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Ownership of Coal under a Reservation of Oil, Gas, and Other Minerals - The Surface Destruction Test Is Reaffirmed: Reed v. Wylie

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determining whether a challenged statute has an ameliorative purpose, or preclude that possibility by finding the relevant discrimination to be against women. The Court should avoid this position by substituting individual treatment for overbroad gender-based classifications, whatever their purpose.

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Ownership of Coal Under a Reservation of Oil, Gas, and Other Minerals—The Surface Destruction Test Is Reaffirmed: Reed v. Wylie

Bette Reed, the owner of the surface estate of a tract of land in Freestone County, Texas, sought a declaratory judgment establishing her rights to the coal and lignite removable by open-pit or strip mining. W.C. Wylie claimed a portion of the coal and lignite pursuant to a deed reserving a one-fourth undivided interest in "all oil, gas and other minerals." The trial court granted Reed's motion for summary judgment, declaring her the owner of all coal and lignite that *may* be removed from the tract by open-pit or strip mining. The court of appeals reversed,[1] holding that Reed held title to all the coal and lignite which *must* be removed by the aforementioned methods, and that there was insufficient evidence on the point to sustain a motion for summary judgment. *Held, affirmed*: When the reservation of mineral rights in a deed does not expressly include substances which are removable only by methods that will consume or deplete the surface estate, title to such minerals rests with the surface owner. *Reed v. Wylie*, 554 S.W.2d 169 (Tex. 1977).

I. Interpretation of "Other Minerals"

In Texas the owner of a fee simple may sever the mineral and surface estates and convey or reserve mineral rights independent of the surface ownership of the land. This right of severance gives rise to two separate and distinct estates, each having all the incidents and attributes of an estate in land.[2] The mineral estate is the dominant estate in that its owner can use as much of the surface as is reasonably necessary to produce and remove the underlying minerals.[3] The mineral owner, however, must exercise his rights with due regard for the rights of the surface owner. Where a proposed method of extraction would severely impair an existing use of the surface, and under the established practices in the industry an alternate method of recovery is available, the mineral owner may be required to adopt the less destructive method.[4] If there is only one commercially known process for

1. Wylie v. Reed, 538 S.W.2d 186 (Tex. Civ. App.—Waco 1976).
2. Harris v. Currie, 142 Tex. 93, 99, 176 S.W.2d 302, 305 (1943).
3. Sun Oil Co. v. Whitaker, 483 S.W.2d 808, 810 (Tex. 1972).
4. Getty Oil Co. v. Jones, 470 S.W.2d 618 (Tex. 1971). In *Getty* the mineral owner was using two beam-type pumping units to recover oil. The units were so tall that they interfered with the self-propelled sprinkling system which had been installed by the surface owner. The

removing the minerals, however, the mineral owner can pursue this method regardless of the effect on the surface estate.[5] Thus, the owner of a mineral removable solely by the use of open-pit or strip mining would have the right to utilize this means of extraction.

These rules have been developed to accommodate the conflicting interests of the surface owner and mineral owner when the ownership of the mineral is already established. Frequently, however, the instrument of conveyance does not clearly indicate the scope of the estate held by the mineral owner. Often the estate is described as encompassing "mineral rights" or includes a list of specific substances followed by the phrase "and other minerals." The courts have developed various tests for interpreting these broad grants.[6]

Well established case law indicates that the term "minerals" is clear and unambiguous and must be construed by the courts without resorting to extrinsic evidence of the actual intent of the parties.[7] The word is given its ordinary and natural meaning, embracing all substances commonly regarded as minerals, as distinguished from the soil in general.[8] In accordance with this definition, the courts first applied an inherent value test to determine if a substance should be legally recognized as a mineral. In *Psencik v. Wessels*[9] the court held that a reservation of all minerals did not include sand and gravel, since such substances are not exceptional in use or value. This same analysis was used by the Texas Supreme Court in *Heinatz v. Allen*,[10] which held that "mineral rights" did not include the right to mine for commercial limestone. In order for substances such as sand, gravel, and limestone to qualify as minerals, they must be rare and exceptional in character or possess a peculiar property which gives them a special value.[11]

A second basis for the court's decision in *Heinatz* was that the limestone was recoverable only by the open-pit method, which would have destroyed the surface for agricultural and grazing purposes.[12] A surface destruction test was therefore added to the inherent value test to aid the court in interpreting the term "minerals."[13] The rationale for the surface destruction

court found that the mineral owner could use the beam-type pump in cellars or hydraulic pumps on the surface without obstructing the sprinklers. Accordingly, the court held that the owner of the mineral estate should be forced to adopt one of these less obstructive methods, provided the surface owner could show that alternatives to his sprinkler system were impractical and unreasonable.

5. *See* Kenny v. Texas Gulf Sulphur Co., 351 S.W.2d 612 (Tex. Civ. App.—Waco 1961, writ ref'd), where the only known method of producing sulphur caused a subsidence of the surface of from two inches to three feet. The court held that the owner of the surface estate was not entitled to damages occasioned by the subsidence. *See also* Sun Oil Co. v. Whitaker, 483 S.W.2d 808 (Tex. 1972).

6. *See generally* Comment, *Lignite—Surface or Mineral? The Single Test Causes Double Trouble*, 28 BAYLOR L. REV. 287 (1976); Comment, *Surface or Mineral: A Single Test?*, 23 BAYLOR L. REV. 407 (1971); Comment, *Is Coal Included in a Grant or Reservation of "Oil, Gas, or Other Minerals"?*, 30 SW. L.J. 481 (1976).

7. Southland Royalty Co. v. Pan American Petroleum Corp., 378 S.W.2d 50 (Tex. 1964); Anderson & Kerr Drilling Co. v. Bruhlmeyer, 134 Tex. 574, 136 S.W.2d 800 (1940); Williford v. Spies, 530 S.W.2d 127 (Tex. Civ. App.—Waco 1975, no writ).

8. The courts, however, have recognized that if the term "minerals" is interpreted too broadly, the mineral estate would include even the soil itself. Heinatz v. Allen, 147 Tex. 512, 517, 217 S.W.2d 994, 997 (1949).

9. 205 S.W.2d 658, 661 (Tex. Civ. App.—Austin 1947, writ ref'd).

10. 147 Tex. 512, 217 S.W.2d 994 (1949).

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

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

13. The surface destruction test was also discussed in Eldridge v. Edmondson, 252 S.W.2d 605 (Tex. Civ. App.—Eastland 1952, writ ref'd n.r.e.), in which the court held that limestone

test is that a party who severs the mineral estate through the use of general terms would normally not intend to give the mineral owner the right to destroy the surface. Otherwise the severance would be meaningless, for the same instrument which contained the reservation would provide for the destruction of the estate reserved.[14]

In *Acker v. Guinn*[15] the Texas Supreme Court decided that the potential destruction of the surface was the primary factor to consider in determining the ownership of particular minerals under general words of conveyance. The issue was whether the conveyance of an "undivided 1/2 interest in and to all of the oil, gas and other minerals"[16] in a certain tract of land included iron ore. The court held that the controlling consideration was whether the substance had to be removed by methods that would, in effect, consume or deplete the surface estate.[17] Since the iron ore had to be mined by the open-pit or strip mining method,[18] and an intention to include it in the mineral estate had not been affirmatively and fairly expressed, the court held that it was retained by the surface owner.[19] The general reference to "other minerals" was found to be insufficient to convey the iron ore.[20]

On January 1, 1976, the Texas Surface Mining and Reclamation Act[21] went into effect, giving the Texas Railroad Commission the power to oversee surface mining in Texas.[22] Under this act a person who intends to engage in surface mining for coal, lignite, uranium, or uranium ore must apply for a permit[23] and must submit a reclamation plan.[24] The plan must at least show that the land can be restored to the same or to a substantially beneficial condition,[25] and the applicant must file a performance bond to assure that the reclamation plan is carried out.[26] The surface owner is thus protected against destructive surface mining both by the Texas Surface Mining and Reclamation Act and by the fact that the mineral owner can strip mine only

which could be profitably manufactured into cement was not included in a reservation of all "oil, gas, casing-head gas and other minerals."

14. Atwood v. Rodman, 355 S.W.2d 206, 213 (Tex. Civ. App.—El Paso 1962, writ ref'd n.r.e.).

15. 464 S.W.2d 348 (Tex. 1971).

16. *Id.* at 349.

17. *Id.* at 352.

18. *Id.* at 351.

19. *Id.* at 352.

20. *Id.* at 352-53. See text at note 38 *infra* for an indication of the type of wording which the supreme court would accept as manifesting an affirmative and fairly expressed intent to include in the mineral estate substances which had to be strip mined. In Williford v. Spies, 530 S.W.2d 127 (Tex. Civ. App.—Waco 1975, no writ), the court applied the surface destruction test to coal and lignite which had to be strip mined and held that they belonged to the surface owner. The phrase "all minerals, oil gas and other minerals" did not constitute an affirmatively and fairly expressed intention to include strip mined coal. Although the issue was not before the court in either *Acker* or *Williford*, the surface destruction test should only be applied after first determining that the substance in question is inherently valuable. Since both coal and iron ore are generally considered to be valuable the court did not discuss this aspect of the case. If the parties were contesting the ownership of gravel, however, it is doubtful that the court would find in favor of the owner of the mineral estate, even if it were possible to remove the gravel without damaging the surface.

21. TEX. REV. CIV. STAT. ANN. art. 5920-10 (Vernon Supp. 1976-77). An analysis of the Act is contained in Comment, *Texas Surface Mining and Reclamation Act—New Hope for Protection of Texas Resources*, 7 ST. MARY'S L.J. 850 (1976).

22. TEX. REV. CIV. STAT. ANN. art. 5920-10, § 6 (Vernon Supp. 1976-77).

23. *Id.* § 8.

24. *Id.* § 10.

25. *Id.* § 11(b)(2).

26. *Id.* § 14.

if no alternatives are available under the established practices in the industry.[27]

II. REED V. WYLIE

The deed interpreted in *Reed v. Wylie* reserved "a one-fourth undivided interest in and to all oil, gas and other minerals."[28] In determining whether coal and lignite were included in the general reservation of "other minerals," the Texas Supreme Court was forced to reconsider its holding in *Acker*.[29] The key question was whether actual ownership of particular minerals should be determined by the means necessary to extract them. Answering in the affirmative, the court further developed the standard first announced in *Acker*. In order for the surface owner to retain ownership of the mineral he must prove that "as of the date of the instrument being construed, if the substance near the surface had been extracted, that extraction would necessarily have consumed or depleted the land surface."[30] If the surface owner can show that *substantial* quantities of the substance are so located as to require destructive mining methods, he then has title to the substance at whatever depth it is found.[31]

The rationale of the decision was that the parties would not have intended the destruction of the surface by the mineral owner without clearly indicating that intention.[32] The court adhered to the principle that the term "minerals" was clear and unambiguous and could not be altered by evidence of the actual intent of the parties.[33] The court not only failed to discuss the effect of the Texas Surface Mining and Reclamation Act,[34] it held that it was immaterial whether devices of restoration or reclamation were available.[35] If

27. *See* notes 3-5 *supra* and accompanying text.

28. 554 S.W.2d at 170.

29. 464 S.W.2d 348 (Tex. 1971); *see* notes 15-20 *supra* and accompanying text.

30. 554 S.W.2d at 172. See text at note 42 *infra* for Chief Justice Greenhill's interpretation of the phrase "extraction would necessarily have consumed or depleted the land surface."

31. In the first opinion of the supreme court, which is reported at 20 Tex. Sup. Ct. J. 327 (May 25, 1977), and which was withdrawn on motion for rehearing, Justice Reavley stated that the test was whether *commercially producible* quantities were so shallow that their production would require the destruction of the surface. *Id.* at 329. The change to *substantial* quantities would appear to indicate that "substantial" means at least an amount in excess of commercially producible quantities. See discussion in the court's final opinion, 554 S.W.2d at 172.

32. *Id.; see* note 14 *supra* and accompanying text.

33. This was especially important in *Reed* for affidavits sworn to by the original parties to the deed and by the lawyer who drafted it showed that they had all actually intended for the reservation to include lignite. This point is well developed in the court of appeals opinion. 538 S.W.2d at 188.

34. Perhaps the members of the court felt that they could not consider the Act since they were purportedly trying to determine the intent of the parties at the time of the conveyance, a time when the act did not even exist. This concern was anticipated in Broyles, *The Right to Mine Texas Uranium and Coal by Surface Methods: Acker v. Guinn Revisited*, 13 HOUS. L. REV. 451, 471 (1976), in which it is explained that courts frequently try to ascertain the intent of the parties when a situation has arisen which the parties wholly failed to consider. The courts have to guess how the parties would have dealt with the problem had they considered it. In interpreting general words of grant, the courts have to speculate as to what the parties would have done had the mineral owner requested the right to strip mine. Now that the new act is in effect, the courts could consider what the parties would have done if the mineral owner had requested the right to strip mine with guaranteed reclamation. In other words, the passage of the Surface Mining and Reclamation Act is a circumstance which the parties failed to consider and "the intent of the parties with respect to this unanticipated circumstance should be determined in the same manner that a court would determine the intent of the parties with respect to any other unconsidered circumstance." *Id.*

35. 554 S.W.2d at 172.

the method of producing the minerals involved removing the surface soil, it would be presumed to cause consumption or depletion of the surface estate.[36] The court did point out that the language used was sufficient to reserve coal where there was no necessity of surface mining,[37] and further observed that if the reservation had expressly included coal and lignite, or had included all minerals which could be strip mined, it would have been the duty of the court to give effect to that clear intention.[38] The wording used simply did not affirmatively and fairly express an intention to reserve substances which had to be strip mined. If the surface owner had shown that at the time of the conveyance extraction of the lignite would necessarily have consumed or depleted the surface, she would have had title to all of the lignite contained in the tract.[39] The court held that the evidence advanced was insufficient to prove this as a matter of law and, as a result, the motion for summary judgment had been erroneously granted.[40]

In a concurring opinion Chief Justice Greenhill criticized the exacting test established by the majority and suggested that the controlling question should be whether any reasonable method of production would consume or deplete the surface, not whether extraction would necessarily do so.[41] He interpreted this latter test as requiring the surface owner to prove that "the only method of extracting the mineral, at the time the instrument was executed, would have destroyed or substantially depleted the surface."[42] Since the surface owner would expect the owner of the mineral estate to use all reasonable means of extracting the substances included in the grant, the Chief Justice felt that the surface owner should prevail if he could show that strip mining would have been a reasonable method of extraction at the time of the conveyance. If strip mining would have been a reasonable means of removing lignite, then the surface owner would have expected strip mining to be used in removing the substance; so he would not have intended for lignite to be included in the grant of "other minerals" for the same reasons cited by the majority as the basis of their decision.[43]

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36. *Id.*
37. *Id.*
38. *Id.*
39. The court had to consider the effect of extraction at the time of conveyance rather than at the time of trial because of its avowed purpose of determining the intent of the parties to the original deed. See note 47 *infra* for a discussion of the problems caused by applying the surface destruction test at other points in time.
40. The only supporting evidence was an affidavit of a land man for a utility company who stated that the coal and lignite could only be removed by open-pit mining. The court cited Coward v. Gateway Nat'l Bank, 525 S.W.2d 857, 858 (Tex. 1975), and Gibbs v. General Motors Corp., 450 S.W.2d 827, 829 (Tex. 1970), in support of its holding that expert opinion testimony does not establish a fact as a matter of law in support of a motion for summary judgment. 554 S.W.2d at 173. *But see* the text of the amended TEX. R. CIV. P. 166a.
41. 554 S.W.2d at 173.
42. *Id.*
43. *See* note 32 *supra* and accompanying text. Although the logic behind the Chief Justice's analysis is unassailable, he has apparently lost sight of the end with which the opinion is concerned. The purpose of requiring a clearly expressed intention to include minerals which must be strip mined is to protect the rights of the surface owner. If strip mining is but one of several reasonable potential mining methods, due regard for the rights of the surface owner would require that the mineral owner use the least destructive method available. *See* notes 3-5 *supra* and accompanying text. In these circumstances the surface owner's interest is already adequately protected so it is not necessary to declare him the owner of the mineral rights which he most probably intended to convey.

In a dissent joined by Justice Steakley, Justice Daniel agreed with the criticism offered by the chief justice, but felt that the phrase "oil, gas and other minerals" should never include coal. He argued that "other minerals" should be limited to oil and gas related substances such as sulphur, helium, and carbon dioxide.[44] He also pointed to the uncertainty in land titles which would result from the court's decision.[45] He expressed additional concern about the potential inequities created by the majority's ruling. As an example he considered the hypothetical situation of two farmers on adjacent 1000-acre tracts of land, both of whom had conveyed the mineral rights using the phrase "oil, gas and other minerals." If both tracts contained deep coal deposits, but 50 acres of farmer *B*'s land also contained shallow coal which had to be strip mined, farmer *B* would retain title to all of the coal found on the 1000 acres. Farmer *A*, however, whose land contained only deep coal, would not retain title to any of the mineral, even though the same words of conveyance had been used.[46]

Justice Daniel also disagreed with the majority's holding that the application of the surface destruction test must be limited to the time of conveyance. He felt that the parties would not have contemplated the destruction of the surface estate by the mineral owner at any time. Hence, if at some point in the future strip mining becomes a reasonable method of extracting a mineral, the substance should be found to be part of the surface estate, even though strip mining would not have been reasonable at the time of the conveyance.[47]

By deciding the question of mineral ownership on the basis of the necessary means of extraction at the time of the conveyance, the Texas Supreme Court has caused uncertainty in land titles. It will henceforth be necessary to resort to the courts to determine rights to minerals which are found in shallow deposits. This confusion has resulted from a desire to aid the

44. 554 S.W.2d at 178.

45. "If the lease or deed is worded as in the present case, the title examiner cannot tell from the instrument whether the surface owner or the mineral lessee or grantee has title to the lignite and coal until certain factual determinations are made on the ground and possibly in the court room." *Id.* Justice Daniel also quoted from Kuntz, *The Law Relating to Oil and Gas in Wyoming*, 3 WYO. L.J. 107, 114 (1949). "A rule which requires consideration of the contemporaneous factual or legal setting would create the impossible situation of requiring the title examiner to inquire into the local folk lore of the area or of requiring the examiner to retain a catalogued knowledge of the law as to dates of development. In either event, he could never be confident of his conclusion." 554 S.W.2d at 179.

46. *Id.* at 178. A further inequity lies in the fact that even if farmer *B* had intended to convey the rights to the coal and had been duly compensated therefor, the coal would not be included in the grant. Hence, the surface owner manages to retain ownership of the very substance he meant to convey. It would seem to be more in keeping with the intent of the parties to include coal and all other inherently valuable substances in a grant of "other minerals" and to treat the means of extraction as a separate question. Professor Kuntz has emphasized that when a general grant is made of all minerals, it should be reasonably assumed that the parties intended to sever the entire mineral estate from the surface estate. Kuntz, *supra* note 45, at 112.

47. 554 S.W.2d at 181. If Justice Daniel's reasoning were adopted, title to minerals under general words of conveyance would change with the passage of time. The mineral estate owner would have title to the coal until the technology of strip mining improved to the point that it would be a reasonable method of extraction. Then title to the minerals would revert back to the owner of the surface estate. This would be true even though the mineral owner had been mining through shafts and had no intention of converting to surface methods. This does not appear to be a desirable result.

surface owner, but his interest is already adequately protected by the fact that the mineral owner can strip mine only if it is the sole commercially feasible means of extraction[48] and by the Texas Surface Mining and Reclamation Act.[49] Various commentators have suggested more appropriate methods of dealing with the situation presented in *Reed*.[50] A common belief is that title to valuable minerals should always vest in the grantee of a conveyance of "minerals" or "other minerals," with the means of extraction being treated as a separate issue.[51] The courts could fashion remedies to protect the surface owner in the few instances where the current protections prove to be inadequate, including the granting of injunctions and the awarding of damages in appropriate situations.[52] This solution would have the additional advantage of aiding surface owners who had specifically granted the right to mine coal but had clearly not contemplated strip mining.[53]

III. CONCLUSION

Cases prior to *Reed* had developed an inherent value test to determine the ownership of substances under a grant or reservation of "other minerals." The supreme court in *Acker* established the surface destruction test as the overriding consideration in deciding ownership. Subsequently, the legislature passed the Texas Surface Mining and Reclamation Act which was designed to protect the surface estate from destructive strip mining. In spite of this, the supreme court, in *Reed v. Wylie*, decided to adhere to its holding in *Acker*, and ruled that unless a contrary intention is affirmatively and fairly expressed, the surface owner has title to all substances which at the time of the grant could only be extracted by means that would consume or deplete the surface estate. If substantial quantities of the mineral must be strip mined, then the surface owner has title to the substance at whatever depth it may be found. As a result, title to minerals which are located close to the surface can only be established by resorting to the courts. A better solution would be to recognize that the mineral owner has title to the substance, and then treat the method of extraction as a separate question.

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48. *See* notes 3-5 *supra* and accompanying text.
49. An additional consideration is that the court's holding seems to be contrary to the policy stated in the act that surface mining is a basic and essential activity making an important contribution to the economic well being of the state. TEX. REV. CIV. STAT. ANN. art. 5920-10, § 2(1) (Vernon Supp. 1976-77).
50. *See generally* Comment, *Lignite—Surface or Mineral? The Single Test Causes Double Trouble*, 28 BAYLOR L. REV. 287 (1976); Comment, *Is Coal Included in a Grant or Reservation of "Oil, Gas, or Other Minerals"?*, 30 SW. L.J. 481 (1976).
51. Maxwell, *The Meaning of "Minerals"—The Relationship of Interpretation and Surface Burden*, 8 TEX. TECH L. REV. 255, 287 (1976).
52. Broyles, *supra* note 34, at 477.
53. *Id.* at 479.