any remaining title uncertainty would only be over which substances are within the ordinary meaning of minerals.[150] This uncertainty could be partially eliminated by following prior judicial classifications of specific substances as mineral or non-mineral as a matter of law.[151] The owner of the mineral estate, however, should be entitled to *all* substances that are within the natural meaning of minerals.[152]

The supreme court could also decide to leave the "ordinary and natural meaning" of minerals for judicial clarification on a case-by-case, substance-by-substance basis.[153] Such an approach would require expensive litigation, and uncertainty would continue until each known substance was judicially catalogued as within or not within the ordinary meaning of minerals.[154] The Texas Legislature could heed its constitutional mandate to promote the development of natural resources,[155] and avoid substance-by-substance litigation, by enacting a statute listing all substances within the ordinary meaning of minerals.[156] Once the composition of the ordinary meaning of minerals is settled, the title examiner will have a list of substances, belonging to either

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ership in 1949. *See* Heinatz v. Allen, 147 Tex. 512, 517, 217 S.W.2d 994, 997 (1949). Furthermore, the rationale behind both *Heinatz* and *Acker* was that the ordinary meaning of minerals does not include substances that have a close physical relationship with the soil. *See* Reed v. Wylie, 554 S.W.2d 169, 182 (Tex. 1977) (Daniel, J., dissenting); *see also* Robinson v. Robbins Petroleum Corp., Inc., 501 S.W.2d 865, 866-67 (Tex. 1973) (*Acker* and *Heinatz* hold that certain substances having close relationship to surface are not minerals).

150. *Cf.* Moser v. United States Steel Corp., 676 S.W.2d 99, 102 (Tex. 1984) (uranium is the only substance classified under the ordinary meaning test).

151. *See id.* at 101-02 (court follows substance classifications that have already been made).

152. *See id.* at 102 ("minerals" encompasses *all substances* within natural meaning of the word) (emphasis added). Where substances to be included as minerals are not specified, and no specific intent to exclude particular substances is evident from the face of the instrument, the parties' general intent to exact a complete severance of all minerals should be effectuated. *See* Kuntz, *The Law Relating to Oil and Gas in Wyoming*, 3 WYO. L.J. 107, 114 (1949).

153. *Cf.* Moser v. United States Steel Corp., 676 S.W.2d 99, 101 (Tex. 1984) (court's discussion limited to "in the case of uranium"). In *Moser II*, the court noted that certain substances have already been classified "on a substance-by-substance basis." *See id.* at 101.

154. *See* Note, *Mines and Minerals — Title to Minerals — Moser v. United States Steel Corp.*, 15 ST. MARY'S L.J. 477, 486 & n.56 (1984) (title suits will continue while doubt remains as to what substances are covered by ordinary meaning of minerals).

155. *See* TEX. CONST. art. XVI, § 59 (legislature shall pass laws to promote public rights in resource development and conservation); *see also* TEX. NAT. RES. CODE ANN. § 131.002(1) (Vernon 1978 & Supp. 1985) (legislature declares policy that surface extraction of minerals essential to state economic well-being).

156. *Cf.* TEX. NAT. RES. CODE ANN. § 131.004(1) (Vernon Supp. 1985) (defining "minerals" as uranium and uranium ore for Uranium Surface Mining & Reclamation Act purposes); TEX. REV. CIV. STAT. ANN. art. 5920-11, § 3(10) (Vernon Supp. 1985) (defining "other minerals" as clay, gravel, stone, sand, ores, and other commercially valuable hard substances for Coal Mining and Reclamation Act purposes).

the surface estate or to the mineral estate as a matter of law, from which to determine ownership rights.[157] Mineral titles could then be determined by simply examining the instrument itself without referring to extrinsic factual factors, thereby fulfilling the primary purpose of *Moser II* — title certainty.

As with any departure from precedent, changing mineral ownership law in Texas will create short-term inequities.[158] Justice Cardozo, in the celebrated opinion of *Great N. Ry. v. Sunburst Oil & Ref. Co.*,[159] stated that state courts have broad discretion "in defining the limits of adherence to precedent."[160] With Cardozo's words in mind, the inescapable conclusion follows that the overriding, long-term public interests in title certainty and resource development should not be sacrificed to protect those people who assumed that they had rights under the surface destruction tests which could be confirmed only in the courtroom.[161]

IX. CONCLUSION

In *Moser I,* the Supreme Court of Texas devised a test which could eventually eliminate the mineral title uncertainty caused by the factual inquiries accompanying the surface destruction tests. However, the surface destruction factor had become firmly entrenched in Texas mineral jurisprudence, and the court, in retreating from *Moser I* with the *Moser II* opinion, chose to

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157. *Cf.* Moser v. United States Steel Corp., 676 S.W.2d 99, 101-02 (Tex. 1984) (sand, gravel, water, limestone, building stone, surface shale, caliche, uranium, and solid sulphur classified as a matter of law). Substance classifications should be flexible, however, so that substances becoming valuable through future technological improvements can be classified as minerals. *See* Kuntz, *The Law Relating to Oil and Gas in Wyoming,* 3 WYO. L.J. 107, 113 (1949).

158. *See* Currier, *Time and Change in Judge-Made Law: Prospective Overruling,* 51 VA. L. REV. 201, 241 (1965) (societal value of equality is necessarily impaired when precedents are overruled); *see also* Friedman v. Texaco, Inc., 691 S.W.2d 586, 590 (Tex. 1985) (Ray, J., dissenting) (mineral owner's rights under *Heinatz* ordinary meaning test and *Cain v. Neumann* precedents sacrificed as majority attempts to reconcile the irreconcilable *Moser, Reed,* and *Acker* decisions).

159. 287 U.S. 358 (1932).

160. *See id.* at 364.

161. *Compare* Moser v. United States Steel Corp., 676 S.W.2d 99, 101 (Tex. 1984) (application of surface destruction test causes mineral title uncertainty) *with* Kuntz, *The Law Relating to Oil and Gas in Wyoming,* 3 WYO. L.J. 107, 114 (1949) (rule affording mineral title certainty best serves policy favoring resource development); *see also* Friedman v. Texaco, Inc., 691 S.W.2d 586, 589-90 (Tex. 1985) (Ray, J., dissenting) (mineral titles cannot be safely determined under *Acker* and *Reed* without litigation); Kuntz, *The Law Relating to Oil and Gas in Wyoming,* 3 WYO. L.J. 107, 114 (1949) (title examiner never confident of ownership determinations under rule requiring inquiry into factual setting). *Stare decisis* does not mandate adherence to precedent where such adherence allows confusing, conflicting, and obstructive opinions to remain the law. *See* Hanks v. McDannell, 307 Ky. 243, 210 S.W.2d 784, 787 (Ky. Ct. App. 1948).

expand the surface destruction test rather than to uproot it. The *Schwarz* and *Friedman* decisions have continued this retreat and perpetuated the use of the surface destruction test. Consequently, the law preceding the *Moser* opinions remains substantially intact, and the ordinary meaning test will have a very limited impact on Texas mineral ownership law.

Determining mineral ownership after *Moser II* requires untangling a confusing conglomeration of divisions in the law based upon time, the exact substance involved, the exact location of the substance involved, the status of the parties to a mineral transaction, and possibly, the wording of the severing clause being construed. The supreme court should strive to dissolve these divisions while remembering that title certainty lies in expanding the ordinary meaning test and not in clinging to the surface destruction test. Simplicity, consistency, and certainty can be achieved by applying the ordinary meaning test exclusively and by totally abandoning consideration of factors outside the actual instrument conveying or reserving the minerals. Without such simplification, *Moser II* will be a landmark only in the sense that it stands as a judicial obstacle to the development of Texas' natural resources.