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Lori Ann Merrill

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OWNERSHIP OF UNSPECIFIED MINERALS IN TEXAS AND OKLAHOMA AFTER *REED v. WYLIE II*

I. INTRODUCTION

It is a well established principle of property law that the mineral estate may be severed from the surface estate by a grant of the minerals in a deed or lease, or by a reservation of the minerals by the grantor in a conveyance.¹ The grants and reservations are often worded to include oil, gas and "other minerals."² Years after the conveyance is made, a problem of interpreting the parties' intent as to "other minerals" may arise when both the mineral estate owner and the surface estate owner claim ownership of a mineral that is not specifically listed in the initial conveyance. To determine what substances are actually included in the grant or reservation of "other minerals" a court must first ascertain if the substance in question is a mineral.³ If determined to be a mineral, it must then be decided if the parties to the conveyance intended for that particular substance to be included in the grant or reservation of unnamed minerals.⁴

In recent years the Texas Supreme Court has taken a leading role in establishing guidelines for determining which substances are to be included in the phrase "other minerals."⁵ In 1971, the Texas court announced the "surface destruction test."⁶ The test was designed to protect the surface estate from the mineral owner's use of destructive

1. I E. KUNTZ, A TREATISE ON THE LAW OF OIL AND GAS, § 3.1 (1962); *e.g.*, *Stowers v. Huntington Dev. and Gas Co.*, 72 F.2d 969 (4th Cir. 1934); *Adams v. Riddle*, 233 Ala. 96, 170 So. 343 (1936); *Bodcaw Lumber Co. v. Goode*, 160 Ark. 48, 254 S.W. 345 (1923); *Jilek v. Chicago, Wilmington & Franklin Coal Co.*, 382 Ill. 241, 47 N.E.2d 96 (1943); *Humphreys-Mexia Co. v. Gammon*, 113 Tex. 247, 254 S.W. 296 (1923).

2. General conveyances of unnamed minerals are typically worded as follows: reservation of "all oil, gas and other minerals;" grant of "all oil, gas and mineral rights;" mineral deed to "all oil, gas and other minerals."

3. Whether a particular substance is a mineral is a question of fact and policy. Depending upon the substance, jurisdictions can differ widely. If a substance is not determined to be a mineral, it is of course included in the surface estate and the issue of the parties intent regarding its classification becomes moot.

4. *See Acker v. Guinn*, 464 S.W.2d 348, 351-52 (Tex. 1971).

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

6. *Acker v. Guinn*, 464 S.W.2d 348 (Tex. 1971). The court stated: "Unless the contrary intention is affirmatively and fairly expressed therefore, a grant or reservation of 'minerals' or

extraction methods. If access to the mineral conveyed would mean that the surface would be destroyed, the mineral would belong to the surface estate. Factual determinations were required as to the depth of a particular mineral and the various types of extraction methods available on the date the instrument was executed. The test met with extensive criticism by commentators,⁷ and by owners of "other minerals" who could no longer be sure of which minerals were included in their mineral estates.

In 1980, the court refined and clarified this test in *Reed v. Wylie II*.⁸ This note will examine the *Reed II* decision and its underlying rationale. In addition, the impact of *Reed II* on mineral law in Oklahoma will be examined. It is the thesis of this note that the refined surface destruction test creates uncertainty in land and mineral titles since ownership of minerals cannot be ascertained from the face of the instrument because judicial factual determinations are required.

II. PAST DETERMINATIONS OF UNSPECIFIED MINERALS IN TEXAS AND OKLAHOMA

A. *Texas Law*

Prior to 1971 Texas courts consistently held that the term "other minerals" was unambiguous and therefore limited the construction process to the face of the instrument.⁹ These courts limited the conveyance of "other minerals" by restricting the definition of "mineral." In

'mineral rights' should not be construed to include a substance that must be removed by methods that will, in effect, consume or deplete the surface estate." *Id.* at 352.

7. See, e.g., Maxwell, *The Meaning of "Minerals"—The Relationship of Interpretation and Surface Burden*, 8 TEX. TECH. L. REV. 255 (1976); Patterson, *A Survey of Problems Associated With Ascertaining the Ownership of "Other Minerals"*, 25 ROCKY MTN. MIN. L. INST. 21.1 (1979); Patton, *Recent Changes in the Correlative Rights of Surface and Mineral Owners*, 18 ROCKY MTN. MIN. L. INST. 19 (1973); Predergast, *The Texas Enigma—When Is a Mineral Not a Mineral?*, 23 ROCKY MTN. MIN. L. INST. 865 (1977); Note, *Oil and Gas—The Surface Destruction Test As Applied In Reed v. Wylie and Its Possible Effect On Arkansas Law*, 33 ARK. L. REV. 422 (1979); Comment, *Lignite: Surface or Mineral—The Surface Destruction Test and More*, 29 BAYLOR L. REV. 879 (1977); Note, *Ownership of Coal Under a Reservation of Oil, Gas and Other Minerals—The Surface Destruction Test is Reaffirmed: Reed v. Wylie*, 31 SW. L.J. 1163 (1977) (hereinafter cited as *Ownership of Coal*); Note, *Beneath the Surface Destruction Test: The Dialectic of Intention and Policy*, 56 TEX. L. REV. 99 (1977); Note, *Oil and Gas—Reservation of "Oil, Gas and Other Minerals" Reserves to the Surface Owner All Substances that, as of the Date of the Instrument, Must Be Removed by Methods that Would Necessarily Have Destroyed the Surface Estate*, 9 TEX. TECH. L. REV. 184 (1977).

8. 597 S.W.2d 743 (Tex. 1980). The *Reed* case was before the Texas Supreme Court twice. The second opinion will be discussed in this note. To distinguish the two opinions the second one will be referred to as *Reed II*.

9. See *Williford v. Spies*, 530 S.W.2d 127 (Tex. 1975); *Anderson & Kerr Drilling Co. v. Bruhlmeier*, 134 Tex. 574, 136 S.W.2d 800 (1940).

*Hienatz v. Allen*¹⁰ the Texas Supreme Court held that only substances of rare and exceptional quality or those possessing a peculiar property giving them a special value apart from the land itself would be considered as minerals for the purpose of a general conveyance of minerals.¹¹ Texas courts generally held that all unnamed minerals were a part of the mineral estate regardless of the method of extraction.¹²

In 1971 in *Acker v. Guinn*¹³ the Texas Supreme Court created the surface destruction test to further limit the extent of the mineral estate.¹⁴ In so doing the court resorted to evidence beyond the face of the instrument to ascertain the parties' true intent.¹⁵ In *Acker*, the court deemed the probability of surface damage in extracting a particular mineral to be a factor of primary importance in determining ownership of unnamed minerals.¹⁶ The issue in *Acker* was whether iron ore was included in the conveyance of "all of the oil, gas and other minerals in and under, and that may be produced from" a tract of land.¹⁷ The Texas court held that the iron ore remained a part of the surface estate because the surface would be destroyed or substantially impaired by extraction of the iron ore.¹⁸

In determining whether iron ore was properly included in the conveyance of "other minerals" in *Acker*, the Texas court looked for the parties' general intent.¹⁹ The court, partially adopting Dean Eugene Kuntz's approach,²⁰ reasoned that a person granting an interest in "other minerals" would not have intended that his surface be destroyed by the extraction of unnamed minerals.²¹ Therefore, the surface destruction test provides that, unless a contrary intention is expressed, a

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

11. *Id.* at 997.

12. *Cain v. Neumann*, 316 S.W.2d 915 (Tex. Civ. App. 1958); *Prendergast*, *supra* note 7, at 869.

13. 464 S.W.2d 348 (Tex. 1971).

14. *Id.* at 352.

15. *Id.* at 350-51.

16. *Id.* at 349. *See also* Note, *Ownership of Coal*, *supra* note 7, at 1165.

17. 464 S.W.2d at 349.

18. *Id.* at 351-53.

19. *Id.* "General intent" is a term of art first used by Dean Eugene Kuntz to describe the intent of parties to a conveyance of unnamed minerals. Kuntz, *The Law Relating to Oil and Gas in Wyoming* 3 WYOMING L.J. 107, 112 (1949).

20. Kuntz, *supra* note 19, at 112. Kuntz argues that when a general grant or reservation of minerals is made without qualifying language, the "general intent" of the parties should determine the extent of the conveyance. The general intent, as attributed to the parties by Kuntz, is that the mineral estate should be totally severed from the surface estate. But in *Acker* the Texas Supreme Court did not utilize Kuntz's concept of general intent in its entirety. *See* discussion *infra* at 525.

21. 464 S.W.2d at 352; *See generally* Patton, *supra* note 7, at 25.

substance is not a mineral if its removal would substantially destroy the surface estate. This is true even if the substance is defined as a mineral.²² The *Acker* opinion intimated that if a mineral were mined by means of wells or shafts or some other method not destructive to the surface, it would be included in the mineral estate.²³

B. *Oklahoma Law*

Like Texas, Oklahoma courts have consistently held that the term "other minerals" is unambiguous and have therefore limited the construction process to the face of the instrument.²⁴ The courts have relied on two different devices to limit the mineral estate. First, the courts have utilized the common definition of a mineral over the technical definition in determining whether a substance is part of the mineral estate.²⁵ In *Beck v. Harvey*,²⁶ the plaintiff claimed that gravel was included in his reservation of "mineral royalties." The Oklahoma Supreme Court, relying on an English case,²⁷ held that gravel was not *commonly* considered a mineral and was therefore not included in the reservation of "mineral royalties."

A second aid to construction, more frequently utilized by the Oklahoma courts, is the doctrine of *ejusdem generis*, meaning that "general words following a specific enumeration will be limited to things of a like class."²⁸ Unlike Texas, where *ejusdem generis* has never been generally accepted,²⁹ Oklahoma courts have used it to limit the

22. *Id.*

23. 464 S.W.2d at 352.

24. *Allen v. Farmers Union Coop. Royalty Co.*, 538 P.2d 204, 207 (Okla. 1975); *West v. Aetna Life Ins. Co.*, 536 P.2d 393, 398 (Okla. 1974); *Panhandle Coop. Royalty Co. v. Cunningham*, 495 P.2d 108, 112 (Okla. 1971).

25. *Holland v. Dolese Co.*, 540 P.2d 549, 550 (Okla. 1975); *Mack Oil Co. v. Laurence*, 389 P.2d 955, 959 (Okla. 1964); *Beck v. Harvey*, 196 Okla. 270, 272, 164 P.2d 399, 401 (Okla. 1945).

The term "mineral" is susceptible of various meanings. In a broad and scientific sense it is a natural inorganic substance having a chemical composition; in its ordinary and popular meaning it is an inorganic substance found in the earth and obtained by mining processes of bringing it to the surface. . . . In a broad sense, any sort of earthy substance or substances found in the earth, other than ordinary common rock, is a mineral.

Patterson, *supra* note 7, at 21.7-8.

26. 196 Okla. 270, 272, 164 P.2d 399, 401 (1945); *see* *Holland v. Dolese*, 540 P.2d 549, 551 (Okla. 1975); *Mack Oil Co. v. Laurence*, 389 P.2d 955, 959 (Okla. 1964).

27. *Waring v. Foden*, [1932] 1 Ch. 276, *reprinted in* 86 A.L.R. 969 (1933). *Waring* held that gravel was not considered a mineral in the "vernacular of the mining world, the commercial world or by landowners." [1932] 1 Ch. at 294, 86 A.L.R. at 982.

28. R. HEMINGWAY, *THE LAW OF OIL AND GAS* 4 (1971).

29. *Southland Royalty Co. v. Pan American Petro. Corp.*, 378 S.W.2d 50, 54 (Tex. 1964); *Cain v. Neumann*, 316 S.W.2d 915 (Tex. Civ. App. 1958) (*no writ*); *Luse v. Boatman*, 217 S.W. 1096 (Tex. Civ. App. 1919) (*wr. ref.*). In *Luse* the court stated:

substances included in the mineral estate.³⁰ Thus, in a conveyance of specified and unspecified minerals (*i.e.* "to all oil, gas and other minerals") the Oklahoma courts have used *ejusdem generis* to limit the grant of unspecified minerals to substances of like kind to the minerals specified.³¹

III. THE REFINEMENT OF THE SURFACE DESTRUCTION TEST IN *REED v. WYLIE II*

Reed I provided the Texas Supreme Court with an opportunity to reexamine the surface destruction test.³² In 1950, A.C. Wylie and his wife conveyed approximately 223 acres of land, reserving "a one-fourth (1/4) undivided interest in and to all oil, gas and other minerals on and under the land and premises."³³ The surface owner, relying on *Acker v.*

"If we should apply the rule of *ejusdem generis*, what qualities or peculiarities of the specified type, "coal," shall be considered in determining the classification intended by the use of the word "mineral"? Are we to classify according to value? If so, can it be said that oil and gas on the one hand and coal on the other are of different kinds or species of minerals? If we classify as to use, is it not true that all three are used for fuel? Shall the classification be determined by the form, density, color, weight, value, or uses of the particular species mentioned? Taking either value, use or nature of origin as the basis of the classification mentioned, can we say that oil and coal do not belong to the same class? It is true that coal in its commercial form is found in a solid state, while oil is a liquid. But are we justified in limiting the minerals intended to be included in the reservation to those only which are found in a solid state? Such evident difficulty in applying the rule of *ejusdem generis* to the terms of the reservation under consideration renders it an unsafe guide, and we do not believe any aid in the interpretation of the terms used in the reservation will be afforded by such rule.

Id. at 1099 (emphasis added).

30. See *West v. Aetna Life Ins. Co.*, 536 P.2d 393, 399-400 (Okla. 1974) (a grant of "oil, gas and other minerals" did not convey an interest in metallic minerals); *Panhandle Coop Royalty Co. v. Cunningham*, 495 P.2d 108, 113 (Okla. 1971) (a grant of "oil, gas and other minerals" conveyed only oil and gas and constituents thereof and did not convey copper, silver, gold or other types of metallic minerals); *Cronkhite v. Falkenstein*, 352 P.2d 396, 399 (Okla. 1960) ("oil, gas and other minerals" did not include gypsum rock); *Vogel v. Cobb*, 193 Okla. 64, 141 P.2d 276, 280 (1943) ("oil, gas, petroleum, coal, asphalt and all other minerals of every kind and character" did not include water); *Wolf v. Blackwell Oil and Gas Co.*, 77 Okla. 81, 186 P. 484 (1920) ("oil or other minerals" did not include gas well gas).

31. See note 30 *supra*.

32. 554 S.W.2d at 171-72. In *Reed I* the court reaffirmed their six year old holding in *Acker* in order to assure those persons who had dealt in mineral and land interests that *Acker* would continue to be the Texas Law. The court also took the opportunity to stress that the surface destruction test required the surface estate owner to prove that the mineral extraction would have *necessarily* (as opposed to *probably*) destroyed the surface.

33. *Id.* at 170. The reservation continued as follows:

[A]nd it is hereby expressly agreed and understood that Grantors herein, their heirs and assigns shall have, and they hereby have the right of ingress and egress for the sole and only purpose of mining and operating for oil, gas and all other minerals, on and under said land, and to produce, mine, save and take care of said products, and to take all usual, necessary and convenient means for working, preparing and removing said minerals from under and away from said land and premises.

Id. at 170, 171.

Guinn,³⁴ sought to have the reservation interpreted as not including any coal and lignite that would have to be recovered by open pit or strip mining. The *Reed I* court affirmed *Acker* and set down the following guidelines for applying the surface destruction test:

1. If the surface owner can prove that, on the date of execution of the instrument being construed a mineral located close to the surface will necessarily have to be extracted by surface destructive methods, then the surface owner will hold title to that mineral at all depths.³⁵
2. If the method of extraction requires the depletion of the surface, the availability of restoration and reclamation devices is immaterial.³⁶
3. The intent and knowledge of the parties in determining the relevant ownership of "other minerals" is immaterial if extraction of the mineral requires surface destruction.³⁷

Therefore under *Reed I* the primary consideration for determining ownership of unspecified minerals was the method of production to be used. The Texas Supreme Court ultimately disposed of *Reed I* by remanding the case to the district court for a factual determination regarding the depth at which the disputed mineral (lignite) was located.³⁸ This information was needed to determine whether or not the extraction of the lignite would have *necessarily* destroyed the surface of the land, thereby vesting title to the lignite in the surface owner.

The Texas Supreme Court, in *Reed II* further defined the surface destruction test.³⁹ The court explained its meaning of "at the surface"

By that we did not mean only on the top of the surface, as one would find an object on the surface. The opinion used the word surface as having some depth,—a depth shallow enough

34. 464 S.W.2d 348 (Tex. 1971).

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

36. *Id.*

37. *Id.* The value of the substance on the date of the instrument was held to be immaterial.

38. 597 S.W.2d 743 (Tex. 1980). On remand to the district court defendant Wylie amended his pleading to include facts regarding a mutual mistake of the parties to the instrument and prayed for a reformation of the instrument. The district court entered summary judgment in favor of the surface owner, Reed, after holding as a matter of law that the lignite was at the surface and was therefore not to be included in the minerals reserved by the grantor, Wylie. The district court also ruled that, as a matter of law, the grantors were not entitled to reformation. The court of civil appeals reversed the district court on both rulings and remanded for a new trial. The supreme court affirmed the holding of the court of civil appeals as to the issue of reformation but disagreed with the court of civil appeals that the fact issues existed as to the ownership of the lignite. This article shall concern the reasoning of the court as to the issue of the ownership of unnamed minerals.

39. *Id.* at 748.

that it must have been contemplated that its removal would be by a surface destructive method.⁴⁰

The court then held, as a matter of law, that a deposit within two-hundred (200) feet of the surface was at the surface of the land.⁴¹ Finally, the court held that if the surface owner was able to prove that any reasonable method of extraction of a substance, as of the date of the second opinion, would destroy the surface, then the surface owner would own the substance at whatever depth it might be found.⁴²

The surface destruction test then, as set forth by the Texas Supreme Court in *Reed II*, would allow the surface owner to keep an unspecified mineral at all depths if he could prove that:

1. Any part of the mineral was located within 200 feet of his surface area *or* within 200 feet of the surface in the reasonably immediate vicinity of his surface area,⁴³ and
2. that any reasonable method of extraction of the mineral at the date of the *Reed II* opinion would destroy or deplete the surface.⁴⁴

IV. STATUS AND EFFECT OF THE SURFACE DESTRUCTION TEST

A. *Effect in Texas*

Two cases decided after *Reed I* by the Texas Court of Civil Appeals⁴⁵ indicate that the surface destruction test will be strictly applied in Texas. In *Sheffield v. Gibbs Brothers and Co.*⁴⁶ the grantors had reserved "all of the minerals and mineral rights, except sand, gravel and stone."⁴⁷ They maintained that since substances not usually considered minerals were specifically reserved (*i.e.* sand, gravel, stone), an inference could be drawn that all other substances which would destroy the surface on removal had been included in the reservation of "minerals

40. *Id.* at 746.

41. *Id.* at 748.

42. *Id.*

43. *Id.* Apparently, the court intended that even if the mineral was below 200 feet of the surface on the tract in question but was above 200 feet 'in the reasonably immediate vicinity' the mineral would belong to the surface estate owner. The court noted that iron ore found above 200 feet of the surface "within half a mile" of a particular tract was to be considered in the "reasonably immediate vicinity." *Id.*

44. *Id.* at 747.

45. *Sheffield v. Gibbs Brothers and Co.*, 596 S.W.2d 227 (Tex. Civ. App. 1980) (*rehearing denied*); *Riddlesperger v. Creslenn Ranch Co.*, 595 S.W.2d 193 (Tex. Civ. App. 1980) (*rehearing denied*).

46. 596 S.W.2d 227 (Tex. Civ. App. 1980) (*rehearing denied*).

47. *Id.* at 228.

and mineral rights.”⁴⁸ The court rejected this argument and applied the surface destruction test to hold that:

Where an instrument reserves all of the minerals and mineral rights . . . from the land granted it will be *conclusively presumed* that there was no intention to grant surface coal and lignite unless there is an affirmative statement included in the grant or reservation which fairly expresses the intention of the parties that those substances be included in the grant or the reservation.⁴⁹

In *Riddlesperger v. Creslenn Ranch Co.*⁵⁰ the mineral estate owner claimed title to coal and lignite under a deed that included “all of the oil, gas, uranium, and other minerals and gravel in, on and under said land.”⁵¹ The mineral owner contended that since gravel and uranium were substances that would have to be mined by surface destructive methods the deed affirmatively showed that the parties generally intended that the surface estate would be destroyed by the removal of all the reserved substances including coal and lignite.⁵² Applying the surface destruction test, the court rejected this contention. The court stated that minerals which could only be removed by destroying the surface belonged to the surface owner “unless the contrary intention is affirmatively and fairly expressed.”⁵³

The *Reed II* decision was most recently discussed in a Texas Court of Civil Appeals case, *Moser v. United States Steel Corp.*⁵⁴ That case involved a reservation of “all the oil, gas and other minerals of every kind and character.”⁵⁵ The issue was whether uranium was part of the “other minerals” reserved or properly a part of the surface estate.⁵⁶ In *Moser* the court applied the surface destruction test, as refined in *Reed II*, to hold that the uranium properly belonged to the mineral estate⁵⁷ since it could reasonably be mined by a process⁵⁸ that did not result in

48. *Id.* at 229.

49. *Id.* (emphasis added).

50. 595 S.W.2d 193 (Tex. Civ. App. 1980) (*rehearing denied*).

51. *Id.* at 194.

52. *Id.* at 195.

53. *Id.* at 196.

54. 601 S.W.2d 731 (Tex. Civ. App. 1980).

55. *Id.* at 732.

56. *Id.* at 731.

57. *Id.* at 734. The court stated the *Reed II* test, “now is whether any reasonable method, including such a method as of the date of this opinion . . . will consume, deplete or destroy the surface.” *Id.* at 733 (citing *Reed I* at 747).

58. 601 S.W.2d at 734. Solution mining was used in the area to extract uranium ore. The court described solution mining as follows:

substantial destruction of the surface.⁵⁹ This was held to be true even though there was uranium ore within 200 feet of the surface;⁶⁰ the depth accepted by the court in *Reed II* as "near surface" as a matter of law for coal, iron or lignite.⁶¹

Reed II illustrates that various minerals will require different types of extraction devices. Therefore it now appears that the *Reed II* determination of what is "a depth shallow enough that it must have been contemplated that its removal would be by a surface destructive method,"⁶² may vary depending on the mineral involved. In addition, since the determination of which extraction devices will be surface destructive is a question of fact, more uncertainty of land titles will be created.

B. *Effect in Oklahoma*

Oklahoma courts have made no mention of Texas' surface destruction test but have continued to use the *ejusdem generis* doctrine as a means of limiting the mineral estate when unspecified minerals are included in a conveyance.⁶³ However, the Oklahoma Supreme Court has twice used the reasoning of Dean Kuntz, as did the Texas Supreme Court when it developed the surface destruction test.⁶⁴ In *Holland v. Dolese*⁶⁵ the Oklahoma Supreme Court referred to the Kuntz "manner of enjoyment test" and the test's emphasis on the relative rights of the surface and mineral estate owners to the enjoyment of their respective interests.⁶⁶ The court applied the test to exclude limestone from a reservation of mineral rights.⁶⁷ It sought to allow the surface owner to

Solution mining is a process by which wells are drilled into ore horizons containing uranium and solvents are injected through these wells to capture the uranium from the land in solution form. The solution is then piped to a processing plant and processed into uranium oxide, which is the product sold in the market place.

Id.

59. *Id.* "The evidence conclusively establishes that the surface is not depleted or destroyed by the solution mining process." *Id.*

60. *Id.* at 733. "The nearest ore horizon to the surface is approximately 193 feet below the surface." *Id.*

61. 597 S.W.2d at 748.

62. *Id.* at 746.

63. *Eike v. Amoco Prod. Co.*, No. 52, 511 (Okla. Sup. Ct., filed Nov. 12, 1980) reprinted in 51 OKLA. B.A.J. (Nov. 15, 1980); *Allen v. Farmers Union Coop. Royalty Co.*, 538 P.2d 204 (Okla. 1975); *West v. Aetna Life Ins. Co.*, 536 P.2d 393 (Okla. 1974); *Panhandle Coop. Royalty Co. v. Cunningham*, 495 P.2d 108 (Okla. 1971).

64. *Eike v. Amoco Prod. Co.*, No. 52, 511 (Okla. Sup. Ct., filed Nov. 12, 1980) reprinted in 51 OKLA. B.A.J. 2686 (Nov. 15, 1980); *Holland v. Dolese Co.*, 540 P.2d 549 (Okla. 1975).

65. 540 P.2d 549 (Okla. 1975).

66. *Id.* at 551.

67. *Id.* at 552.

retain the limestone since it would be necessary for the full use and enjoyment of the surface.⁶⁸ But, in so holding, the Oklahoma court failed to apply the manner of enjoyment test in its entirety.

If the entire test had been applied in *Holland*, the mineral estate owner would have been able to retain the limestone subject to the surface owner's rights to the use and enjoyment of his estate.⁶⁹ This would be giving effect to the parties' general intent to sever the entire mineral estate from the surface estate so that the respective owners would know with certainty what estate they owned.⁷⁰ The Oklahoma court could then have shifted its efforts to developing guidelines for a reasonable use of the surface estate by the mineral owner and to determining the dollar value that would adequately compensate the surface owner for partial destruction of the surface.

In *Eike v. Amoco Production Company*,⁷¹ the Oklahoma Supreme Court utilized Kuntz's "theory of enjoyment" in conjunction with *ejusdem generis* to decide that brine water was included in the phrase "oil, gas and other minerals."⁷² Significantly, the court also adopted the reasoning behind Kuntz's "theory of enjoyment."⁷³ Kuntz had reasoned that the mineral estate was enjoyed by extraction and removal of substances, whereas the enjoyment of the surface was through retention of substances necessary for the use of the surface and that these respective modes of enjoyment should be considered in disposing of unspecified substances.⁷⁴ Applying Kuntz's rationale to the facts, the court determined that since brine water was unfit for consumption or irrigation it

68. *Id.*

69. Kuntz states:

The severance of the "minerals" generally should be construed to sever from the surface ownership of all substances presently valuable in themselves, apart from their location in the earth, whether their presence is known or not known, and all substances which become valuable through the development of the arts and sciences, and that nothing presently or prospectively valuable as extracted substances would be intended to be excluded from the mineral estate.

A limitation upon the mineral estate should be that only those substances can be removed without compensation to the surface owner which can be removed without unreasonable injury to the enjoyment of the surface, that is, without unreasonably interfering with the uses for which the land is adapted. If there is unreasonable injury to the enjoyment of the surface, compensation should be paid on the basis of the value of the land for surface purposes and not for mineral purposes. This approach does no violence to the intention of the parties.

E. KUNTZ, *supra* note 1, at 305-06.

70. See Kuntz, *supra* note 19, at 112.

71. No. 52,511 (Okla. Sup. Ct., filed Nov. 12, 1980), reprinted in 51 OKLA. B.A.J. 2686 (Nov. 15, 1980).

72. 51 OKLA. B.A.J. at 2688.

73. *Id.* at 2687-88.

74. E. KUNTZ, *supra* note 1, at 305.

was of no use to the surface estate and thereby properly a part of the mineral estate.⁷⁵

The court then applied the *ejusdem generis* doctrine to find that brine water was sufficiently related to oil and gas to be included in the grant of "oil, gas and other minerals."⁷⁶ In a dissent, Judge Hargrave argued that under the doctrine of *ejusdem generis*, brine water was *not* a part of the mineral estate because it was not similar in kind to oil and gas.⁷⁷ Judge Irwin's opinion, concurring in part and dissenting in part, indicated that ownership of the brine water should fluctuate between the surface and mineral estate depending on how it was used.⁷⁸

The disagreement as to the application of *ejusdem generis* in *Eike* is a good illustration of the problems with that doctrine. The primary criticism directed at the surface destruction test also applies to Oklahoma's use of *ejusdem generis* to aid in the disposition on unnamed minerals.⁷⁹ The use of *ejusdem generis* in limiting the mineral estate, like the use of the surface destruction test, makes it impossible to determine, with certainty, the extent of the estate reserved, or conveyed, from the face of the document. One commentator offered this description of the situation:

The problems of either the conveyancer, or the counselor who . . . must deal in a particular case with a history of conveyancing of "surface" and "minerals" defy solutions as to particular substances to be or presumed to have been conveyed or reserved. Adherence to the standards of professional care in many cases precludes (a) any attempt to prepare a conveyance of a particular substance, or of the right to recover it; (b) any attempt to advise a client he has the right to recover a particular substance. The present state of the law in Oklahoma . . . should prompt the lawyer to conclude that litigation or compromise is the only available means of answering these questions, in certain cases, either with certainty or

75. 51 OKLA. B.A.J. at 2688.

76. *Id.*

77. *Id.* at 2691 (dissenting opinion).

78. *Id.* at 2691 (concurring in part and dissenting in part). Judge Irwin stated: "When brine water is being used for its water characteristics, it belongs to the surface estate owner and not the mineral estate owner . . ."

79. See *Luse v. Boatman*, 217 S.W. at 1099. From the discussion of *ejusdem generis* in *Luse* (see note 29 *supra*), it seems apparent the *ejusdem generis* analysis requires a judgment as to (1) what chemical compositions are similar enough to named substances to be included in a genus with the named substances and (2) what properties of a substance will be emphasized to determine whether the substance is part of a prior named classification. Compare Comment, *supra* note 7, at 902 and Kuntz, *supra* note 1, at 304.

safety.⁸⁰

C. *Criticism of the Surface Destruction Test*

Prior to the development of the surface destruction test, Texas courts generally held that all unnamed minerals were a part of the mineral estate if legally defined to be minerals, regardless of the method of extraction.⁸¹ But with the surface destruction test, the Texas Supreme Court stipulated that minerals requiring extraction by surface destructive techniques are never a part of the mineral estate.⁸²

The surface destruction test, as promulgated in *Acker* and refined in the two *Reed* opinions, has received extensive commentary.⁸³ Many commentators criticized the test for creating uncertainty in land and mineral titles and thereby causing unnecessary litigation.⁸⁴ The uncertainty was attributed to the factual determinations required by the test.⁸⁵

The surface destruction test as it now stands, requires at least three⁸⁶ factual determinations in order to establish the ownership of unnamed minerals in a grant or reservation. It must be determined:

80. Emery, *What Surface is Mineral and What Mineral is Surface*, 12 OKLA. L. REV. 499, 520 (1959).

81. See note 11 *supra* and accompanying text.

82. 464 S.W.2d at 352. "Unless the contrary intention is affirmatively and fairly expressed . . . a grant or reservation of 'minerals' . . . should not be construed to include a substance that must be removed by methods that will, in effect, consume or deplete the surface estate." *Id.* See also Note, *Beneath the Surface Destruction Test: The Dialectic of Intention and Policy*, 56 TEX. L. REV. 99, 115 (1977).

83. See, e.g., note 7 *supra*.

84. See, e.g., Patterson, *supra* note 7, at 21.20. "In summary of the Texas rules of construction concerning the ownership of 'other minerals,' it is a foregone conclusion that a multitude of lawsuits have been, and will continue to be, filed by parties who for years may have labored under the mistaken impression that they owned certain substances or recognized minerals either by grant or reservation." *Id.*; Comment, *supra* note 7, at 898. "[T]he application of the surface destruction test to . . . unnamed substances will result in less than uniform determinations as to the estate to which they belong" *Id.*; Note, *Oil and Gas—Reservations of "Oil, Gas and Other Minerals" Reserves to the Surface Owner All Substances that, as of the Date of the Instrument, Must Be Removed by Methods that Would Necessarily Have Destroyed the Surface Estate*, 9 TEX. TECH. L. REV. 184 (1977). "Unfortunately, interpretation of all of the pre-*Acker* conveyancing instruments may have to be done on a case-by-case method because of the overwhelming extrinsic proof requirements." *Id.* at 197.

85. *Id.* at 197 n.98.

86. There is a possible fourth factual determination that must be made. In *Reed II* the court referred back to the *Acker* opinion where the court had made the point that the iron ore conformed generally to the earth's surface. 597 S.W.2d at 748. The *Reed II* court did not state explicitly that a minerals' conformation to the surface was a determination to be made. But it could be that a factual determination as to the minerals' conformation to the surface would be required in determining the depth at which the mineral was located. Judge Spears, concurring in *Reed II*, stated that this was another factual determination required by the surface destruction test. *Id.* at 750.

- (1) whether a portion of the mineral is located within 200 feet of the surface anywhere on the land;⁸⁷
- (2) whether a portion of the mineral is located within 200 feet of the surface of adjacent land considered to be in the "reasonably immediate vicinity" of the land in question;⁸⁸ and
- (3) whether any reasonable method of extraction would be destructive to the surface.⁸⁹

The uncertainty created by the above issues becomes even more evident when the sub-issues are considered. For example, if a "reasonable" method of extraction in one year would cause surface damage but the following year a new means of extraction would not cause surface damage, this could result in the ownership of unnamed minerals vacillating between the surface and mineral estate. Even if a grantor had intended to convey a particular substance he could end up retaining the substance if the means of extraction was found to be destructive.⁹⁰

The inequity of *Reed II* can be seen in the hypothetical situation of two farmers owning 1000-acre tracts of land, both of whom had conveyed mineral rights in the general form of "oil, gas and other minerals." If both tracts had deposits of coal at a depth greater than 200 feet but farmer A's land also had 25 acres of coal deposits within 200 feet of the surface which had to be strip mined, farmer A could retain title to all the coal found on the 1000 acres. Farmer B, on the other hand, whose land contained only deep coal deposits, would not retain title to any of the minerals, even though the same words of conveyance had been used.⁹¹ As recognized by one commentator, the test could prejudice the rights of the mineral estate owner if a substance is determined to belong to the surface estate after the surface owner had conveyed it to the mineral owner.⁹² It is ironic that the surface destruction test was an attempt by the Supreme Court to lend stability to convey-

87. *Id.* at 748.

88. 597 S.W.2d at 745, 748. Apparently this depth applies only to coal, lignite and iron. It will vary with the mineral involved. See *Moser v. U.S. Steel Corp.*, 601 S.W.2d 731 (Tex. Civ. App. 1980).

89. 597 S.W.2d at 750.

90. Note, *Ownership of Coal*, *supra* note 7, at 1168 n.46. "A further inequity lies in the fact that even if [a surface owner] had intended to convey the rights to the [mineral] and had been duly compensated therefor, the [mineral] would not be included in the grant. Hence, the surface owner manages to retain ownership of the very substance he meant to convey."

91. In the present hypothetical it is assumed that the tracts of land are not adjacent. This hypothetical is a modification of one proposed by Judge Daniel in *Reed I*, 554 S.W.2d at 178-79.

92. Comment, *supra* note 7, at 888. "Recent decisions . . . suggest that the court may have

ancing law in Texas.⁹³

The surface destruction test fails to carry out the parties general intent—to sever the mineral estate from the surface estate.⁹⁴ One writer states:

[T]he parties to the instrument probably had no specific intent as to the substances that are, usually years later, the subject of dispute. All that can be said of most of these instruments is that the appearance in them of the words “minerals” or “other minerals” evidences an intention to sever a mineral estate from a surface estate.⁹⁵

Judge Spears, in his concurring opinion in *Reed II*, criticized the surface destruction test for failing to provide a definite and certain rule of property law that would be fair and would lend stability to land titles.⁹⁶ He suggests that any workable test should meet two criteria:

- (1) It should be such that the ownership of the substance in question can be ascertained from examining the instrument of grant or reservation *alone*.⁹⁷
- (2) The rule should present the ownership of the substance as a question of law, not one that requires a factual determination based on location of the substance.⁹⁸

D. *Manner of Enjoyment Test*

As previously discussed, the Texas court in devising the surface destruction test, relied heavily on a theory advanced by Dean Eugene Kuntz.⁹⁹ Kuntz theorized that parties to a conveyance involving a

been unduly zealous in its efforts to protect the surface owner, and may have in fact prejudiced the mineral estate.” *Id.*

93. In *Reed I* the court commented on the system by which all unspecified minerals would be left in the mineral estate. “[W]e are not convinced that a rule of law which leaves questions of reasonable use of the surface, in each instance where mineral substances at or near the surface are to be produced, will lead to more certainty and less litigation.” 554 S.W.2d at 171.

94. Kuntz, *supra* note 19, at 112 “When a general grant or reservation is made of all minerals without qualifying language, it should be reasonably 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 manners.” *Id.*

95. Maxwell, *supra* note 7, at 260.

96. 597 S.W.2d at 750. Judge Spears stated, “I would go further and announce prospectively a rule that would enable any person reading a mineral lease or reservation to know from the instrument itself what has been granted or reserved without resort to factual investigation.” *Id. Accord*, Comment, *supra* note 7, at 905. “In order to alleviate these ownership uncertainties it is imperative that the meaning of ‘minerals’ and ‘other minerals’, as used in conveyancing instruments, be determined by the courts as a matter of law rather than leaving their meaning to future factual determinations.” *Id.*

97. 597 S.W.2d at 751 (emphasis added).

98. *Id.*

99. Kuntz, *supra* note 19.

grant of "other minerals" do not have specific minerals in mind at all.¹⁰⁰ He proposed that the courts consider the general intent of the parties as determined by the purpose of the grant or reservation in terms of manner of enjoyment intended in the ensuing interests.¹⁰¹

When a general grant or reservation is made of all minerals without qualifying language, it should be reasonably 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 manners. The manner of enjoyment of the mineral estate is through extraction of valuable substances, and the enjoyment of the surface is through retention of such substances as are necessary for the use of the surface, and these respective modes of enjoyment must be considered in arriving at the proper subject matter for each estate.¹⁰²

The Texas court adopted the general intent rationale behind Kuntz's manner of enjoyment test.¹⁰³ They further concurred that the general intent was to be determined by a review of the purposes of the conveyance viewed from the manner of enjoyment intended for the owners of the surface and mineral estates.¹⁰⁴ But the Texas court rejected the second proposal that Kuntz made based on his theory of general intent. Kuntz had proposed that the mineral estate include "all substances presently valuable in themselves, apart from the soil, whether their presence is known or not, and all substances which become valuable through development of the arts and sciences."¹⁰⁵ The Texas court, however, interpreted general intent to mean only that the parties would not have generally intended that the surface would be destroyed.¹⁰⁶ The Texas court sought to protect the surface estate by allowing the surface owner to keep all minerals that might result in surface depletion if extracted.¹⁰⁷

Kuntz, however, sought to protect the surface by forcing the min-

100. *Id.* at 112.

101. *Id.*

102. *Id.*

103. 464 S.W.2d at 352. The court noted that it considered Kuntz's basic theory "entirely sound" but went on to reason that the parties would not have contemplated that the utility of the surface would be destroyed and that therefore the iron would remain in the surface estate.

104. *Id.*

105. Kuntz, *supra* note 19, at 113.

106. 464 S.W.2d at 352. The court stated: "It is not ordinarily contemplated, however, that the utility of the surface for agricultural or grazing purposes will be destroyed or substantially impaired." *Id.*

107. *Id.*

eral owner to compensate the surface owner for harm done to the surface estate in extracting the minerals.¹⁰⁸ Kuntz's approach would add more certainty to the ownership of unspecified minerals.¹⁰⁹ His solution would allow the ownership of unnamed minerals in conveyancing instruments to be decided as a matter of law from the face of the document without resort to factual investigation.¹¹⁰ This would preclude the litigation necessary to determine, on a tract by tract basis, the ownership of unnamed minerals.¹¹¹ It would also eliminate the uncertainty that would confront mineral and surface owners whenever some substance "heretofore thought to be valueless in itself, should suddenly become very valuable by virtue of a new scientific or technological development."¹¹² Rather than determining whether each newly discovered mineral belonged in the surface or mineral estate by a factual analysis, resort could be had to the face of the conveyancing instrument because the mineral estate would own *all* legally cognizable minerals. A discovery of new substances, intrinsically valuable in and of themselves, would not expand the grant or reservation but would simply clarify what was owned by the mineral owner.¹¹³ If the newly discovered mineral required extraction by a method that would unreasonably deplete the surface estate then the mineral owner would have to wait until a less destructive means of extraction became available,¹¹⁴ or compensate the surface owner sufficiently.¹¹⁵ If the mineral substance was so intrinsically a part of the soil that its extraction would unavoidably deplete the surface, the mineral owner would have to forego extracting the substance in deference to the right of the surface owner to enjoy the benefits of his estate.

Kuntz viewed the surface and mineral estates as both mutually dominant and mutually servient:

The surface estate is burdened with the right of access, and the mineral estate is burdened with the right of the surface owner to insist that the surface be left intact and that it not be rendered valueless for the purposes for which it is adapted, by depletion of sub-surface or surface substances.¹¹⁶

108. Kuntz, *supra* note 19, at 113.

109. See Comment, *supra* note 7, at 896.

110. Kuntz, *supra* note 19, at 113-15.

111. Comment, *supra* note 7, at 905.

112. Kuntz, *supra* note 19, at 114-15.

113. *Id.* at 114.

114. Comment, *supra* note 7, at 889.

115. Kuntz, *supra* note 19, at 113.

116. *Id.*

While it is conceded that the manner of enjoyment test would not prevent all litigation it would decrease litigation since it would require only the determination of what would be a reasonable burden upon the surface estate. Furthermore, the manner of enjoyment test would preserve both free alienability of land and certainty of land titles by giving effect to the general intent of the parties.

Finally, in addition to the built-in safeguards for both the surface estate owner and the mineral owner, weight should be given to legislation that would impose stringent requirements on the owner of the mineral estate and on the mining industry itself to reclaim any land altered by the mining operation.¹¹⁷

V. CONCLUSION

Certainty of law with regard to mineral severances is a critical need in the development of Oklahoma property law. This need is amplified by renewed interest in alternative energy sources and the now financially feasible development of known energy reserves. Along with the current surge in exploration has come an increasing urgency to establish a sure and efficient means of determining the true ownership of valuable mineral reserves.

Texas has established a test that requires numerous factual determinations.¹¹⁸ Such an approach will inevitably lead to more uncertainty in land titles and increased litigation. For those reasons it would be unwise for Oklahoma to adopt the surface destruction test. Yet the current approach in Oklahoma is equally unsatisfactory. The doctrine of *ejusdem generis* also lends itself to uncertainty due to the factual determinations required.¹¹⁹ To give effect to the general intent of the parties and to maintain certainty and stability in land titles, Oklahoma should abandon *ejusdem generis* and adopt the manner of enjoyment test first proposed by Dean Kuntz in 1948.

Lori Ann Merrill

117. Texas Surface Coal Mining and Reclamation Act of 1979, TEX. REV. CIV. STAT. ANN. art. 5920-11; Mining Lands Reclamation Act of 1971, 45 OKLA. STAT. tit. 45, §§ 721-738 (1971) (requires a company intending to engage in surface mining for coal, lignite, uranium or uranium ore to apply for a permit and submit a reclamation plan. The plan must show that the land can be restored to the same or to a substantially beneficial condition and the applicant must file a performance bond to assure that the reclamation is carried out.)

118. See text accompanying notes 86-88 *supra*.

119. See notes 77 & 88 *supra* and accompanying text.