Texas Reexamines the Meaning of Minerals: Moser v. United States Steel Corp.

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RECENT DEVELOPMENTS

TEXAS REEXAMINES THE MEANING OF 'MINERALS': MOSER v. UNITED STATES STEEL CORP.

I. INTRODUCTION

Instruments which sever mineral interests from surface estates often contain the term "minerals" in the description of the substances severed. When either the mineral or surface owner subsequently desires to utilize a substance found under the land, disputes over whether or not the substance is included in the classification "minerals" often arise. Courts faced with such questions have struggled, with mixed success, to formulate rules of law which will simultaneously effectuate the parties' intention, provide for certainty of land titles, and promote the development of mineral resources.

This judicial dilemma has been evident in Texas, which has rendered a number of decisions redefining the term "minerals" in recent years. In Moser v. United States Steel Corp., its most recent encounter with such language, the Texas Supreme Court has adopted a rule of interpretation based on Professor Eugene Kuntz' "manner of enjoy-

1. See, e.g., Cronkhite v. Falkenstein, 352 P.2d 396, 398 (Okla. 1960) (form mineral deed conveying an interest in "all of the oil, gas and other minerals" under the land granted); Vogel v. Cobb, 193 Okla. 64, 67, 141 P.2d 276, 280 (1944) (mineral deed conveying an interest in "oil, petroleum, gas, coal, asphalt and all other minerals of every kind or character"); Heinatz v. Allen, 147 Tex. 512, ___ 217 S.W.2d 994, 995 (1949) (devise of "the mineral rights"); Schwarz v. State, 658 S.W.2d 822, 823 (Tex. Ct. App.—Austin 1983, writ pending) (patent reserving "all the minerals" to the state).
2. Professor Lowe has aptly described this struggle:
[The more the courts attack [the issue of what substances are included in a grant or reservation of "minerals" or "other minerals"], the more stuck they become. The uncertainties, the delays, the litigation, and the liabilities that result are clearly counter-productive to the legal system's goals of certainty and fairness as well as to society's goal of greater energy self-sufficiency.
3. See, e.g., Reed v. Wylie, 597 S.W.2d 743 (Tex. 1980) (Reed II); Reed v. Wylie, 554 S.W.2d 169 (Tex. 1977) (Reed I); Acker v. Guinn, 464 S.W.2d 348 (Tex. 1971).
4. 26 Tex. Sup. Ct. J. 427 (June 8, 1983). As of the time of this writing, the Moser case has not yet been reported, as the court has not rendered a decision on a motion for rehearing.
ment” theory. With the Moser decision, Texas has taken a major step toward achieving fairness, title certainty, and maximum energy development. This Recent Development will analyze the Moser decision, assess its impact on Texas law, and recommend a similar approach for Oklahoma, which has yet to adopt a consistent position on severances of minerals.

II. TEXAS LAW PRIOR TO MOSER

In earlier interpretations of severances of minerals, the Texas courts sought to infer the parties’ specific intention to convey or reserve each substance under the land. Until 1971, the “ordinary and natural meaning” of the term “minerals” was most often said to be the meaning intended by the parties. The extent of damage to the surface caused by extraction of a substance had been considered only one of many factors in determining whether or not the substance was part of the surface estate or the mineral estate. In 1971, however, the Texas Supreme Court elevated this factor to the status of a conclusive test in Acker v. Guinn. Noting that a severance of minerals is intended to create estates of value to the surface owner as well as the mineral interest owner, the court held that unless otherwise specified “a grant or

5. See Kuntz, The Law Relating to Oil and Gas in Wyoming, 3 Wyo. L.J. 107, 112-14 (1949); see also infra notes 12, 52 and accompanying text.
6. See infra notes 54-55, 64-67 and accompanying text.
7. See infra notes 73-94 and accompanying text.
9. See, e.g., Atwood, 355 S.W.2d at 212; Heinatz, 147 Tex. at __ S.W.2d at __. See infra notes 42-50 and accompanying text for a discussion of the “ordinary and natural meaning” test.
10. See, e.g., Heinatz, 217 S.W.2d at 998.
11. 464 S.W.2d 348 (Tex. 1971). The case involved the extraction of iron ore by strip mining, which would have impaired the surface uses of farming, ranching, and timber production. Id. at 351.
12. Id. at 352. The court thus partially adopted Professor Eugene Kuntz' “manner of enjoyment” theory. According to this concept:

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.

Kuntz, supra note 5, at 112, cited with approval in Acker, 464 S.W.2d at 352; see also 1 E. Kuntz, A TREATISE ON THE LAW OF OIL AND GAS § 13.3, at 305-07 (1962) (later articulation of manner of enjoyment theory).
reservation of 'minerals' or 'mineral rights' should not be construed to include a substance that must be removed by methods that will, in effect, consume or deplete the surface estate.”

This “surface destruction” test was clarified and modified twice in the decade following Acker. In Reed v. Wylie (Reed I), the Texas Supreme Court required classification of a substance as part of the surface estate if the surface owner proved 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.” Certain aspects of the Reed I opinion were “reexamined” in Reed v. Wylie (Reed II). Under the Reed II test, instead of needing to prove that extraction of substances near the surface “would necessarily” destroy the surface, the surface owner needed only to show that “any reasonable method” of extraction would result in surface destruction. To increase title certainty, the court held that the availability and destructive impact of reasonable methods of extraction were to be judged as of the time of litigation, rather than as of the time of the conveyance as under Reed I.

The surface destruction test was widely criticized. The factual determinations required made it impossible to determine title to unspecified substances from the instrument alone. Under the Reed II test, before rendering an opinion on ownership of a substance, a title exam-

13. Acker, 464 S.W.2d at 352.
14. 554 S.W.2d 169 (Tex. 1977). This case involved the extraction of coal and lignite. Id. at 170.
15. Id. at 172. Substances “at” the surface belonged to the surface estate without proof of the method of extraction. Id. at 173.
16. 597 S.W.2d 743 (Tex. 1980).
17. Id. at 747. The court held that substances “near” the surface were those within 200 feet of the surface of the parcel of land in question, or of land in the reasonably immediate vicinity. Id. at 748. If the substance was “near” the surface and the surface destructiveness test was met, the substance belonged to the surface owner at all depths. Id.
18. Id. at 747.
miner would have to inspect the land itself to determine whether the substance was at the surface or was located within 200 feet of the surface anywhere in the reasonably immediate vicinity of the parcel. The examiner would also have to determine whether any reasonable method of extraction of the substance would destroy the surface. Surface and mineral owners would doubtless hold different opinions concerning these issues, thus necessitating time-consuming litigation in many instances before the substance could be developed.

III. STATEMENT OF THE CASE

The Mosers and the Gefferts owned neighboring ranches. The Moser property was originally separated from the Gefferts' property by a winding road. After the road was straightened in 1949, a 6.77-acre tract of the Moser ranch was isolated on the side of the road adjacent to the Geffert property. A 6.42-acre parcel of Geffert land was similarly separated from the main tract across the road adjacent to the Moser property. For the sake of convenience, in 1949 the landowners exchanged ownership of the surface estates of the isolated parcels, reserving "all of the oil, gas and other minerals" thereunder. After deposits of uranium were discovered on the 6.77-acre tract, the Mosers sued the Gefferts to quiet title to the uranium. The Gefferts counterclaimed, arguing that uranium was one of the "other minerals" reserved by their 1949 deed.

The case was tried in 1979, when the Reed I decision was the most current statement of Texas law. Applying the Reed I test, the jury found that mining the uranium would not have necessitated substantial surface destruction. Thus, the trial court held that the uranium be-

20. *Reed II*, 597 S.W.2d at 750 (Spears, J., concurring).
22. The defendants included the Gefferts and all others who owned a mineral interest in the tract in question. *Id* at 427 n.2.
23. *Id* at 427.
26. *Id*. The Gefferts also argued that the Mosers should be estopped from claiming ownership of the uranium since they had leased the uranium on the 6.42-acre tract in which they owned the mineral estate. *Moser*, 601 S.W.2d at 732. The appeals court found it unnecessary to decide the estoppel issue, as it held that the Gefferts owned the uranium as a matter of law. *Id* at 734.
28. See supra notes 14-15 and accompanying text.
29. *Moser*, 26 Tex. Sup. Ct. J. at 427. The uranium was to be mined using the "solution
longed to the Gefferts, as owners of the mineral estate.\textsuperscript{30}

The Mosers appealed the trial court’s decision. The Reed II clarification of the surface destruction test was rendered while the case was on appeal.\textsuperscript{31} The Eastland Court of Civil Appeals, applying the Reed II test retroactively,\textsuperscript{32} held that as the only reasonable method of extracting the uranium would not have depleted or destroyed the surface, the uranium was a mineral as a matter of law.\textsuperscript{33}

\section*{IV. Holding and Analysis}

The Texas Supreme Court affirmed the judgments of the lower court in Moser,\textsuperscript{34} but in doing so abandoned the surface destruction rule.\textsuperscript{35} The court recognized that the surface owner’s rights to enjoyment of his estate were overemphasized by the holdings in Acker, Reed I, and Reed II. While “the general intent of parties executing a mineral deed or lease is presumed to be an intent to . . . convey all valuable substances to the mineral owner . . . ,”\textsuperscript{36} under the surface destruction test title to substances of value would nonetheless belong to the surface owner if extraction would damage the surface.\textsuperscript{37} In Moser, the court reasoned that the surface owner’s rights could be adequately protected under a rule that separated the issues of the ownership of minerals and the right to use the surface to produce them. Thus, the court held that, with certain exceptions,\textsuperscript{38} “a severance of minerals in an oil, gas and other minerals clause includes all substances within the ordinary and natural meaning of that word, whether their presence or value is known at the time of extraction.”\textsuperscript{39} The mineral owner has the right to reasonably use the surface to the extent necessary for the removal of all such substances, whether or not removal will result in sur-

\begin{footnotesize}
\begin{enumerate}
\item 31. Id.
\item 32. Moser, 601 S.W.2d at 734.
\item 33. Id. As the uranium was 193 feet below the surface at its highest point, the “near surface” test was applicable. Id. at 733-34.
\item 34. Moser, 26 Tex. Sup. Ct. J. at 427.
\item 35. Id. at 428.
\item 36. Id. at 429 (citing Kuntz, supra note 5, at 113).
\item 37. See supra notes 11-18 and accompanying text.
\item 38. See infra notes 55-59 and accompanying text.
\end{enumerate}
\end{footnotesize}
face destruction. This right, however, is limited by a duty to compensate the surface owner for all surface destruction caused by reasonable or unreasonable removal of substances not specifically named in the severance of "minerals."

A. 'Ordinary and Natural Meaning' Rule

As noted above, in the years preceding Acker Texas courts often applied the "ordinary and natural meaning" rule of interpretation to severances of minerals. The specific requirements of the rule tended to vary from court to court. One court held all substances "commonly regarded as minerals as distinguished from the soil in general" to be part of the mineral estate. Another stated that "the true test is what ['minerals'] means in the vernacular of the mining and mineral industry, the commercial world, and the land owners at the time of the grant . . . " Substances which are "rare and exceptional in character or possess peculiar property giving them special value" have also been held to be within the ordinary and natural meaning of "minerals."

The Moser court itself offered no suggestions for application of the test, merely concluding that "uranium is a mineral within the ordinary and natural meaning of the word." Thus, presumably the formulations of the test prior to Acker are the best indications of the current state of the law. If so, the Texas Supreme Court's attempt to increase certainty of land titles may fall somewhat short of its goals, as title examiners will still have to determine some factual issues. The way in which people experienced in mining, commerce, and agriculture interpret the term "minerals" is a question of fact which will require the testimony of experts in those fields. Although Texas courts have con-

40. Id. This right of surface use is not absolute. See infra notes 61-63 and accompanying text.
42. See supra note 9 and accompanying text.
43. Psencik v. Wessels, 205 S.W.2d 658, 660-61 (Tex. Civ. App.—Austin 1947, writ ref'd) (such substances are "legally cognizable minerals").
45. Heinz v. Allen, 147 Tex. 512, __, 217 S.W.2d 994, 997 (1949). The Atwood court expressed its opinion that this statement in Heinz was merely dictum. 355 S.W.2d at 215. However, the earlier Psencik opinion (which, like Heinz, cited the Waring case) stated that the word "minerals" includes "substances exceptional in use, in value and in character." 205 S.W.2d at 661.
47. These experts may also be asked to give their opinions "as to the nature of the substance, its relation to the surface of the land, its use and value, and the method and effect of its removal." Heinz, 217 S.W.2d at 995-96.
sistently rejected a scientific or technical definition of "minerals," the opinion of an expert in mining or business may be based in part on the scientific meaning of the term. Factual issues as to whether a given substance has "exceptional characteristics" or "special value" may also necessitate litigation. Further, if the ordinary and natural meaning of the language is to be determined as of the time of the conveyance, as was suggested in a case decided prior to Acker, the present-day title examiner may have difficulty in ascertaining the meaning of "minerals" in the vernacular at the date of execution. On the other hand, if the "exceptional" or "valuable" character of the substance is to be evaluated under the current vernacular, title to a substance may shift from the surface to the mineral estate as technologies of extracting and using the substance improve over time.

Adoption in full of Kuntz' manner of enjoyment theory might have eliminated much of the title uncertainty which remains in Texas as a result of Moser. According to Kuntz, "the severance should be construed to sever from the surface 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." Title to any unnamed substance would be ascertainable from the face of the severance alone under this formula-

48. See Luse v. Boatman, 217 S.W. 1096, 1099-101 (Tex. Civ. App.—Fort Worth 1919, writ ref'd); accord Psencik, 205 S.W.2d at 659. The reasoning behind this rejection was well stated by the Supreme Court in Northern Pac. Ry. v. Soderberg, 188 U.S. 526 (1903):

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 signification in a given case. Thus the scientific division of all matter into the animal, vegetable or mineral kingdom would be absurd as applied to a grant of lands, since all lands belong to the mineral kingdom, and therefore could not be excepted from the grant without being destructive of it.

Id. at 530. For this reason, courts have held that if the parties intended "minerals" to be interpreted in a scientific or technical sense, they must have clearly indicated that intention. Heinatz, 217 S.W.2d at 997. Cf. OKLA. STAT. tit. 15, § 160 (1981) (words are to be interpreted "in their ordinary and popular sense . . . unless used by the parties in a technical sense"). Oklahoma cases rejecting a technical interpretation of "minerals" include Cronkhite v. Falkenstein, 352 P.2d 396, 399 (Okla. 1960); Beck v. Harvey, 196 Okla. 270, 272, 164 P.2d 399, 401 (1944); and Vogel v. Cobb, 193 Okla. 64, 67-68, 141 P.2d 276, 280 (1943).

49. Fleming, 337 S.W.2d at 852.

50. Cf. Lowe, supra note 2, at 139-40 (discussing the possibility of shifting ownership of substances under the Reed II test).

51. The Moser court may have been reluctant to discard the ordinary and natural meaning rule for several reasons, including a fear that it would thwart the parties' intentions if it abandoned the search for a specific intent, a hesitation to reverse precedent based on inferences of specific intent, and a belief that to do so would be unfair to the surface owner. Lowe, supra note 2, at 141; see also Broyles, supra note 19, at 476 (discussing stare decisis).

52. Kuntz, supra note 5, at 113.
tion, thus reducing the need to litigate factual disputes. The inclusion of both presently and prospectively valuable substances as “minerals” would also eliminate the possibility of shifting ownership.

Despite its drawbacks, the Moser test is a significant improvement over the surface destruction rule. No longer will parties to a conveyance have to investigate the physical characteristics of the land and surrounding territory or the available extraction technology to determine ownership of unspecified substances. Further, the Moser court may have reduced the scope of future litigation when it stated that its previous decisions holding certain substances not to be minerals as a matter of law would be given effect without application of the ordinary and natural meaning test.

To protect the interests of parties who may have relied on the surface destruction test in granting or reserving interests in minerals, the Texas Supreme Court has stated that all such contracts, leases and deeds executed after Acker and before Moser will be interpreted under the law in effect at the time of the conveyance. While this exception to the Moser rule is equitable, it will create interesting problems for title examiners and the courts. Not only will title examiners have to investigate the facts surrounding such conveyances, but they will also need to ascertain the state of the law at the time of execution. Severances prior to 1980 will be especially difficult to interpret, as prior to Reed II the parameters of the surface destruction test were not entirely clear. The Moser opinion also leaves uncertain the status of title to unspecified “minerals” claimed by a party who acquired an interest

53. See Note, supra note 19, at 526.
54. See supra notes 19-20 and accompanying text.
55. Moser, 26 Tex. Sup. Ct. J. at 429. The court cited several Texas decisions as examples, including Heinatz, 147 Tex. at —, 217 S.W.2d at 997 (building stone and limestone); Atwood, 355 S.W.2d at 216-17 (limestone, caliche and surface shale); Fleming, 337 S.W.2d at 852 (fresh water); and Psencik, 205 S.W.2d at 661-62 (sand and gravel). In addition, certain decisions may be interpreted as including some substances in the mineral estate as a matter of law. See Moser, 26 Tex. Sup. Ct. J. at 428-29 (court, stating, “We now... hold that title to a substance which we have determined to be a mineral is held by the owner of the mineral estate as a matter of law,” held uranium to be a mineral); see also Southland Royalty Co. v. Pan Am. Petroleum Corp., 378 S.W.2d 50, 55 (Tex. 1964) (natural gas); Ambassador Oil Corp. v. Robertson, 384 S.W.2d 752, 763 (Tex. Civ. App.—Austin 1964, writ ref’d n.r.e.) (salt water); Luse, 217 S.W. at 1101 (oil and gas). By overruling Acker and Reed II, the Moser court may have implicitly held that iron ore and lignite also belong to the mineral estate. See Schwartz v. State, 658 S.W.2d 822, 823 (Tex. Ct. App.—Austin 1983, writ pending) (court, following Moser, held coal and lignite to be “minerals”).
56. Moser, 26 Tex. Sup. Ct. J. at 430. This holding applies to instruments executed between February 10, 1971, and June 8, 1983. Id.
57. See supra note 20 and accompanying text.
58. See supra notes 11-15 and accompanying text.
between 1971 and 1983 from a grantor whose title is derived from a mineral severance predating *Acker*. 59

B. Compensation of Surface Owner for Damage Caused by Mineral Extraction

As a general rule, “The mineral owner, as owner of the dominant estate, has the right to make any use of the surface which is necessarily and reasonably incident to the removal of the minerals.” 60 In the past, this right has been limited only by a prohibition against negligent or excessive use of the surface while extracting minerals, 61 the accommodation doctrine, 62 and a duty to comply with reclamation statutes. 63 After the *Moser* decision, an additional duty governs the mineral owner’s use of the surface while extracting minerals not specifically named in the grant or reservation of mineral rights. Although the mineral owner may still make reasonable use of the surface to recover all min-

59. As an example, assume that a severance of “all the mineral rights” takes place in 1970. In 1981, the surface owner, relying on Reed II’s holding that lignite at the surface belongs to the surface estate, leases the lignite rights. Under *Moser*, the 1981 lease is valid under the Reed II test. However, the surface owner’s title is derived from a 1970 severance, which if considered alone would be governed by the ordinary and natural meaning test. Thus, assuming lignite would be considered part of the mineral estate under the law prior to *Acker*, it is debatable whether a court would hold that the surface owner had any rights in the lignite to convey to the lessee.


62. *Moser*, 26 Tex. Sup. Ct. J. at 430. The accommodation doctrine, also known as the “due regard” doctrine, provides that:

[W]here there is an existing use by the surface owner which would otherwise be precluded or impaired, and where under the established practices in the industry there are alternatives available to the lessee whereby the minerals can be recovered, the rules of reasonable usage of the surface may require the adoption of an alternative by the lessee. *Getty Oil Co. v. Jones*, 470 S.W.2d 618, 622 (Tex. 1971); *see also Sun Oil Co. v. Whitaiker*, 483 S.W.2d 808, 812 (Tex. 1972) (lessee must resort to alternative methods of recovery only when they can be employed on the leased premises).

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eral's if he damages or destroys the surface while extracting unnamed minerals he must pay compensation to the surface owner. The reasoning behind this requirement is logical and persuasive. The Moser court stated:

It is reasonable to assume a grantor who expressly conveys a mineral which may or must be removed by destroying a portion of the surface estate anticipates his surface estate will be diminished when the mineral is removed. It is also probable the grantor has calculated the value of the diminution of his surface in the compensation received for the conveyance. This reasoning is not compelling when a grantor conveys a mineral which may destroy the surface in a conveyance of "other minerals." Thus, the court felt a requirement of additional compensation of the surface owner for damages caused by extraction of unnamed substances furthered the intention of the parties.

The Moser court did not specify the method to be used in calculating the compensation owed for surface damages. While Kuntz suggested that "[s]uch damages [should] not be measured by the value of the substance in its new use, but [should] be measured by the reduction in value of the land for its surface use," the general remedy provided in Texas for tortious injury to real property depends on the extent of the injury. If the land is destroyed, the owner may recover its fair market value at the time of its destruction. If the land is permanently damaged, the owner is entitled to the difference in its fair market value immediately before and after the injury. Finally, should the land be only temporarily damaged, the tortfeasor is liable for the cost to restore the land to its prior condition. It remains to be seen whether Texas courts will apply Kuntz' suggestion or will utilize existing remedies.

As this discussion indicates, the full implications of the Moser decision cannot be evaluated at present. This uncertainty will limit the

65. Id. at 429.
66. Id.; see also Kuntz, supra note 5, at 115.
68. Kuntz, supra note 5, at 115.
70. Schofield, 72 Tex. at —, 10 S.W. at 576.
71. Id.
72. Id. at 576-77.
rule’s usefulness in decreasing litigation until Texas courts clearly define and apply the ordinary and natural meaning test.

V. IMPACT OF MOSER IN OKLAHOMA

A. Present State of Oklahoma Law

When interpreting the scope of the term “minerals” or “other minerals,” the paramount objective of Oklahoma courts has been to discover the intention of the parties at the time of the severance. Courts will not apply rules of construction to ascertain the meaning of a conveyance if the intention of the parties can be ascertained from the “four corners” of the instrument. Thus, in Panhandle Cooperative Royalty Co. v. Cunningham the Oklahoma Supreme Court held that a mineral deed granting an interest in “oil, gas and other minerals” was unambiguous and included only oil and gas, their constituents and components. Although the holding in Panhandle seemed to be restricted to the facts of the case, apparently a majority of the Oklahoma Supreme Court has construed Panhandle as applicable to any severance of “oil, gas and other minerals.” However, language such as “all minerals,” “the mineral rights,” or “oil, gas, coal and other minerals” would not


74. Okla. Stat. tit. 15, §§ 154-57 (1981); see Butler, 53 Okla. B.J. at 135-37 (Hargrave, J., concurring specially); see also Panhandle Coop. Royalty Co. v. Cunningham, 495 P.2d 108, 114 (Okla. 1971); Erwin v. Poole, 446 P.2d 601, 602 (Okla. 1968); Mack Oil Co. v. Laurence, 389 P.2d 955, 960 (Okla. 1964); Cronkhite, 352 P.2d at 399.

75. 495 P.2d 108 (Okla. 1971).

76. Id. at 113.

77. The court’s holding in Panhandle was based on the rule that the meaning of a conveyance must be ascertained from the instrument as a whole, giving effect to each part. Id. (citing Okla. Stat. tit. 15, §§ 155, 157 (1981)). The grant of “oil, gas and other minerals” was contained in a “Mineral Deed” which stated that the mineral interest conveyed was subject to future oil and gas leases and which made provision for the payment of bonus and rentals from any future oil and gas lease. Id. at 111. These provisions led the court to state that the parties were obviously “preoccupied with oil and gas, that oil and gas was dominating the attention and the intention of the parties to the conveyance.” Id. at 112. Thus, the phrase “and other minerals” was held to unambiguously limit the grant to components and constituents of oil and gas. Id. at 113.

78. See Allen v. Farmers Union Co-Op. Royalty Co., 538 P.2d 204 (Okla. 1975). In Allen, a reservation of “all oil, gas & mineral rights” in the initial severance of minerals from land was held, under the Panhandle rule, to include only “oil, gas and other minerals produced as a component or constituent thereof.” Id. at 208. Unlike Panhandle, however, it does not appear that the instrument of severance contained any provisions concerning oil and gas lease rights. Thus, the court apparently interpreted Panhandle as stating a universal rule of law applicable to any conveyance of “oil, gas and other minerals,” whether or not other language in the instrument indicated the parties’ “preoccupation” with oil and gas. See Butler, 53 Okla. B.J. at 135 (Hargrave, J., concurring specially) (noting that the Allen court acknowledged the correct, narrow rule of Panhandle only in dicta in an alternative holding).
be governed by this broad reading of Panhandle.79

When an ambiguity is found in an instrument, severances of minerals will be interpreted under established rules of construction. Although the Oklahoma legislature has enacted several such rules into law,80 a non-statutory rule, that of ejusdem generis, is almost always applied by state courts to severances of minerals.81 Under ejusdem generis, "where specific minerals are enumerated along with a general mineral grant or reservation, the court may conclude that the parties had in mind only those minerals which have characteristics in common with the enumerated minerals."82 This rule has been criticized for its difficulty of application83 and inconsistency of results,84 but has not yet lost favor in Oklahoma.85

79. See Allen, 538 P.2d at 207 (court indicated that scope of the phrase "mineral rights" might be different if "standing alone").
82. 1 E. Kuntz, supra note 12, § 13.3, at 304.
83. Texas courts have consistently refused to apply ejusdem generis to grants or reservations of "minerals." In Luse v. Boatman, 217 S.W. 1096 (Tex. Civ. App.—Fort Worth 1919, writ ref’d) the court explained the reason for its refusal to use the doctrine in construing a reservation of "all the coal and mineral":

   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 or 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.

217 S.W. at 1099; see also Maser, 26 Tex. Sup. Ct. J. at 428; Southland Royalty Co. v. Pan Am. Petroleum Corp., 378 S.W.2d 50, 54 (Tex. 1964); Note, supra note 19, at 521, 526.
84. See Butler, 53 Okla. B.J. at 134 (Hargrave, J., concurring specially) (arguing that "the Court should allow the parties to utilize all traditional avenues of construction to resolve the ambiguity, rather than singling out ejusdem generis as the only available aid to resolution."); see also 1 E. Kuntz, supra note 12, § 13.3, at 304; Note, supra note 19, at 521 & n.79 (noting factual determinations required under ejusdem generis). But see Emery, What Surface is Mineral and What Mineral is Surface, 12 OKLA. L. REV. 499, 500-01, 516 (1959) (contention that ejusdem generis is the proper constructional aid and promotes certainty of titles).
85. See, e.g., Allen, 538 P.2d at 207-08 (applies ejusdem generis).
When *ejusdem generis* is inapplicable, however, Oklahoma courts have turned to other rules of construction to aid in interpreting ambiguous instruments. Notably, the Oklahoma Supreme Court has cited with approval the rule enunciated in Texas that "minerals" is to be construed according to its meaning in the vernacular of mining, commerce and land ownership. More recently, in *Holland v. Dolese Co.*, the court applied the exceptional characteristics test, as well as parts of the manner of enjoyment theory, in holding that limestone is not part of the mineral estate under a reservation of "the mineral rights."

The extent to which the latter test has become part of Oklahoma law is unclear. The *Holland* court cited Kuntz' proposition that mineral owners be required to pay compensation for surface damages caused by removal of unnamed substances, but did not have to apply the principle as it held the substance in question part of the surface estate. The opinion in a later case applying the manner of enjoyment theory, as well as *ejusdem generis*, to the question of whether brine and iodine were included in a grant of "all the oil, gas and other minerals" was withdrawn for unspecified reasons.

**B. A Proposal for Oklahoma**

Under the current state of the law, the next Oklahoma court faced

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86. The doctrine cannot be used to interpret instruments which grant or reserve "all minerals" without mentioning specific substances. *See supra* note 82 and accompanying text.
87. *Mack Oil*, 389 P.2d at 961 (language indicating "all mineral rights reserved" construed as conveying water with the surface estate); *see supra* note 44.
88. 540 P.2d 549 (Okla. 1975).
89. *Id* at 550-52.
90. *Id* at 551.
91. *Id* at 552.
93. *Id*
94. 53 OKLA. B.J. 2602 (Oct. 21, 1982). The Oklahoma Supreme Court subsequently affirmed the trial court's judgment in an unpublished memorandum opinion. *Eike v. Amoco Prod. Co.*, No. 52,511 (Okla. Sup. Ct. filed Feb. 8, 1983) (mem. per curiam) (disposition noted at 54 OKLA. B.J. 414 (1983)). The trial court had held the brine water and iodine in controversy to be part of the surface estate, but did not state the legal theory upon which its conclusion was based. Exhibit A at 5, *Eike v. Amoco Prod. Co.*, No. 52,511 (Okla. Sup. Ct. filed Feb. 8, 1983) (trial court's conclusions of law). In dissenting from the Oklahoma Supreme Court's action, Justice Doolin cited Kuntz' manner of enjoyment theory, as well as *ejusdem generis*, for his opinion that "when the mineral estate is severed, the mineral owner . . . has the right to take the brine water into his temporary possession and extract therefrom and reduce to ownership any minerals, such as . . . iodine." *Eike v. Amoco Prod. Co.*, No. 52,511, at 5 (Okla. Sup. Ct. filed Feb. 8, 1983) (Doolin, J., dissenting).
with an interpretation of the term "minerals" may have an opportunity to follow the Moser rule or to adopt Kuntz' theory in its entirety. To achieve the greatest degree of title certainty and to encourage development of all mineral resources, the court should choose the latter course. The court can initially declare as a matter of law that the grant or reservation is unambiguous, thus rendering rules of construction such as *ejusdem generis* inapplicable. Next, recognizing the parties' lack of specific intent concerning ownership of unnamed substances, the court can give effect to the general intent to sever all presently and prospectively valuable substances from the surface estate. In the interest of fairness, the court can continue to adhere to prior Oklahoma decisions holding certain substances as non-minerals. Then, to protect the surface estate from unforeseen diminution in value, the court can impose on the mineral estate a duty to compensate the surface owner for damages resulting from extraction of unnamed "minerals."

Since Moser provided no guidance as to the amount of damages, Oklahoma courts are free to fashion a just remedy. As noted above, Kuntz has suggested that damages be measured by the diminution in value of the surface estate due to the extraction of unspecified minerals. Oklahoma may adopt this position or may choose to apply its common-law remedies, similar to those of Texas, for tortious injury to realty. It is also possible that a court may characterize the mineral

95. While the Moser rule, based as it is on Kuntz' theory, would also represent an improvement over the *ejusdem generis* rule, Oklahoma would be inviting litigation by adopting the "ordinary and natural meaning" element of the Moser test without defining that meaning in Kuntz' terms. See supra notes 47-53 and accompanying text.


97. See supra note 12.

98. See, e.g., Holland, 540 P.2d at 552 (limestone); Mack Oil, 389 P.2d at 961 (fresh water); Cronkrite, 352 P.2d at 399 (gypsum); Beck, 196 Okla. at 272, 164 P.2d at 401 (sand and gravel). In Sloan, 547 F.2d at 116, the Tenth Circuit held coal to be part of the surface estate under its interpretation of Oklahoma law. This decision was subsequently cited in Hutchinson v. McClure, 621 P.2d 546, 546 (Okla. Ct. App. 1980). In Butler, however, Justice Hargrave stated that he found the Tenth Circuit's interpretation of state law incorrect. 53 OKLA. B.J. at 137 (Hargrave, J., concurring specially). See also Defendants' Trial Brief at 88-89, Randall & Blake Okla., Inc., v. Federal Land Bank of Wichita, No. 79-258-C (E.D. Okla. 1979) (expert opinion that coal is considered a mineral by the parties to a grant or reservation of "all the oil, gas, and other minerals").

99. See supra notes 64-67 and accompanying text.

100. See supra note 68 and accompanying text.

101. See supra notes 69-72 and accompanying text.

102. See, e.g., Kerr-McGee Corp. v. Petchinsky, 438 P.2d 475, 476-77 (Okla. 1968) (owner of permanently damaged land is entitled to difference in land value immediately before and after damage); Ellison v. Walker, 281 P.2d 931, 933 (Okla. 1955) (owner of temporarily damaged land
owner’s duty to pay for surface damages as contractual rather than tortious in nature, and thus impose damages for breach of contract. For instance, a court may award the surface owner the cost of performance of the mineral owner’s obligation to restore the surface. However, if the implied covenant to restore the surface is found merely incidental to the purpose of the contract, and if the cost of restoration greatly exceeds the resulting economic benefit, the court may measure damages by the diminution in value of the surface rather than the cost of restoration. If crops are damaged by the mineral owner, the surface owner would be awarded the value of the crops at the time of injury. The court might also require the mineral owner to pay a reasonable rent should his activities deny the surface owner the use of the land during the time mineral operations are being conducted.

Some commentators believe the manner of enjoyment theory gives the mineral interest owner greater rights to the surface than were contemplated by the parties. The mineral operator’s duty of compensation has been termed merely a “forced sale” of the surface. While these fears are not groundless, they should not be alleviated by a definition of mineral ownership that thwart the parties’ intent to sever all substances of value. The surface owner’s interests are protected not only by the right to compensation but by the mineral owner’s duty to restore the surface, whether statutorily or judicially imposed. Adoption of the accommodation doctrine in Oklahoma would also al-


104. See Peevyhouse, 392 P.2d at 114. The Tenth Circuit’s contrary holding in Rock Island was based on the court’s belief that Oklahoma courts would not follow Peevyhouse if faced with a similar case today. Rock Island, 698 F.2d at 1078-79.


107. Harrell, Recent Developments in Nonregulatory Oil and Gas Law, 31 INST. ON OIL & GAS L. & TAX’n 327, 360-61 (1980). Professor Harrell argues that at the time of conveyance, the parties are more concerned with the surface than with the mineral estate, which is speculative and uncertain in nature. Id.


110. In Tenneco Oil Co. v. Allen, 515 P.2d 1391 (Okla. 1973), the court held that a mineral owner or lessee has a duty during the term of the lease to restore that portion of the surface used for extracting minerals and later abandoned. Id. at 1396.
leviate the danger of unreasonable surface use.\footnote{See supra note 62 and accompanying text. The Tenneco decision may represent a receptiveness in Oklahoma to future consideration of the accommodation doctrine.} If Oklahoma courts hesitates to adopt the manner of enjoyment theory or the \textit{Moser} rule due to concern for the surface estate, they may wish to consider variations which would keep separate the questions of mineral ownership and surface use. Instead of giving the mineral owner the absolute right to remove any unnamed mineral, the court could allow the surface owner to enjoin all unreasonable surface uses, including methods of extraction which would destroy the surface.\footnote{Comment, \textit{Lignite—Surface or Mineral? The Single Test Causes Double Trouble}, 28 \textsc{Baylor L. Rev.} 287, 312-13 (1976); see Lowe, \textit{supra} note 2, at 143; Maxwell, \textit{supra} note 19, at 285.} If the mineral owner wished to extract substances using surface-destructive techniques, he would be forced to negotiate with the surface owner for the right to do so.\footnote{Maxwell, \textit{supra} note 19, at 277. Maxwell notes that the surface owner’s power to block mineral development may result in a forced sharing of the value of the mineral estate with the surface owner. \textit{Id.} at 281.} Alternatively, the court could require a mineral owner to seek judicial permission to extract unspecified minerals. Such permission would be granted only after the court “balanced the equities” in favor of the mineral owner, and would be conditioned on payment of compensation to the surface owner.\footnote{\textit{Id.} at 285.} While these approaches are not without disadvantages,\footnote{See Norvell, \textit{supra} note 19, at 201 (noting that they may retard mineral development and thwart the parties’ probable intention that the mineral owner be entitled to use his entire estate).} either rule would help protect the surface owner’s rights to a valuable estate, free from the threat of diminution caused by removal of unnamed minerals.

\section{VI. Conclusion}

The \textit{Moser} decision is worthy of serious study and consideration in Oklahoma. Public policy is better served by adopting either the \textit{Moser} test or Kuntz’ theory. Certainty of titles will be increased by a rule which requires fewer factual determinations to ascertain the ownership of a substance. Burgeoning judicial workloads and costs resulting from litigation would also be reduced. Further, a rule which recognizes the mineral estate’s title to all substances of value would encourage the reasonable development of the state’s natural resources.

Whether Oklahoma will recognize these advantages in the near future is uncertain. While Kuntz’ theory has been mentioned by the courts at times, the withdrawal of the \textit{Eike I} opinion may indicate a
reluctance to embrace the manner of enjoyment concept. However, the leadership of the Texas Supreme Court in *Moser* may influence its Oklahoma counterpart to adopt or fashion a similar rule.

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