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IS COAL INCLUDED IN A GRANT OR RESERVATION OF "OIL, GAS, OR OTHER MINERALS"?

by

Barksdale Hortenstine

We Americans consume more fuel than we produce. We have become increasingly dependent upon foreign oil—a dependency which has an impact not only upon our domestic economy but our balance of payments position as well. We must respond, now.¹

Due largely to an accelerating demand and a declining production of domestic oil and gas, the formerly strong energy position of the United States has deteriorated greatly. As a result, the United States faces an energy problem of unprecedented proportions.² This energy crisis has led to an awareness by the American public of the nation's dependence upon energy, a realization that the only guarantee for an uninterrupted supply of energy is the ownership of energy resources, and an interest in alternative domestic fuels which can be quickly developed to make up for the oil shortfall. The most suitable alternative resource in the short term is coal, and this in turn has led to a renewal of interest in the rich supply of both lignite and bituminous coal in the State of Texas.³

1. Address by Treasury Secretary William Simon, National Press Club, Feb. 5, 1974.

2. In 1972 72 quadrillion (72×10^{15}) British Thermal Units (Btu) of energy were consumed in the United States. That amount was 50% more than a decade previous and twice the consumption of 20 years ago. By 1980 the level of consumption is projected to be one-third higher than today. Estimates by the U.S. Bureau of Mines show that consumption in the year 2000 will be more than 2.6 times that of 1972. In addition to the overall increase in level of consumption per capita consumption of energy has increased 44% in the past 20 years.

W. KAISER, TEXAS LIGNITE: NEAR-SURFACE AND DEEP-BASIN RESOURCES 2 (1974).

3. The near-surface resources of Texas lignite alone are estimated at 10 to 20 billion tons. Approximately one million acres are underlain by lignites at depths of less than 200 feet. The deep-basin resources at depths of 200 to 5,000 feet below the surface are estimated at well in excess of 100 billion tons, which is equivalent on a Btu basis to 277 billion barrels of oil. This is an energy equivalent of approximately twenty times the current proven oil reserves of Texas, or about sixteen times the present proven natural gas reserves in the state. Statewide production of lignite is currently estimated at 8 to 10 million short tons annually. When additional lignite-fueled, steam-electric plants are operational by 1980, production is expected to be about 25 million tons annually. Texas at that time will rank among the top ten coal-producing states in the nation.

Lignite is a "low rank, brownish black coal with a high moisture and volatile matter content and a heating value of less than 8300 BTU/16, that is intermediate in coalification between peat and subbituminous coal. Most lignite contains clearly separable pieces of plant material, is soft, friable and comparatively porous, and has a low specific gravity." *Id.* at 3. It is a result of this lower Btu heating value that lignite offers more potential as an alternate energy resource than other types of coal. *Id.*

Bituminous coal is:

[O]ne rank in a spectrum of coal varieties based on degree of metamorphism or coalification. Commonly recognized ranks of coal, in increasing degree of metamorphism are: (1) lignite (2) subbituminous (3) bituminous (4) semibituminous (5) semianthracite and (6) anthracite. Bituminous coal contains fixed carbon of 86 percent or less, volatile matter

As a result of this increasing demand the question of ownership of coal when there has been a grant or reservation of "oil, gas, and other minerals" is becoming extremely significant.⁴ The words "other minerals" mean different things to different people.⁵ The technical definition of "minerals" found in the dictionary is "[a]ny naturally occurring, homogeneous inorganic substance having a definite chemical composition and characteristic crystalline structure, color, and hardness."⁶ The legal definition of "minerals" as "[a]ny natural substance having sufficient value to be mined, quarried, or extracted for its own sake or its own specific use"⁷ is obviously quite distinct from the technical definition. The mining industry long ago defined the term as including all the substances on the earth's crust which are sought for and removed by man for the substance itself.⁸ In the latter part of the last century the Land Department of the United States determined "minerals" to encompass any substance which, when found in quantity and quality, renders land sought to be patented more valuable than it would be if used for agriculture.⁹ The foregoing enumeration is not an exhaustive list of the valid definitions of "minerals," but an illustration of the broad sweep of the term and the problems inherent in interpreting it.

I. THE TEXAS INTERPRETATION OF "OTHER MINERALS"

A. Rules of Interpretation

The determination of the ownership of coal when a conveyance of "oil, gas, and other minerals" in a deed or a lease is involved will depend upon the meaning the court attributes to the words "other minerals." Certain fundamental principles of interpretation are essential to this determination.

of 14 percent or more, and heating values of 11,000 or more BTUs per pound of coal.

T. EVANS, BITUMINOUS COAL IN TEXAS 3 (1974).

4. This conveyance can be found in wills, mineral deeds, and mineral leases. Practically speaking, however, the crux of the problem is concerned with conveyances of "oil, gas, and other minerals" found in ancient deeds and wills since most of the old mineral leases have expired except as to oil and gas production. The new deeds and leases specifically delineate the minerals conveyed due to the awareness of the problem.

5. See, e.g., *Northern Pac. Ry. v. Soderberg*, 188 U.S. 526 (1903). The United States Supreme Court stated, "The word 'mineral' is used in so many senses, dependent upon the context, that the ordinary definitions of the dictionary throw but little light upon its significance in a given case." *Id.* at 530.

6. AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 835 (1st ed. 1969). It is necessary to point out that under this definition oil and gas are technically not "minerals" for they as well as coal are products of organic rather than inorganic processes. This technical restriction, however, has not stopped the courts from categorizing oil and gas as a "mineral." See *Warner v. Patton*, 19 S.W.2d 1111 (Tex. Civ. App.—Amarillo 1929, writ ref'd); *Luse v. Parmer*, 221 S.W. 1031 (Tex. Civ. App.—El Paso 1920, writ ref'd); *Luse v. Boatman*, 217 S.W. 1096 (Tex. Civ. App.—Fort Worth 1919, writ ref'd). See also H. WILLIAMS & C. MEYERS, OIL AND GAS LAW, MANUAL OF TERMS 261 (1971), where it is stated: "Although scientifically this term [mineral] refers to a chemical element or compound occurring naturally as a product of inorganic processes, it has been broadened colloquially in the oil, gas and coal extractive industries to include these products of organic processes."

7. BALLENTINE'S LAW DICTIONARY 801 (1969).

8. 1 W. SNYDER, MINES AND MINING 114 (1902).

9. Comm'r Drummond Circular Gen. Land Office, July 15, 1873, as cited in 1 W. SNYDER, *supra* note 8, at 115 n.3.

The judicial function in a deed controversy is to give effect to the intent of the parties.¹⁰ Consequently, the meaning of the term "other minerals" is in significant part dependent upon what the words meant to the parties rather than any legal or technical meaning.¹¹ The intent of the parties must, if possible, be gathered from the language used in the instrument submitted to construction.¹² The intent of the parties as evidenced by the language used within the four corners of the instrument will in turn depend upon the meaning attributed to those words. Since the court is limited to the four corners of the instrument, the meaning attributed to the words must be determined by some objective standard. The standard used to determine the meaning of words in a deed is the popular standard or the normal sense of the words in the community.¹³ Once ascertained by application of this standard, the meaning will be given effect and no extrinsic evidence will be allowed to show that the parties intended a contrary meaning.¹⁴ It must be emphasized that the court may consider evidence peculiar to the particular minerals in question to determine if that substance was intended to be included in the term as used in the deed.¹⁵ For this process of interpretation the parol evidence rule does not exclude extrinsic evidence.¹⁶ The rule operates only after meaning is established to prevent proof that something was intended or agreed upon which the writing does not express.¹⁷ The term "other minerals," therefore, does not have to be shown to be ambiguous for the court to consider evidence of exceptional characteristics, unique value, method of extraction, and other particular characteristics of the substances in question.

The rule of "plain meaning" has other qualifications. First, the intent of the parties (or the meaning of the words) is to be ascertained by a reading of the instrument as a whole.¹⁸ Thus, if other words appear in the instrument which show that the parties intended a word to mean something

10. 2 R. DEVLIN, *THE LAW OF REAL PROPERTY AND DEEDS* §§ 835, 836 (3d ed. 1911).

11. 1 E. KUNTZ, *THE LAW OF OIL AND GAS* § 16.1 (1962).

12. 3 A. CASNER, *AMERICAN LAW OF PROPERTY* § 12.89 (1952).

13. 9 J. WIGMORE, *EVIDENCE* §§ 2458, 2463 (3d ed. 1940).

14. 2 R. DEVLIN, *supra* note 10, § 836.

15. 3 A. CORBIN, *CONTRACTS* § 579 (1951). See also Young, *Parol Evidence and Texas Deeds: Some Current Problems*, 34 *TEXAS L. REV.* 351 (1956). This point is of utmost importance when a court considers extrinsic evidence of characteristics of the particular minerals in question to determine whether it was the intent of the parties to include them in a grant or reservation of "minerals," but also says that the term "minerals" is not ambiguous. See, e.g., *Williford v. Spies*, 530 S.W.2d 127 (Tex. Civ. App.—Waco 1975, no writ), where the court stated that the deed in question was not ambiguous and refused to consider surrounding circumstances for explanation of the intention of the parties. The court allowed evidence of the method of extraction necessary for production of the coal, however, and refused to hold that coal passed under the conveyance because the method destroyed the surface estate. The court reasoned that it would not be the intention of the original grantor to convey a mineral the extraction of which would destroy the surface owner's estate. Allowance of this evidence might appear erroneous to one unaware of the distinction between allowing extrinsic evidence as a means of interpretation and allowing extrinsic evidence as a result of an ambiguity. For further explanation, see Comment, *Surface or Mineral: A Single Test?*, 23 *BAYLOR L. REV.* 407, 409 n.8 (1971).

16. 3 A. CORBIN, *supra* note 15, § 579.

17. *Id.*

18. 2 R. DEVLIN, *supra* note 10, § 844a.

less than the popular meaning, then the limited meaning will be given effect. Secondly, if two conflicting intentions are expressed and the meaning of the instrument is deemed ambiguous, then various aids of construction are utilized in arriving at the intent of the parties.¹⁹

Based upon these principles of interpretation, there are three instances when substances such as coal, normally construed to be "minerals," would not be included in a conveyance of "oil, gas, and other minerals": (1) when the particular characteristics of the substance in question indicate that these substances would not be included in the popular meaning of "minerals"; (2) when other language in the deed shows that the parties meant to limit the popular meaning of "mineral"; and (3) when due to a determination of ambiguity by the court arbitrary aids of construction, such as the doctrine of *ejusdem generis*,²⁰ are resorted to.

B. Particular Characteristics of the Substance

Courts will normally consider the particular characteristics of the substance in question when deciding whether or not certain substances should be included in a conveyance of "other minerals." These characteristics and their relative effect upon the surface and mineral estates are vital to a determination of the ownership of the coal.

Natural Meaning Test. Texas courts early realized that if all matter were divided into three classes of animal, vegetable, and mineral, a broad definition of the term "mineral" would encompass the soil itself as well as all substances contained therein.²¹ To use such a broad definition would remove any distinction between the mineral estate and the surface estate, a result the courts have generally rejected as unreasonable.²² On the other hand the courts have also rejected an undue restriction of the term to its technical meaning which would include only metallic ores and precious metals.²³ Many recent cases support an inquiry into the meaning of the words which were used in the grant and which at the time of the grant were a part of the vernacular of the mining industry, the commercial world, and the landowners.²⁴ By establishing this "ordinary and natural meaning

19. *Id.* § 839.

20. The rule of *ejusdem generis* states that when the terms "mineral" or "mineral rights" are coupled with an enumeration of specific substances, the general words following a specific enumeration will be limited to things of a like class. See R. HEMINGWAY, HANDBOOK ON THE LAW OF OIL AND GAS § 1.1 (1971) [hereinafter cited as HEMINGWAY]. See also text accompanying notes 79-85 *infra*.

21. *Heinatz v. Allen*, 147 Tex. 512, 217 S.W.2d 994 (1949); *Anderson & Kerr Drilling Co. v. Bruhlmeier*, 134 Tex. 574, 136 S.W.2d 800 (1940); *Fleming Foundation v. Texaco*, 337 S.W.2d 846 (Tex. Civ. App.—Amarillo 1960, writ ref'd n.r.e.).

22. See, e.g., *Atwood v. Rodman*, 355 S.W.2d 206 (Tex. Civ. App.—El Paso 1962, writ ref'd n.r.e.).

23. See, e.g., *Psencik v. Wessels*, 205 S.W.2d 658 (Tex. Civ. App.—Austin 1947, writ ref'd).

24. *Heinatz v. Allen*, 147 Tex. 512, 217 S.W.2d 994 (1949) (limestone held not included in devise of "mineral rights"); *Anderson & Kerr Drilling Co. v. Bruhlmeier*, 134 Tex. 574, 577, 136 S.W.2d 800, 802 (1940) (oil and gas held included in reservation of "one-half interest in all Minerells Paint Rock &c found or will be found" on conveyed tract); *Fleming Foundation v. Texaco*, 337 S.W.2d 846 (Tex. Civ. App.—Amarillo 1960, writ ref'd n.r.e.) (water not included in reservation of "oil, gas, and other minerals");

test" these courts have provided a standard easily applicable to those substances traditionally considered minerals.²⁵

There is another line of authority which recognizes a need for a more liberal standard to encompass newly discovered minerals. This standard, which was implied in *Luse v. Boatman*²⁶ and expressly established in *Cain v. Neumann*,²⁷ is based upon a presumed intention of the parties to sever completely the surface and mineral estates. Consequently, the minerals included in the mineral estate need not have been contemplated or even discovered at the time of the grant.²⁸ The court in *Cain* recognized that, as people's concepts change, the term "minerals" should encompass new substances. One writer interprets *Cain* as holding that the recognition of a substance as a mineral should be applied to instruments executed before the substance was recognized as such since absence of knowledge of the substance at the time of the deed does not alter the clear intent to convey "other minerals."²⁹

Unique Value Test. When no specific intention is expressed by the parties as to a particular substance, some courts have classified the substance as a mineral by considering whether the substance has an exceptional characteristic or possesses a peculiar property giving it a special value apart from the surface itself.³⁰ On the basis of this value test several courts have held that sand, gravel, and common stones belong to the surface estate and do not pass under a conveyance of "oil, gas, and other minerals."³¹ These cases have reasoned that the term "minerals" contemplates only substances of particular value, and that sand, gravel, and building stone are not valuable within the ordinary meaning of the term. The leading case is *Heinatz v. Allen*.³² In

Psencik v. Wessels, 205 S.W.2d 658 (Tex. Civ. App.—Austin 1947, writ ref'd) (reservation of an individual one-half interest in all "minerals" did not include sand and gravel).

25. This concedes that oil, gas, coal, sand, gravel, etc., are within the legal meaning of "other minerals" but says that if the minerals were not known to exist at the time of the conveyance, then they could not be considered within the popular meaning at that time. Therefore, since they were not included in the popular meaning of "minerals," the intent of the parties could not have been to include them.

26. 217 S.W. 1096 (Tex. Civ. App.—Fort Worth 1919, writ ref'd). The implication in *Luse* that knowledge of the particular substance at the time of conveyance or reservation was immaterial was adopted by the Texas Supreme Court in *Elliott v. Nelson*, 113 Tex. 62, 251 S.W. 501 (1923).

27. 316 S.W.2d 915 (Tex. Civ. App.—Amarillo 1960, writ ref'd n.r.e.) (uranium included in a grant of "all oil, gas, coal, and other minerals").

28. According to one writer the citation to *Luse* suggests that the *Cain* court relied upon the premise that specific words of exception are required to remove any particular substance from a grant of unnamed minerals. See *Holland, Is Helium Covered by Oil and Gas Leases?*, 41 TEXAS L. REV. 408 (1963).

29. See Comment, note 15 *supra*. The reasoning appears sound based on the assumption that the intent of the parties to the deed was not to reserve only known minerals but to have a complete severance of the estates and to give to the holder of the mineral estate the right to extract any valuable substances from beneath the surface, whether the substance was known to exist or not. The grantor is attempting to give one party the right to use the surface and the other the right to extract and market valuable substances found in the ground.

30. See HEMINGWAY § 1.2.

31. *Heinatz v. Allen*, 147 Tex. 512, 217 S.W.2d 994 (1949); *Eldridge v. Edmondson*, 252 S.W.2d 605 (Tex. Civ. App.—Eastland 1952, writ ref'd n.r.e.); *Psencik v. Wessels*, 205 S.W.2d 658 (Tex. Civ. App.—Austin 1947, writ ref'd).

32. 147 Tex. 512, 217 S.W.2d 994 (1949). The unique value test can actually be traced back to the old land department cases where the court was attempting to formu-

Heinatz the Texas Supreme Court found that limestone of the particular character involved was not a "mineral" included in a devise of "mineral rights."³³ In the court's opinion substances such as sand, gravel, and limestone were not "minerals" within the ordinary and natural meaning of the word unless they possessed some special value, such as sand valuable for making glass and limestone of such quality as to be profitably manufactured into cement.³⁴ This theory was recently given additional support by the Texas Supreme Court. In *Robinson v. Robbins Petroleum Corp.* the court held that salt water was not a mineral but an incident of the surface estate.³⁵ The court noted that a different case would be present if a mineral in solution was valuable enough to justify production of the water to extract the minerals therein.³⁶

Despite *Heinatz* and *Robinson* the "unique value" test has not been totally accepted by Texas courts. Limestone, caliche, and surface shale that could have been profitably sold for the manufacture of cement were held in *Atwood v. Rodman* to be excluded from conveyances and exceptions of "oil, gas, and other minerals."³⁷ The court of civil appeals expressly rejected the *Heinatz* example of limestone possessing a special value for use in cement.³⁸ In *Guinn v. Acker* the court of civil appeals again refused to hold that the unique value test controlled the determination of "other minerals."³⁹ According to the court in *Guinn* a decision whether the term "other minerals" includes iron ore cannot be controlled by the fact that iron ore is commercially profitable for making pig iron or for road building, or that it possesses a definite chemical formula.⁴⁰ Upon appeal the supreme court seemed to consider the unique value of the iron ore more seriously than did the court of civil appeals.⁴¹ It found the test was not controlling, however, and gave approval to the *Atwood* decision.⁴²

late a test for fixing the character of land as mineral or nonmineral. The test adopted was whether the land was more valuable for mineral purposes than for agricultural purposes and holding it to be mineral or nonmineral according to the preponderance of the evidence upon this point. See *Iron Silver Mining Co. v. Mike & Starr Gold & Silver Mining Co.*, 143 U.S. 394 (1892); *Francour v. Newhouse*, 40 F. 618 (1889); *McLaughlin v. Powell*, 50 Cal. 64 (1875); *Alford v. Barnum*, 45 Cal. 482 (1872); *Merrill v. Dixon*, 15 Nev. 401 (1880). See also 1 W. SNYDER, *supra* note 8, § 159.

33. 147 Tex. 512, 217 S.W.2d 994 (1949).

34. *Id.* at 518, 217 S.W.2d at 997. See also *Eldridge v. Edmondson*, 252 S.W.2d 605 (Tex. Civ. App.—Eastland 1952, writ ref'd n.r.e.), which directly affirms the *Heinatz* case.

35. 501 S.W.2d 865 (Tex. 1973).

36. *Id.*

37. 355 S.W.2d 206 (Tex. Civ. App.—El Paso 1962, writ ref'd n.r.e.).

38. The court in *Atwood* held this example was unnecessary to the disposition of the *Heinatz* case and, therefore, mere obiter dictum, not judicial precedent. However, the court also considered the general nature of the land where the limestone lay and decided that, since it was common to both the local and state area, it was not of rare or exceptional character. So in essence, while rejecting the *Heinatz* case on its face, the *Atwood* decision impliedly lent credence to the theory of unique value.

39. *Guinn v. Acker*, 451 S.W.2d 549 (Tex. Civ. App.—Tyler 1970), *aff'd*, 464 S.W.2d 348 (Tex. 1971).

40. 451 S.W.2d at 551.

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

42. Both *Atwood* and *Acker*, which seemed to reject the unique value test, can be better explained by reasoning that they did not totally discard the test. The courts in both cases considered the unique value test but chose not to hold it controlling. Their main consideration was with the fact that the mineral involved could only be extracted by the open pit method leading to a complete destruction of the surface estate. The

Relation to Surface Test. To determine whether a particular substance should be included as "other minerals" some courts have considered whether the substance in question is traditionally associated with surface ownership by being essential or beneficial to the utilization of the surface of the land.⁴³ In *Heinatz v. Allen* there was evidence that fifteen acres of the four-hundred-acre tract in question consisted of exposed limestone.⁴⁴ The court drew an analogy between the limestone in *Heinatz* and the sand and gravel in *Psencik v. Wessels*⁴⁵ and *Winsett v. Watson*,⁴⁶ apparently indicating that they were in a class of substances which courts hold to be excluded from a grant or reservation of "minerals" because of an extremely close relation to the soil.⁴⁷ In *Acker v. Guinn*⁴⁸ evidence was introduced which showed the iron ore deposits lying from the surface to about fifty feet below the surface, and in places lying on top of the ground itself. This fact seemed to make the iron ore so much a part of the surface estate that the court refused to allow it to pass to the owners of the minerals without expression of a clearer intention than "oil, gas, and other minerals." The test appears to state that when a substance has an indestructible intimacy with the soil and with the use of the surface it becomes classified as part of the "surface."⁴⁹

Surface Destruction Test. Supplementing the theory that minerals in close proximity to the soil become part of the surface estate is the theory that the surface owner should retain title to any substances requiring an extraction process which would tend to render the surface of the land useless.⁵⁰ The basis of this theory is that the original parties could not have intended as "other minerals" any substance the extraction of which would destroy the surface estate. A corollary to this analysis states that the inclusion as "mineral" of the substance which comprises such a large part of the surface would make the grant or reservation so large that there would be nothing conveyed or reserved, a result that surely could not have been intended. For years *Heinatz v. Allen* was the ruling case in Texas relating to substances recoverable only by open pit or strip mining.⁵¹ The court recognized that

courts seemed to balance this surface destruction test against the unique value test and hold the former controlling. While the court in *Heinatz* considered the destruction of the surface test, it expressly held it was not decisive of the question of inclusion. The surface destruction test will be discussed later. See text accompanying notes 50-60 *infra*.

43. See HEMINGWAY § 31.2.

44. 147 Tex. 512, 217 S.W.2d 994 (1949).

45. 205 S.W.2d 658 (Tex. Civ. App.—Austin 1947, writ ref'd).

46. 206 S.W.2d 656 (Tex. Civ. App.—Fort Worth 1947, writ ref'd).

47. 147 Tex. 512, 217 S.W.2d 994 (1949). In *Heinatz* the Texas Supreme Court stated:

The limestone . . . underlying most if not all of the land at varying and usually shallow depths, outcropping in all the ravines, sometimes found on the top of the surface . . . is so closely related to the soil, so nearly a part of the very surface, the soil itself, that it is reasonably and ordinarily considered a part of the soil and as belonging to the surface estate rather than as a part of the minerals or mineral rights.

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

48. 464 S.W.2d 348 (Tex. 1971).

49. See Emery, *What Surface Is Mineral and What Mineral Is Surface*, 12 OKLA. L. REV. 499 (1959).

50. See HEMINGWAY § 1.2.

51. 147 Tex. 512, 217 S.W.2d 994 (1949). See also *Eldridge v. Edmondson*, 252 S.W.2d 605 (Tex. Civ. App.—Eastland 1952, writ ref'd n.r.e.).

the required quarrying would destroy the surface for agricultural and grazing purposes.⁵² Although held not to be decisive in itself, this mining process and its resulting damage was considered heavily in a determination of the intent of the grantor.⁵³ *Heinatz* was followed by *Atwood v. Rodman* which held that a grantor reserving or conveying "oil, gas, and other minerals" did not intend to reserve or convey limestone, caliche, or surface shale which are recoverable only by the open pit method.⁵⁴ The court found these substances to belong to the surface owner who had the right to use any possible method to extract them. Currently, the leading case in this area is *Acker v. Guinn*.⁵⁵ Although no test to determine what substances were included in the term "other minerals" was specifically set out in *Acker*, the court looked to the effect that strip mining iron ore would have on the surface estate. The grant or reservation of "minerals" would not be considered under the *Acker* holding to include a substance that must be removed by methods that would, in effect, consume or deplete a surface estate used for agricultural or grazing purposes.⁵⁶ The court limited the scope of the general intent of the parties with the statement: "The parties . . . usually think of the mineral estate as including valuable substances that are removed from the ground by means of wells or mine shafts."⁵⁷ One author suggests that by this statement the court in *Acker* was indirectly taking judicial notice of the widespread common knowledge concerning production of oil and gas in Texas, and the predominant use of the formbook style "oil, gas, and other minerals."⁵⁸

The most recent case involving the determination of whether a substance requiring destruction of the surface for recovery was a "mineral" is *Williford v. Spies*.⁵⁹ This case decided that coal would not pass to the mineral estate under a conveyance of "oil, gas, and other minerals." The entire basis of the decision was the theory used in *Acker*: the parties to the conveyance could not have intended to define "minerals" as a substance which had to be removed by methods that would destroy the surface estate. The court would only construe "minerals" to mean such a substance upon the finding of an intention affirmatively and fairly expressed in the instrument containing the grant or reservation. Since no such intention was expressed, the court found that the coal belonged to the surface owner.⁶⁰

C. Limitations in the Language of the Deed

The intention of the parties to a deed is to be determined by a reading of the instrument as a whole.⁶¹ An unambiguous instrument can be construed

52. 147 Tex. at 518, 217 S.W.2d at 998.

53. *Id.* at 518-19, 217 S.W.2d at 998.

54. 355 S.W.2d 206 (Tex. Civ. App.—El Paso 1962, writ ref'd n.r.e.).

55. 464 S.W.2d 348 (Tex. 1971).

56. *Id.* at 351.

57. *Id.* at 352.

58. See Comment, note 15 *supra*.

59. 530 S.W.2d 127 (Tex. Civ. App.—Waco 1975, no writ).

60. *Id.* at 130.

61. 2 R. DEVLIN, *supra* note 10, § 884a.

to include or exclude certain substances within the terms "other minerals" depending upon an intention of the parties found in the habendum clause or in certain provisions relating to the manner of extraction and the easements or privileges incident to the employment of the granted or reserved mineral interest.⁶² Language limited to methods and structures appropriate to hard mineral or surface mining may indicate, for example, an intent not to include oil and gas.⁶³ Texas courts have even held that granting a right to "mine" does not include the right to drill for oil and gas.⁶⁴ If "mining" were interpreted in such a restricted sense, it would not be difficult to imagine courts holding minerals which could only be extracted by open pit mining as not included in the grant or reservation.⁶⁵ The general rule in Texas, however, seems to regard "mine" as a generic term which includes all means of extracting metals and minerals from beneath the ground.⁶⁶

The major Texas case restricting a mineral grant to substances extracted in a certain manner is *Praetorian Diamond Oil Ass'n v. Garvey*.⁶⁷ In this case a lease for purposes of exploration, development, and exploitation of oil, gas, and other minerals was held not to include gravel. The intention of the parties to the lease was evidenced by certain provisions in the instrument which provided the lessee should have the right to "erect derricks," "build tanks," and "lay pipe lines" on the land. There was nothing in the lease mentioning appropriate means for the production of gravel; the provisions listed applied only to the production of oil and gas. The royalty payment was relative to the quantity delivered in pipelines or tanks and did not appear to contemplate gravel.⁶⁸

D. Ambiguities

"Other Minerals" as an Ambiguous Term. The Texas courts agree that if the deed under consideration is ambiguous, extrinsic evidence may be admitted to show the facts and circumstances surrounding the parties' execution of the instruments. The court can thus arrive at the true meaning of the instrument and the intention of the parties.⁶⁹ The courts are split, however, with respect to whether the term "other minerals" standing alone or in conjunction with the provisions in the deed creates an ambiguity.⁷⁰ The

62. See HEMINGWAY § 1.1.

63. *Id.*

64. *Barton v. Wichita River Oil Co.*, 187 S.W. 1043 (Tex. Civ. App.—Fort Worth 1916, writ ref'd).

65. This would not be very significant since these substances are usually not included as "minerals" due to their geographic location in relation to the soil or due to their destructive method of extraction as previously discussed. See notes 43-60 *supra*, and accompanying text.

66. *Luse v. Boatman*, 217 S.W. 1096 (Tex. Civ. App.—Fort Worth 1919, writ ref'd).

67. 15 S.W.2d 698 (Tex. Civ. App.—Beaumont 1929, writ ref'd). This case illustrates the tendency of courts to use extrinsic evidence in the process of construing an instrument even though they declare that such evidence is not to be admitted to show contrary intention once the interpretation process is accomplished. See note 15 *supra*.

68. 15 S.W.2d at 698.

69. *Acker v. Guinn*, 464 S.W.2d 348 (Tex. 1971); *Anderson & Kerr Drilling Co. v. Bruhlmeier*, 134 Tex. 574, 136 S.W.2d 800 (1940); *Praetorian Diamond Oil Ass'n v. Garvey*, 15 S.W.2d 698 (Tex. Civ. App.—Beaumont 1929, writ ref'd).

70. *Heinatz v. Allen*, 147 Tex. 512, 217 S.W.2d 994 (1949). See also 1 E. KUNTZ,

majority of cases in Texas favor declaring the term clear on its face and disallowing any extrinsic evidence to the contrary.⁷¹ The leading case in this area is *Anderson & Kerr Drilling Co. v. Bruhlmeier*.⁷² In *Anderson & Kerr* the court held that a reservation of one-half interest in all minerals "plainly and clearly evidenced the intention of the grantors to reserve all minerals including oil and gas."⁷³ This holding was specifically affirmed in *Heinatz v. Allen* which held that the intention of the testatrix as to what was devised was to be ascertained without aid from evidence as to the attending circumstances.⁷⁴ The most recent case on this issue was *Williford v. Spies*. In *Williford* the court of civil appeals held that the intention of the parties in an unambiguous instrument containing a reservation of "oil, gas, and other minerals" was to be ascertained by construing the language in the instrument without the aid of extrinsic evidence.⁷⁵ The court cited both *Anderson & Kerr* and *Heinatz*.⁷⁶

Texas has, upon occasion, subscribed to a more subjective test of intent which allows inquiry into the extrinsic facts surrounding the execution of what the courts term ambiguous conveyances.⁷⁷ According to *Psencik v. Wessels*⁷⁸ the proper construction of this ambiguous conveyance of unnamed minerals should rest upon what the instrument means in light of its evident purpose, its context, and its surrounding circumstances.

Ejusdem Generis. In 1918 the court of civil appeals in *Luse v. Boatman* defined the rule of *ejusdem generis* to mean that "where there is an enumeration of particular things, followed by general words, the latter shall be construed as having reference to things only of the same kind and class with those specifically mentioned . . ."⁷⁹ Although on its face this rule appears quite clear and helpful, the court in *Luse v. Boatman* refused to apply it.⁸⁰ The court pointed out that it did not know what qualities or peculiarities of "coal" to consider when determining the classification intended by the use of the word "minerals." Considering the *nature of origin* of the substances, coal could be distinguished from oil and gas as could a solid from a liquid. Considering *use*, however, they are almost indistinguishable,

supra note 11, § 16.1. Attention must once again be called to the fact that this discussion concerns the use of extrinsic evidence for purposes of construction of the instrument rather than for purposes of interpretation of individual terms. See note 15 *supra*. Whether or not a grant or reservation of "other minerals" will be ambiguous will depend on its interpretation in light of the other provisions in the instrument, resulting in a case-by-case determination.

71. *Acker v. Guinn*, 464 S.W.2d 348 (Tex. 1971); *Heinatz v. Allen*, 147 Tex. 512, 217 S.W.2d 994 (1949); *Anderson & Kerr Drilling Co. v. Bruhlmeier*, 134 Tex. 574, 136 S.W.2d 800 (1940); *Williford v. Spies*, 530 S.W.2d 127 (Tex. Civ. App.—Waco 1975, no writ); *Praetorian Diamond Oil Ass'n v. Garvey*, 15 S.W.2d 698 (Tex. Civ. App.—Beaumont 1929, writ ref'd).

72. 134 Tex. 574, 136 S.W.2d 800 (1940).

73. *Id.* at 583-84, 136 S.W.2d at 805.

74. 147 Tex. 512, 217 S.W.2d 994 (1949).

75. 530 S.W.2d 127 (Tex. Civ. App.—Waco 1975, no writ).

76. *Id.* at 130, 131.

77. *Atwood v. Rodman*, 355 S.W.2d 206 (Tex. Civ. App.—El Paso 1962, writ ref'd n.r.e.); *Winsett v. Watson*, 206 S.W.2d 656 (Tex. Civ. App.—Fort Worth 1947, writ ref'd); *Psencik v. Wessels*, 205 S.W.2d 658 (Tex. Civ. App.—Austin 1947, writ ref'd).

78. 205 S.W.2d 658 (Tex. Civ. App.—Austin 1947, writ ref'd).

79. 217 S.W. 1096 (Tex. Civ. App.—Fort Worth 1919, writ ref'd).

80. *Id.* at 1099.

both being sources of fuel. Uncertainties such as these caused the court in *Luse* to render the rule of *ejusdem generis* an unsafe guide to interpretation.⁸¹

The Texas Supreme Court in *Southland Royalty Co. v. Pan American Petroleum Corp.* stated that the doctrine of *ejusdem generis* had never been applied in Texas.⁸² Holding that gas was included in a reservation of "minerals," the court cited the *Anderson & Kerr* case and *Rio Bravo Oil Co. v. McEntire*⁸³ as support for the theory that the rule had never been accepted. One writer views these cases as stating that absent ambiguity the rule of *ejusdem generis* is not a rule of construction, applicable at all times, but only an interpretative aid to be used when the intention is not otherwise apparent from the instrument.⁸⁴ Upon determining the instrument clear and unambiguous the court should not consider the rule. Thus, *Southland's* rejection of the rule was unnecessary because it held the instrument to be unambiguous. The writer also thought the court of appeals in *Guinn v. Acker* had erroneously interpreted the rule by holding that the instrument was unambiguous but at the same time applying the rule.⁸⁵

II. COAL AND ITS MINING PROCESSES IN TEXAS

Information concerning the location, nature, and means of extraction of coal in Texas is necessary to determine the right of the mineral and surface estates in their respective claims to coal.⁸⁶ This technological information is not only essential for describing the nature of Texas coal and its relation to the mineral kingdom, but also for demonstrating that in many cases there is no alternative to strip mining. With respect to strip mining, discussion of the

81. The rule had been used prior to *Luse* by the Texas Supreme Court in holding that a deed conveying land to a railroad company for a right of way along with the right to take all "timber, earth, stone and mineral" did not convey oil which had to be drilled for, even though it was a mineral. However, the development of Texas' use of the rule in construing mineral deeds has been comparatively slow, with few decisions actually using the rule. *Right of Way Oil Co. v. Gladys City Oil, Gas & Mfg. Co.*, 106 Tex. 94, 157 S.W. 737 (1913). Several courts subsequent to the court in *Right of Way Oil Co.* discussed the risk of *ejusdem generis*. *Guinn v. Acker*, 451 S.W.2d 549 (Tex. Civ. App.—Tyler 1970), *aff'd*, 464 S.W.2d 348 (Tex. 1971); *Atwood v. Rodman*, 355 S.W.2d 206 (Tex. Civ. App.—El Paso 1962, writ ref'd n.r.e.); *Fleming Foundation v. Texaco*, 337 S.W.2d 846 (Tex. Civ. App.—Amarillo 1960, writ ref'd n.r.e.).

82. 378 S.W.2d 50, 54 (Tex. 1964).

83. 128 Tex. 124, 96 S.W.2d 1110 (1936).

84. See Note, *Has Ejusdem Generis as Applied to Mineral Deeds Been Accepted in Texas?*, 2 TEX. TECH L. REV. 164 (1971). See also *Anderson & Kerr Drilling Co. v. Bruhlmeier*, 134 Tex. 574, 136 S.W.2d 800 (1940); *Rio Bravo Oil Co. v. McEntire*, 128 Tex. 124, 96 S.W.2d 1110 (1936); *Richardson v. Nesbit*, 204 S.W. 689 (Tex. Civ. App.—San Antonio 1918, writ ref'd).

85. 451 S.W.2d 549 (Tex. Civ. App.—Tyler 1970), *aff'd*, 464 S.W.2d 348 (Tex. 1971). Upon appeal the supreme court rejected the use of the *ejusdem generis* rule. There are several other rules of construction such as: (1) *expressio unius est exclusio alterius*—the expression of one thing is the exclusion of another; (2) the instrument will be construed against the party who prepared the instrument and is responsible for the language used; (3) the provisions of the granting clause will control in the event of an irreconcilable conflict with other provisions; and (4) a specific description of the interest in the deed will control over a general description. See 1 E. KUNTZ, *supra* note 11, § 16.1. See also HEMINGWAY § 1.1. However, the Texas courts have not found these rules effective in interpreting a grant or reservation of "oil, gas, and other minerals" so they will not be discussed here.

86. The discussion here will be limited to lignite coal and its mining methods for it not only presents the greatest potential as an energy resource but it is also the most frequently mined coal in Texas today. Significant information is lacking for any competent assessment of identified bituminous coal reserves, quality, and economic aspects surrounding potential bituminous coal development. T. EVANS, *supra* note 3, at 6.

new Texas Surface Mining and Reclamation Act⁸⁷ and the possibility of successful reclamation in Texas is relevant.

In Texas lignite coal is found in near-surface and deep-basin deposits throughout the Texas Gulf Coastal Plain.⁸⁸ Near-surface lignite occurs in two elongated bands stretching from the Rio Grande to the Red River. Deep-basin lignite occurs coastward and downdip from the near-surface resource locations.⁸⁹

All of the lignite currently mined in Texas and located at depths of less than 200 feet is strip mined. Modern earth moving equipment and the availability of large lignite reserves beneath shallow, unconsolidated overburden make surface mining more economical than underground mining. The term "surface mining" or "strip mining" refers to processes by which minerals are uncovered from the surface of the earth and then extracted. It is distinguished from deep mining in which a shaft is constructed to the mineral vein and the mineral is extracted through the shaft.⁹⁰ The process most often begins with the use of heavy equipment to strip away the overburden and to gain access to the minerals.⁹¹ When the overburden is removed the minerals are usually extracted by smaller mechanical equipment. The increase in size and efficiency of strip mining machinery has permitted a steady increase in the maximum amount of overburden which can be stripped away. Presently, overburden of 180 to 185 feet thick is being removed in large-scale operations. A maximum of 200 feet does not seem unrealistic.

All types of surface mining have a significant effect upon the surrounding area. The immediate effects of surface mining have been classified into five

87. TEX. REV. CIV. STAT. ANN. art. 5920-10 (Supp. 1975-76).

88. The following discussion concerning lignite coal is based upon W. KAISER, TEXAS LIGNITE: NEAR-SURFACE AND DEEP-BASIN RESOURCES (1974) and a telephone conversation with Professor Kaiser of the Bureau of Economic Geology at the University of Texas. Instead of citing each factual statement to these sources, the reader may assume that support for any factual statement not marked with a citation was from these sources.

89. Deep-basin lignite is a vast potential energy resource that can possibly be tapped through *in situ* gassification recovery methods. Deep basin lignites are most numerous and thickest in Madison, Houston, Leon, Lee, Fayette, and Bastrop Counties. The most promising available underground gassification method applicable to the gently dipping Texas lignites is the percolation method. This method involves penetrating the coal seam with long horizontal boreholes or by vertical boreholes spaced 40 to 400 feet apart and located in a geometric pattern of rhombohedroids, rectangles, squares, or concentric circles. If the seam is penetrated by horizontal boreholes, fewer holes are necessary. Gassification takes place between different pairs of linked boreholes with offtake and intake holes depending on the locational pattern and gassification procedure. Potentially, underground gassification of coal is a cheap source of energy for electric power generation and raw material for synthetic gasses, liquid fuels, and other chemicals. The methods so far developed can produce a combustible gas of low Btu value but not on a continuous basis or at a constant Btu value. Because the Btu rating of gas from underground gassification is low it will be uneconomical to pipe long distances without upgrading to pipeline quality. Future exploitation will require the siting of electric-power or synthetic pipeline-quality gas plants at or reasonably close to the underground gassifier.

90. S. CASSIDY, ELEMENTS OF PRACTICAL COAL MINING 386 (1973).

91. One dragline in use has a capacity of 220 cubic yards (325 tons) of overburden. It can dig down to 185 feet and costs \$24,000,000. It has been estimated that a dragline of 145 cubic yards capacity could dig out the Panama Canal in fifty-five 16-hour days. Binder, *A Novel Approach to Reasonable Regulation of Strip Mining*, 34 U. PITT. L. REV. 339 (1973).

categories: air pollution, water pollution, safety and health hazards, noise and vibration, and destruction of aesthetics.⁹² Strip mining alters the land surface and topography, exposing formerly buried rocks and soil to the atmosphere. These exposed substances may yield toxic particulates that are potential pollutants of streams and surrounding lands. Acid water runoff is a serious problem where the overburden and coal are high in sulfur and the climate warm and humid. At the present time acid water runoff has not become a serious problem in Texas because the lignite being extracted is moderately low in sulfur content with a sulfur-free overburden.

Land is not necessarily ruined or lost from future usefulness as a result of the strip mining of coal. There is abundant evidence that the large and responsible coal mining operators have been successful in beautifying stripped areas and have converted these strip mined lands into game and wildlife refuges, artificial lakes for boating, swimming, fishing and other recreation, forests, and grazing lands.⁹³ There are even accounts that the restored land consisting of the overburden is more tolerable to certain types of plant growth and provides better flood control.⁹⁴

Basically, three factors are determinative of a successful reclamation program: climate, terrain, and land capability.⁹⁵ In areas of relatively high rainfall such as East Texas revegetation occurs easily and naturally, and artificial lakes can be shaped for recreation, stock ponds, or homesites. Terrain is not as significant an impediment to reclamation in Texas as in other areas. In Texas the lignite occurs in flat to moderately rolling country, a topography easily reproduced by redistribution and remodeling of parallel rows of unconsolidated spoil. Furthermore, most of the lignite lands of

92. See Brooks, *Strip Mine Reclamation and Economic Analysis*, 6 NAT. RES. J. 13 (1966).

93. See Donley, *Some Observations on the Law of the Strip-Mining of Coal*, 11 ROCKY MTN. MIN. L. INST. 123 (1966). See also Rielly, *For Better Strip Reclamation*, COAL AGE, Dec. 1965, at 83-87 ("the long term reclamation plans of the Hanna Coal Division, Consolidated Coal Co., insure that the potential use of mineral lands will be as good as it was before mining, whether for part-time farming, grazing, industrialization, forestry or recreation"); *Strip Mining, The Total Benefit Industry*, COAL AGE, Dec. 1966, at 93-116 ("the strip mining industry has provided communities in strip mining areas with new recreational facilities, improved water supplies and many economic benefits"); Vande & Linde, *Reclamation Accomplishments of the Coal Mining Industry*, MINING CONG. J., Dec. 1971, at 58-61 ("the coal industry has a record in mined land reclamation that is little known. It is time for the public to understand what is actually being achieved."). In Texas, an example of successful reclamation projects are those run jointly by the Dallas Power & Light Co., the Texas Power & Light Co., and the Texas Electric Service Co. located at the Martin Lake plant near Henderson in Rusk County, the Monticello plant near Mt. Pleasant in Titus County, and the Big Brown plant near Fairfield in Freestone County. After the lignite is removed, the displaced earth is redistributed, and trees, grasses, and other vegetation native to the area are planted. Runoff water from the mining area is constantly monitored to see that federal and state water quality standards are met. The three companies have agreements with the various state and local governmental bodies to restore the reclaimed areas to recreational projects available to the public. At the Big Brown plant, Fairfield State Park was created by the Texas Parks & Wildlife Department, and has attracted hundreds of thousands of tourists. At Monticello, Titus County is developing a park which has already become a very popular fishing and recreational area. Recreational facilities are planned for the Martin Lake site. DALLAS POWER & LIGHT CO., *ELECTRICITY FOR PROGRESS WITH LIGNITE COAL* (1976).

94. Brooks, *Strip Mining, Reclamation, and the Public Interest*, AMERICAN FORESTS, March 1966, at 18-19.

95. W. KAISER, *TEXAS LIGNITE: NEAR-SURFACE AND DEEP-BASIN RESOURCES* (1974).

Texas are post oak savannah. The topsoils are not significantly different from the underlying sediments and rocks so that the topsoils are not much more fertile than overburden. If this area were rich, productive farmland, the results of strip mining would be much more severe. Fortunately, the principal lignite deposits and the principal strip mining are in the eastern part of the state where this favorable climate and terrain make the situation conducive to successful reclamation projects.

The recently enacted Texas Surface Mining and Reclamation Act⁹⁶ is designed to prevent the adverse effects to society and the environment which result from unregulated surface mining operations and to protect the rights of surface landowners.⁹⁷ The statute creates a commission to have exclusive jurisdiction over the establishment of reclamation requirements for mining operations in the state.⁹⁸ One of the commission's most important powers is to issue permits which will be required before any person can conduct surface mining operations in Texas.⁹⁹ The Act establishes certain reclamation standards which must be met by the surface mining operations.¹⁰⁰ Among other things these standards require the operator to conduct his mining operations in so prudent a manner as to maximize the utilization and conservation of the resource recovered, to restore the affected land to the same or a substantially beneficial condition, to reduce all spoil piles so as to control erosion and sustain vegetation, and to replace the topsoil or the best available subsoil on top of the land to be reclaimed.¹⁰¹ The statute requires that the surface mining operator file with the commissioner a performance bond payable to the State of Texas and conditioned upon full and faithful performance of all the requirements of the Act.¹⁰² The amount of the bond will be determined by the commission but will be sufficient to assure the completion of the reclamation plan if the work must be completed by a third party in the event of forfeiture.¹⁰³ The statute provides for enforcement by giving any member of the commission the power to order the immediate cessation of surface mining operations upon the determination that any practice exists in violation of any requirement of the Act.¹⁰⁴ The statute also empowers the commission upon finding a violation to bring civil suit for an injunction against the practice or for a fine of not more than \$5,000 for each day of violation or for both an injunction and a fine.¹⁰⁵ All sums received through the payment of fees, loans, grants, penalties, and bond forfeitures will go to a fund to be expended for the administration and enforcement of the Act and for the reclamation of lands affected by surface mining operations.¹⁰⁶

96. TEX. REV. CIV. STAT. ANN. art. 5920-10 (Supp. 1975-76).

97. *Id.* § 3.

98. *Id.* § 6.

99. *Id.* §§ 6, 8.

100. *Id.* § 11.

101. *Id.*

102. *Id.* § 14.

103. *Id.*

104. *Id.* § 20.

105. *Id.* § 21.

106. *Id.* § 22.

The United States Department of the Interior has estimated that in 1965 surface mining accounted for approximately four-fifths of the total mineral production in the United States.¹⁰⁷ In the last fifteen years there has been a definite trend toward surface mining methods rather than underground methods.¹⁰⁸ There are several explanations for favoring surface mining over underground mining. The explanations generally center around economics.¹⁰⁹ The cost per ton is greatly reduced by surface mining because of the relative ease of obtaining the coal.¹¹⁰ There is also a much greater percentage of coal recovery—nearly ninety-five percent from surface mines as compared to an average of fifty percent from underground mines.¹¹¹ Much surface mining retrieves coal that could not be extracted by underground methods due to coal bed thinness, multiple beds close together, split seams, the nature of the roof, and other geologic conditions.¹¹² As a result of these different economic and geologic conditions, there is very often no choice but to strip mine.

One possible alternative to either underground or strip mining is underground gassification of coal, but this involves problems of its own.¹¹³ Technology on the subsurface gassification process is in the initial stage. Only in the USSR have industrial plants for underground gassification been installed. Worldwide, there has been very little advancement in available technology since about 1965. The United States Bureau of Mines and the Union Pacific Corporation have been conducting a joint project at Hanna, Wyoming, since 1972 to test the economics and technology of the process. Several universities and privately owned companies are also experimenting with underground coal gassification. Aside from the lack of technological development, much of the coal currently being strip mined is located in too shallow an area to be converted into energy by *in situ* methods. Mining in the East Texas area is an example. There are also several unsolved problems with the process regarding control of the fire front (location, size, and temperature) or combustion zone, roof collapse, leaking of points within the coal seam, leakage of the gassifying agent and product gas, groundwater flow into the reaction zone causing ground water contamination, and surface subsidence. The threat to ground water aquifers can be effectively minimized by gassifying coal seams below the principal aquifers. This means utilization of deeper coal beds, however, and would not even involve those beds of coal obtained through strip mining. Once developed, subsurface gassification will effectively utilize deep-basin resources of coal but will do little towards furnishing an alternative to surface mining.¹¹⁴

107. U.S. DEPT. OF THE INTERIOR, SURFACE MINING AND OUR ENVIRONMENT 42 (1967).

108. See Brooks, *supra* note 92.

109. S. CASSIDY, ELEMENTS OF PRACTICAL COAL MINING 377 (1973).

110. *Id.*

111. *Id.*

112. *Id.*

113. See note 89 *supra*.

114. See W. KAISER, *supra* note 95. See also Lignite, *Rebirth of a Texas Resource*, 2 TEXAS ENERGY & MINERAL RESOURCES, Dec. 1975, at 2.

III. RELATIVE RIGHTS OF THE MINERAL OWNER AND SURFACE OWNER

As previously discussed, the two most recent cases involving an interpretation of a grant or reservation of "oil, gas, and other minerals" held as controlling the fact that the substance could only be removed by surface mining.¹¹⁵ Since the means of extraction resulted in the destruction of the surface estates, the courts gave the substance to the surface owner.¹¹⁶ The courts place great emphasis on the mode of extraction in determining the intent of the parties. A discussion of the relative rights that accompany the mineral and surface estates under a conveyance of "oil, gas, and other minerals" will be necessary, therefore, to any determination of who should own coal which requires strip mining.

In Texas the mineral estate is an estate in land capable of being severed from the surface estate so that each estate may be owned in fee simple absolute by different parties.¹¹⁷ The severance of the two estates can be effectuated by deed through a conveyance, reservation, or exception.¹¹⁸ The mineral estate is treated as a real property interest and is controlled by real property conveyance laws.¹¹⁹ The nature of the mineral estate requires use of the surface estate for exploring, mining, or drilling. A severance of the two estates, therefore, often makes it necessary to establish the rights of the two estate holders.

In Texas the mineral estate has long been held the dominant estate;¹²⁰ the mineral owner or lessee possesses the right to use and possess so much of the surface of the land and at such a time, place, and manner as is reasonably necessary to enjoy the mineral estate.¹²¹ Without such a dominant-servient system the ownership of the mineral estate would be worthless since there would be no means to enter and extract the valuable substances. There are some basic limitations, however, on the dominant estate. Only that amount of the surface estate reasonably necessary to the utilization of the mineral estate may be used.¹²² Additionally, any use of

115. *Acker v. Guinn*, 464 S.W.2d 348 (Tex. 1971); *Williford v. Spies*, 530 S.W.2d 127 (Tex. Civ. App.—Waco 1975, no writ).

116. As seen by the prior discussion of reclamation, it is very questionable whether this treatment of surface mining as destroying the surface estate is valid. See notes 93-106 *supra* and accompanying text.

117. *Humphreys—Mexia Co. v. Gammon*, 113 Tex. 247, 255, 254 S.W. 296, 299 (1923); *Shields v. Harris County*, 248 S.W.2d 510 (Tex. Civ. App.—Fort Worth 1952, writ ref'd n.r.e.); *County School Trustees v. Free*, 154 S.W.2d 935, 937 (Tex. Civ. App.—Texarkana 1941, writ ref'd w.o.m.). See generally 1 H. WILLIAMS & C. MEYERS, OIL AND GAS LAW 431 (1971).

118. *Humphreys—Mexia Co. v. Gammon*, 113 Tex. 247, 256, 254 S.W. 296, 299 (1923); See 1 E. KUNTZ, *supra* note 11, § 14.1.

119. *County School Trustees v. Free*, 154 S.W.2d 935, 937 (Tex. Civ. App.—Texarkana 1941, writ ref'd w.o.m.); see 1 E. KUNTZ, *supra* note 11, § 14.1.

120. *Chambers Liberty County Navigation Dist. v. Banta*, 453 S.W.2d 134, 137 (Tex. 1970); *General Crude Oil Co. v. Aiken*, 162 Tex. 104, 106, 344 S.W.2d 668, 669 (1961).

121. *Warren Petroleum Corp. v. Monzingo*, 157 Tex. 479, 304 S.W.2d 362 (1957); *Warren Petroleum Corp. v. Martin*, 153 Tex. 465, 271 S.W.2d 410 (1954); see Note, *Eminent Domain*, 47 TEXAS L. REV. 1458, 1461 n.14 (1969).

122. *Sun Oil Co. v. Whitaker*, 483 S.W.2d 808 (Tex. 1972); *Getty Oil Co. v. Jones*, 470 S.W.2d 618 (Tex. 1971); *Humble Oil & Ref. Co. v. Williams*, 420 S.W.2d 133 (Tex.

the surface estate by the owner or lessee of the mineral estate must not be negligent.¹²³ These basic limitations have been discussed and slightly expanded in three leading cases.¹²⁴

In *Kenny v. Texas Gulf Sulphur Co.*¹²⁵ the Waco court of civil appeals held that the owner of the mineral estate was not liable for damages to the owner of the surface estate for subsidence of the surface resulting from the mining of sulfur. The sulfur had been extracted by the "frash process,"¹²⁶ which had caused a surface subsidence of from two inches to three feet in some places. However, since the process used was the only commercially known method of extracting the sulfur, and since there were no allegations of negligence, the process was accepted as a reasonably necessary use of the surface. The court held that the law of Texas and the commonly used oil and gas leases in the state permit the lessee or owner of the mineral estate to use as much of the premises as is reasonably necessary to enjoy the mineral lease and to effectuate its purpose.

In *Getty Oil Co. v. Jones*¹²⁷ the Texas Supreme Court considered the right of a mineral lessee to the use of the vertical space above the surface when that use prevented the surface owner from implementing a certain irrigation system. Getty Oil Co. had installed two beam-type pumping units, one of which was seventeen feet high at the top of its upstroke and the other thirty-four feet high. This prevented Jones, the surface owner, from installing a sprinkler system which was supported by towers at a height of seven feet above the ground. The Texas Supreme Court, although recognizing the mineral estate as the dominant estate, found for the surface owner. When only one manner of use of the surface can produce the minerals, the lessee or owner of the mineral rights has the right to pursue this use regardless of surface damage. The court found, however, that there was ample evidence to prove that Getty could use other methods to effectuate its oil and gas lease, while the irrigation system used by Jones was the most advantageous and perhaps the only reasonable means of developing the surface for agricultural purposes. The court was heavily influenced by the fact that other lessees in the area had gone to the added expense of placing pumping units in concrete cellars below the surface. This led to the court's finding

1967); *Warren Petroleum Corp. v. Monzingo*, 157 Tex. 479, 304 S.W.2d 362 (1957); *Warren Petroleum Corp. v. Martin*, 153 Tex. 465, 271 S.W.2d 410 (1954).

123. *Brown v. Lundell*, 162 Tex. 84, 86, 344 S.W.2d 863, 865 (1961); *General Crude Oil Co. v. Aiken*, 162 Tex. 104, 106, 344 S.W.2d 668, 669 (1961); *Kenny v. Texas Gulf Sulphur Co.*, 351 S.W.2d 612, 614 (Tex. Civ. App.—Waco 1961, writ ref'd).

124. The most recent case dealing with the relative rights of the surface estate owner and the mineral estate owner is *Winslow v. Duvall County Ranch Co.*, 519 S.W.2d 217 (Tex. Civ. App.—Beaumont 1975, writ ref'd n.r.e.). The plaintiff had obtained a temporary injunction restraining the mineral lessee from pumping, flowing, or producing any oil or gas from his leases, on the ground that his operations were polluting the surface of the land. In overturning the injunction, the court stated that under the modern concept of the correlative rights of the surface owner and the mineral lessee, the mineral lessee is limited to uses which are reasonably necessary and which are made with due regard for the rights of the surface owner, citing both *Sun Oil Co.* and *Getty* for support.

125. 351 S.W.2d 612 (Tex. Civ. App.—Waco 1961, writ ref'd).

126. The "frash process" is a method of mining deep-lying sulfur by forcing into the deposit very hot water and pumping out the sulfur thereby melted. See WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 903 (8th ed. 1961).

127. 470 S.W.2d 618 (Tex. 1971).

that Getty's use of the surface was unreasonable and unnecessary. The court expressly added to this reasonably necessary standard the corollary that the rights implied in favor of the mineral estate are to be exercised with *due regard* for the rights of the owner of the servient estate.

The *Getty* case was quickly followed by *Sun Oil Co. v. Whitaker*.¹²⁸ The issue in *Sun* was whether a mineral lessee had the right to use fresh, subterranean water in its waterflood operation as part of its right to a reasonably necessary use of the surface. Upon rehearing the Texas Supreme Court, in a sharply divided decision, withdrew its original opinion and rendered a decision that reversed itself, the court of civil appeals, and the district court. Under the court's decision the surface owner was enjoined from interfering with utilization of not more than 100,000 gallons of fresh water per day for waterflooding operations.¹²⁹ The court distinguished *Getty* by finding that in the present case there was no reasonable alternative method available to the lessee on the premises. As a result of owning the dominant estate, Sun had the implied right to use so much of the premises as was reasonably necessary to effectuate the purpose of the lease with due regard for the rights of the owner of the surface estate. Justice McGee, speaking for the majority, stated that the use of the fresh water was reasonably necessary to effectuate the purposes of the lease because Sun's attempts to use available supplies of salt water had failed and there were no other available sources of water on the premises. To require Sun to purchase water for its waterflooding operations from an outsider would be in total conflict with the dominant-servient theory.

It is submitted that in both *Getty* and *Sun* the court is balancing the agricultural interests of the surface owner with the interests of the mineral lessee. Due to practical alternatives available to the mineral lessee in *Getty*, the scales tipped in favor of the surface owner. In *Sun*, however, the lack of an alternative extraction method weighed in favor of the mineral estate. The surface estate had to yield regardless of the fact that the depletion of a limited supply of fresh water meant the ultimate destruction of the surface.

These three cases are not directly related to the issue of the ownership of coal under a conveyance of "oil, gas, and other minerals." The ownership of the coal and the right to remove the coal by strip mining are two separate issues, and the question of surface use does not become a factor until ownership of the minerals is established. By analogy these cases support the theory that when there are no alternative means of removal, strip mining is within the mineral estate owner's right to a reasonably necessary use of the surface estate. They are, therefore, relevant to demonstrate the illogical nature of the court's decisions in *Acker* and *Williford* which held that removal of the substance leading to destruction of the surface required ownership of the substance be given to the surface estate owner.

IV. WHO SHOULD GET THE COAL?

The previously discussed tests suggest that coal should pass under a

128. 483 S.W.2d 808 (Tex. 1972).

129. *Id.*

conveyance of "oil, gas, and other minerals." Coal certainly falls within the category of "minerals" as determined by the vernacular of the mining industry, the commercial world, and the landowners at the time of the grant. As long ago as 1923 the Texas Supreme Court held that oil and gas are minerals "in like manner and to the same extent as is coal or any other solid mineral."¹³⁰ An application of *Cain v. Neumann*¹³¹ which held the minerals included in the estate need not have been contemplated or even discovered at the time of the grant would undoubtedly include coal in "other minerals." Coal unquestionably possesses an exceptional characteristic or peculiar property giving it a special value apart from the surface itself, especially when its unique value as an alternative energy resource is considered.¹³² As previously stated, coal can be found from zero to two hundred feet below the surface. It is rarely found in outcroppings above the surface and has never been traditionally associated with surface ownership or as essential to the utilization of the surface. The Waco court of civil appeals in *Williford v. Spies*, however, suggested that these tests were outweighed by the fact that the coal could only be removed by surface mining which would result in the total destruction of the surface estate.¹³³ This case depended solely on *Acker v. Guinn* for its support.¹³⁴ It is submitted that both the reasoning behind the surface destruction theory and the reasoning of the court in *Williford* are illogical. In both *Acker* and *Williford* the court's reasoning is faulty in one specific area. Since the parties had not expressed any specific intent regarding the particular substance in question (coal), it is only logical that the objective of the court would be to effectuate the general intent derived from the conveyance. This general intent is the severance of the mineral and surface estates. Since the two estates may be severed, distinctly different means of enjoyment are contemplated to accompany each estate. The mineral estate is to be enjoyed through the extraction of valuable substances, and the surface estate by a retention and use of all substances necessary for any enjoyment and use to which the surface is adaptable. The supreme court's requirement of an expression of affirmative intent relative to the inclusion of a substance that requires destructive removal is not, however, a test of general intent based on the enjoyment of the estates. The problem with the court's search for a specific intent is that it results in passing to the surface owner those valuable substances which would cause the destruction of the surface when removed by the only profitable means known. The court is thus allowing the surface estate to retain part of what was granted or reserved to the mineral estate.¹³⁵ This

130. *Stephens County v. Mid Kansas Oil & Gas Co.*, 113 Tex. 160, 167, 254 S.W. 290, 292 (1923).

131. 316 S.W.2d 915 (Tex. Civ. App.—Amarillo 1960, writ ref'd n.r.e.).

132. The peculiar value of coal may be greater than many people realize for it is possible that Texas lignite may contain uranium, an element capable of boosting its economic and energy-producing potential. See *Lignite, Rebirth of a Texas Resource*, 2 TEXAS ENERGY & MINERAL RESOURCES, Dec. 1975, at 2.

133. 530 S.W.2d 127 (Tex. Civ. App.—Waco 1975, no writ).

134. *Id.*

135. Based upon this reasoning, if a valuable mineral is discovered, such as uranium, which may only be extracted by a quarrying process resulting in the destruction of the surface, then the surface owner could rightfully possess it. However, the court in *Cain*

result is not only unjust but erroneous, for any particular method of extraction in the minds of the parties at the time of the severance exists as a result of observation and experience and not for the purpose of limiting the substances which the owner may enjoy as part of his estate.¹³⁶ As a result of an enthusiasm to protect the surface estate from any damage, the court has conferred upon the surface owner a valuable mineral deposit and left the mineral owner with nothing.¹³⁷ The surface owner could thereby extract the valuable substance and market it for his own benefit, a result totally in conflict with what the parties intended. Problems with the destruction of the surface test might have been foreseen by the Texas Supreme Court in *Heinatz v. Allen*, an opinion which warned other courts not to use the test as a decisive factor for interpreting the meaning of "minerals."¹³⁸ Obviously the *Acker* and *Williford* courts failed to heed this warning.¹³⁹

The *Williford* court relied principally upon the *Acker* decision to hold that a reservation of "oil, gas, and other minerals" did not include coal since the extraction of coal would result in the destruction of the surface. There are several strong grounds for distinguishing the factual situation in *Acker* from that in the *Williford* case. *Acker* dealt with iron ore, a substance that was primarily used as a foundation base in road construction although it had at times been used to supplement the manufacture of pig iron. The court based its decision on other cases that had held limestone, building stone, and clay were not included within the term "other minerals."¹⁴⁰ The Texas Supreme Court has even explicitly restricted the holding in *Acker v. Guinn* to specific quasi-minerals.¹⁴¹ Coal is obviously different from these quasi-minerals in its nature, its use, and its unusual value. The iron ore in *Acker* was found outcropping in many places. This location of the ore, therefore, caused the substance to become a part of the surface estate.¹⁴² On the other

v. *Neumann* refused to follow this reasoning. 316 S.W.2d 915 (Tex. Civ. App.—San Antonio 1958, no writ).

136. The court in *Acker v. Guinn* seems to be using this knowledge of the grantor to limit his intent by the statement, "the parties to a mineral lease or deed usually think of the mineral estate as including valuable substances that are removed from the ground by means of mines or well shafts." 464 S.W.2d 348, 352 (Tex. 1971). See Comment, *supra* note 15, at 415.

137. This is based upon the assumption that the coal is the only valuable substance found on the particular mineral estate involved. Even when other minerals are present, this is a very great diminution in the value of the mineral estate when coal is given to the surface owner, resulting in just as an inequitable result as if coal were the only mineral present.

138. 147 Tex. 512, 217 S.W.2d 994 (1949). These problems and conflicts are a result of the illogical reasoning behind the destruction of the surface test, which allows the means of extracting the substance to determine the ownership of that substance. The question over the right to strip mine should not even be considered until after the ownership of the substance is determined.

139. Had the courts in *Acker* and *Williford* treated the surface destruction test on the same plane as the other considerations, such as unique value and proximity to the surface, brought out in *Heinatz*, the result would probably have been very different.

140. The *Acker* court cited the *Heinatz v. Allen* and *Atwood v. Rodman* cases for support that a devise of "mineral rights" did not include limestone and building stone.

141. In *Robinson v. Robbins Petroleum Corp.*, 501 S.W.2d 865, 866-67 (Tex. 1973), the court, citing *Acker* as support, states, "[w]hen closely related to the surface itself, gravel and limestone and even iron ore have been held not to be embraced by mineral ownership."

142. This point was strongly emphasized by Professor William J. Flittie, editor of the second edition of *Summers on Oil and Gas*, as distinguishing the *Acker* case from cases

hand, the coal in *Williford* was found at depths of fifty feet or more.¹⁴³

The reservation involved in *Williford* stated grantors retained "[o]ne half (1/2) of all minerals, oil, gas and other minerals in and to and under the above described property herein conveyed."¹⁴⁴ The reservation has been interpreted as saying *all* minerals—all oil, *all* gas, and *all* other minerals.¹⁴⁵ The broad sweep of the word "all" has persuaded some courts to include all known mineral substances in the grant or reservation.¹⁴⁶ This court, however, gave no recognition to this point. There was also evidence that the surface of the land in question had not been destroyed or substantially impaired for agricultural or grazing purposes but that the land had actually been somewhat improved. This evidence was obviously not persuasive to the court.

Another problem is inherent in the destruction of the surface test. If new mining processes are developed or coal is found in a geologic formation conducive to underground mining, the reasoning of *Williford* suggests that the coal would be a part of the mineral estate. Even though the means of extraction and not the inherent nature of the coal has changed, the coal will become a part of an entirely different estate. Such a result perpetuates confusion and lack of uniformity in this area.

An irreconcilable conflict arises when *Williford* is considered with the three major cases dealing with the right of the mineral owner to use the surface estate.¹⁴⁷ It is ironic that the Waco court of civil appeals, after deciding in *Kenny v. Texas Gulf Sulphur Co.*¹⁴⁸ that the owner of the mineral estate was not liable in damages to the surface owner for a three-foot subsidence resulting from the only known mining process, would fifteen years later deprive the mineral owner of the very essence of his estate because damage to the surface would result from the only available mining process.

involving coal. Interview with William J. Flittie, Professor of Law, Southern Methodist University School of Law, in Dallas, Texas, Jan. 12, 1976.

143. 530 S.W.2d at 129.

144. *Id.* at 128.

145. See *New Mexico & Ariz. Land Co. v. Elkins*, 137 F. Supp. 767 (D.N.M. 1956), where, regarding a conveyance of "all oil, gas and minerals underlying or appurtenant to the said lands," the court stated: "The first word 'all,' describes the word 'oil,' the word 'gas,' and the word 'minerals,' and encompasses all minerals, including, specifically, uranium and thorium." *Id.* at 773. See also *Christman v. Emineth*, 212 N.W.2d 543 (N.D. 1973).

146. See *MacMaster v. Onstad*, 86 N.W.2d 36 (N.D. 1957), where, concerning a lease granting the privilege of mining for oil, gas, and "all other minerals," the court stated:

We do think there is significance in the fact the lease authorized the lessee to produce not simply oil and gas and other minerals but oil and gas and all other minerals. No word is more inclusive than 'all' and it is difficult to see why, if the parties intended a restricted construction to be placed upon the reference to other minerals, they should use a word so completely unrestricted in its meaning.

Id. at 41.

147. *Sun Oil Co. v. Whitaker*, 483 S.W.2d 808 (Tex. 1972); *Getty Oil Co. v. Jones*, 470 S.W.2d 618 (Tex. 1971); *Kenny v. Texas Gulf Sulphur Co.*, 351 S.W.2d 612 (Tex. Civ. App.—Waco 1961, writ ref'd).

148. *Kenny v. Texas Gulf Sulphur Co.*, 351 S.W.2d 612 (Tex. Civ. App.—Waco 1961, writ ref'd).

The *Williford* case also conflicts with both *Getty*¹⁴⁹ and *Sun*.¹⁵⁰ Both cases stressed the implied right of the mineral estate owner to use as much of the surface premises as reasonably necessary to effectuate the purpose of the mineral ownership with due regard for the rights of the owner of the surface estate. The underlying theme of both cases and the explicit holding in *Sun* was that the existing method fitted within the standard of "being reasonably necessary with due regard to the surface owner" when no alternative method of developing the mined resources existed. When no available alternative means of extracting the valuable substances of the mineral estate exist, surface mining can be considered, therefore, a reasonably necessary use of the surface by the mineral estate.¹⁵¹ The court in *Sun* expressly held that such a grant was implied by law in all conveyances of a mineral estate and could not be altered by evidence that the parties to a particular instrument of conveyance did not intend the legal consequences of the grant unless an express limitation on the grant was stated in the conveyance.¹⁵² When viewed with respect to these principles, it is difficult to understand how the court in *Williford* could reason that the mineral estate owner did not have the rights to the coal because its extraction resulted in damage to the surface. These two cases expressly give the mineral owner the right to use the surface in any manner necessary for the removal of the minerals when no alternative method is available.¹⁵³

The advent of the new Surface Mining and Reclamation Act,¹⁵⁴ the several accounts of successful reclamation projects,¹⁵⁵ and the fact that the surface mining area in East Texas is particularly conducive to reclamation efforts¹⁵⁶ all suggest the court's statement in *Williford* that the surface mining of coal would lead to total destruction of the surface estate is exaggerated. The surface estate would, of course, be monopolized by the activities of the mineral estate owner during the mining and reclamation process, but surely this would fall within the standard of a reasonably necessary use by the mineral owner. What more than a restoration of an area affected by a surface mining operation to its original or other substantially beneficial condition could fall within the standard of "use with due regard to the surface owner"? An analogy to this situation can be drawn to a case in North Dakota,¹⁵⁷ a state with a reclamation statute¹⁵⁸ very similar

149. 470 S.W.2d 618 (Tex. 1971).

150. 483 S.W.2d 808 (Tex. 1972).

151. This theory is even strengthened when considered in light of the previously discussed Surface Mining Reclamation Act in Texas, putting upon the mining operator the obligation to restore the land to its prior condition and use or at least the equivalent thereof. See TEX. REV. CIV. STAT. ANN. art. 5920-10 (Supp. 1975-76).

152. 483 S.W.2d 808 (Tex. 1972).

153. The only means of resolving this conflict is by reading *Williford* as saying the recipient of a conveyance or reservation of "oil, gas, and other minerals" does not have the full rights to the use of the surface as does the owner of the mineral estate created in some clearer way. This reasoning collapses when coupled with the theory that the general intent of the parties to a conveyance or reservation of "oil, gas, and other minerals" was to sever completely the mineral and surface estate.

154. TEX. REV. CIV. STAT. ANN. art. 5920-10 (Supp. 1975-76).

155. See note 93 *supra* and accompanying text.

156. See W. KAISER, *supra* note 2, at 31.

157. *Christman v. Emineth*, 212 N.W.2d 543 (N.D. 1973).

158. N.D. CENT. CODE §§ 38-14-01 to -13 (1960 and Supp. 1969).

to the Texas statute. The issue before the court in that case was whether a reservation of all oil, gas, and other minerals in or under the land in question included coal. Faced with the argument that coal should not be included because strip mining would destroy the surface for agricultural purposes, the court found coal includable because the North Dakota statute required considerable regrading and replacement of topsoil. The court concluded that the words "all oil, gas, and other minerals" were meant to include lignite coal.¹⁵⁹

Certain policy considerations support the inclusion of coal in the mineral estate formed by a conveyance of "oil, gas, and other minerals." The basic purpose for the dominance given the mineral estate owner is founded on the view that dominance was the most equitable and practical way to develop our natural resources.¹⁶⁰ The Texas Constitution states the public policy of Texas as to its natural resources: "The conservation and development of all of the natural resources of this State . . . are each and all hereby declared public rights and duties; and the Legislature shall pass all such laws as may be appropriate thereto."¹⁶¹ The efficient utilization of natural resources should be a factor in any formulation of legal principles concerning minerals. Efficient utilization presents a strong argument that coal should pass to the mineral estate. A surface owner who receives ownership of coal under the destruction of the surface theory has two alternatives. First, he may develop the coal himself by granting a coal lease on the land and receiving royalties upon its production.¹⁶² As previously discussed, this is extremely inequitable and probably contrary to the intention of the parties. The second alternative is to forestall development of the coal and continue use of his surface for grazing, farming, or the like. The value of the surface estate is bound to rise with the increased demand for coal in the future. The present energy crisis and the resulting need to develop coal as an alternative fuel source make conduct under the second alternative against public policy as contrary to the welfare of the nation. Accordingly, conduct of the surface owner under either alternative will work a harsh injustice.¹⁶³ This injustice is an inevitable result of the surface destruction test, a test which is both illogical in its determination of a specific intent of the parties when none is expressed and erroneous in its view of surface mining as a total destruction of the surface estate.

159. 212 N.W.2d at 551. See also *Martin v. Kentucky Oak Mining Co.*, 429 S.W.2d 395 (Ky. Civ. App.—1968, writ ref'd), where the Kentucky Court of Appeals faced and rejected the identical surface destruction argument in light of the Kentucky reclamation statute, which is also very similar to the Texas statute. See KY. REV. STAT. ANN. ch. 350 (Baldwin Supp. 1965).

160. See Comment, *A New Approach to the Use of the Surface Estate by a Lessee Under an Oil and Gas Lease*, 13 S. TEX. L.J. 269 (1972).

161. TEX. CONST. art. XVI, § 59.

162. It is the opinion of this writer that, practically speaking, the majority of the surface owners in East Texas are far more interested in the coal production royalties than in the general aesthetics and beauty of the land. This is based upon the observation that usually the East Texas land is far more valuable for its coal production than for grazing or farming purposes.

163. For an excellent analysis of this problem, see Comment, *The Meaning of "Minerals" in Grants and Reservations*, 30 ROCKY MT. L. REV. 343 (1958).

V. A PROPOSAL FOR APPLICATION WHEN THE COAL DEVELOPMENT
PROCESS PLACES TOO HARSH A BURDEN ON THE SURFACE OWNER

A dilemma is present whenever there is a reservation or conveyance of "oil, gas, and other minerals." A presumed intent to sever the mineral and surface estate in order to give the mineral estate owner the right to extract all valuable substances from beneath the surface conflicts with an equally valid presumption that the grantor intended to give the surface owner the right to use the surface profitably. The conflict is rooted in the fact that extraction by the mineral owner of certain valuable substances will temporarily injure the surface owner's estate. A feasible solution to this dilemma may be a slight variation of the proposal Professor Kuntz has advocated since 1949.¹⁶⁴ Professor Kuntz finds inequity in the courts' attempts to give effect to an intention to include or exclude a specific substance when actually the parties had nothing specific in mind. He suggests that a court should arrive at a general intent by considering the purposes of the grant or reservation in terms of manner of enjoyment intended in the ensuing interests. When a general grant or reservation is made of all minerals it should be assumed that the parties intended to sever the entire mineral estate from the surface estate, leaving the owner of each with definite incidents of ownership enjoyable in distinctly different ways. Enjoyment of the surface estate requires the retention of substances necessary for the use of the surface; enjoyment of the mineral estate requires the extraction of valuable substances. Professor Kuntz suggests that minerals whose extraction would cause significant damage to the surface estate be deemed to belong to the mineral owner but that he be bound to compensate the surface owner for damages to the surface estate. Damages can be measured by the reduction in value of the land with regard to surface use. This theory is fair to both mineral and surface estate owners. The theory has been criticized, however, as leading to a *forced sale* either of the surface if total destruction is involved, or of the minerals if extraction is prohibited.

The Kuntz theory is certainly more equitable than the surface destruction theory of *Williford*. The new reclamation statute, however, suggests that the Kuntz theory be modified. The coal should continue under the Kuntz theory to be deemed to belong to the mineral estate under a conveyance or reservation of "oil, gas, and other minerals." The right to extract the coal, however, must be treated as a separate issue. Rather than passing ownership of the coal to the surface owner under the *Williford* theory in order to prevent destruction of the surface, ownership and extraction should be treated separately. The right to extract the coal and compensate the surface owner for diminution in value of the surface should not be automatic; there should be a rebuttable presumption that the mineral owner has the right to extract the coal. The mineral owner should be obligated to the surface owner for the fair market rental value of the property from the time when the mining starts to the time the reclamation of the surface is completed. The

164. See Kuntz, *The Law Relating to Oil and Gas in Wyoming*, 3 Wyo. L.J. 107 (1949). See also 1 E. KUNTZ, *supra* note 11, § 13.

mineral owner should also be required to compensate the surface owner for any diminution in value of the surface after reclamation is complete.¹⁶⁵

Under the Surface Mining and Reclamation Act the operator of a surface mining operation is responsible for the total reclamation of the surface.¹⁶⁶ The right of extraction presumption, therefore, can only be rebutted upon a showing which satisfies the court that no possible means of a successful reclamation exist. Upon such a showing the court will have two alternatives. The court can either allow the mineral owner to extract the coal and compensate the surface owner for the diminution in value of his surface estate, or it can issue an injunction against the removal of the coal until such time as technology develops a reclamation method that will allow extraction of the coal without destroying the surface. The court is in the best position to balance objectively the rights of the surface owner, the rights of the mineral owner, and the public policy demands for the development of the coal.

If the court grants the injunction of the surface owner, the coal may stand undeveloped for what could be an extremely long period of time. There is at least an even chance under present case law that the coal will be developed, although the developer may be the surface owner.¹⁶⁷ Issuance of the injunction, however, is unlikely. The surface owner bears a strict burden of proof that reclamation of the surface is impossible. Having met this burden, the surface owner must convince the court that injury from destruction of the surface is greater than injury to both the mineral owner and the general public from allowing the coal to remain undeveloped. The surface owner must show that a compensation award for the diminution in value of the surface would be insufficient in any amount. Such a showing would require exceptional circumstances; but the surface owner should at least have some opportunity to plead his case and not automatically be bound to what would amount to a forced sale of his property.

VI. CONCLUSION

There is genuine need to declare as a matter of law whether the term "oil, gas, and other minerals" in an instrument severing the mineral estate includes coal in the absence of contrary intrinsic evidence. Since parties employing the term "oil, gas, and other minerals" usually have no subjective intent concerning coal, an inquiry into the matter must be concerned with judicially ascertained intent. Any attempt to determine subjective intent by reference to "facts and circumstances then existing" of which adequate proof has since disappeared would be unrealistic.

Declaring as a matter of law whether coal is included in a conveyance of "oil, gas, and other minerals" can also promote exploration and development

165. This diminution in value should be determined by the court on a relative basis of the value of the land prior to the mining as compared to the value of the land after reclamation, whatever its use.

166. TEX. REV. CIV. STAT. ANN. art. 5920-10 (Supp. 1975-76).

167. As previously stated, the surface owner could develop the coal and receive coal production royalties or could just sit on the coal and forestall any development. See notes 160-63 *supra* and accompanying text.

of coal production. A case-by-case determination of whether coal is included in a conveyance creates a risk few coal companies are willing to take. The public interest connected with the development of natural resources is persuasive that the term needs to have an established judicial interpretation.

The present interpretation of the Texas courts does not provide the needed solution to the problem. Negative effects result from the courts' illogical reasoning that the inclusion of coal in a reservation or grant of "oil, gas, and other minerals" hinges upon the manner of extraction. The more logical approach is to treat ownership and the right of extraction by surface mining operations as separate questions. A rebuttable presumption that the mineral owner has a right to surface mine the coal and an obligation on the part of the mineral owner to compensate the surface owner both for the fair market rental value of the land and for any diminution in value after the reclamation process is complete would provide sufficiently equitable treatment and protection of both estates. Whatever proposal is favored, however, the Texas courts should strictly scrutinize the existing surface destruction test and consider discarding it.