Land & Water Law Review

Volume 21 | Issue 2 Article 8

1986

What Other Minerals Should Mean in Wyoming

Charles A. Armgardt

What "Other Minerals" Should Mean in Wyoming

Western land grantors are a wily bunch. They typically convey their interests while reserving "all oil, gas and other minerals" or "all coal and other minerals." They specifically reserve known substances or those likely to be found, while tacking on "other minerals" language to their reservations hoping to gain ownership of unmentioned substances sometime in the future.

Usually, reserved mineral lands contain only those minerals that are enumerated. However, as case law from the past eighty years bears out, new substances are often discovered or become commercially valuable. Of course, the reservation's draftsman, grantor and grantee on many occasions intended to account for this substance. Yet sometimes they forged a vague intent regarding the substance in question, and many times they fashioned no intent at all. Compounding the confusion is the fact that any of these intents might be evidenced by widely varying degrees of articulation in the instrument. Courts are then left to face dilemmas such as how to define mineral, whether a particular substance is a mineral, and whether that substance was intended to be reserved by the parties.[1]

The courts' tasks are not simple. Under real property law, a reservation of an exclusive and unrestricted mining right in effect severs the mineral estate from the surface estate; a fee simple estate is created in the minerals in place.[2] However, problems arise because a reservation may fail to reserve a fee simple estate in all the minerals.[3] Courts are hesitant to vest a grantor who nonchalantly reserves "other minerals" with the full sub-surface estate. Confusion and uncertainty result when courts implement different tests to define mineral, and when they construct devices to decipher the parties' intent.

This uncertainty is of great concern to title examiners. One who seeks to purchase property or to develop mineral resources must know who owns what minerals under a given parcel. A title revealing a grant or reservation bearing "other minerals" language necessarily will be inconclusive. Developers are apt to abandon projects or purchases when ownership questions surround their plans; thus this seemingly innocuous academic problem has stifled much economic growth.

Another aspect of the title uncertainty problem is the task of positively defining the surface and mineral estates. One person may own a fee sim-

---

1. One commentator has called the topic "the tarbaby of natural resources law, because the more courts attack it, the more stuck they become. A year rarely goes by that several appellate courts do not address the issue, often with apparently contradictory results." Lowe, *What Substances are Minerals?* 30 ROCKY MTN. MIN. L. INST. 2-1, 2-2 to 2-3 (1984). For a list of law review articles dealing with the subject, see *id.* at 2-2.

2. IA THOMPSON ON REAL PROPERTY § 160, at 37; 58 C.J.S. *Mines and Minerals* § 155, at 317-318; Picard v. Richards, 366 P.2d 119 (Wyo. 1961).

3. Outside the scope of this comment are problems associated with identifying the various types of mineral interests. For an article with such a focus, see Note, *Classifications, in Wyoming, Of Interests in Oil and Gas For Various Purposes and Their Consequences,* 17 WYO. L.J. 80 (1962).

ple estate, or he may own a fee simple estate in just the surface or just the minerals; there are countless degrees of ownership between those extremes.[4] Of course, the greater the surface estate, the smaller the mineral estate and vice versa. Some approaches to solving the "other minerals" puzzle unduly favor the surface estate, while some unfairly reward the mineral estate. The best approach is one which effects a fair balance.

The need to decide on a clear and fair method for determining the meaning of a general reference to minerals in a grant or reservation is imperative in the mineral rich west. Courts must establish sound precedent as new substances are discovered, as materials are discovered under lands not thought to contain that substance, as commercial uses are developed for substances once valueless, and as known minerals are depleted and assume enough value for marginal deposits to be mined. An effective method would lead to certainty of title, which would spur additional mineral development and economic growth in this state and the region. It would also conserve legal and judicial resources, while promoting the slippery notions of fairness and justice.

Curiously, Wyoming courts have rarely faced the issue of how to interpret general references to minerals. There are two explanations. First, the federal government owns approximately half the land in Wyoming. The less land there is in private hands, the fewer the private suits. Second, other courts squaring off with the issue have found it so complex and confusing, with so many possible methods of solving it, that parties avoid litigation in what would be a first impression court. Mineral companies in Wyoming often purchase the surface estate along with the mineral estate in order to operate free of court hassles.

Wyoming courts are sure to grapple with this legal problem in the future, however. Therefore, this comment will outline the various approaches advocated to classify unnamed minerals in grants and reservations among two private parties. The strengths and weaknesses of each approach will be illustrated. Common devices utilized by courts to classify minerals will be listed, and whatever Wyoming precedent that does exist will be surveyed. Finally, a method for deciding these disputes in the future will be suggested.

THE APPROACHES

Every one of the approaches employed to classify an unnamed substance purports to arrive at the intent of the parties to the grant or reservation. Yet the variety of approaches must mean that some courts place a higher premium on identifying that intent than others. As a result of this focus on the parties' intent there is no exact legal definition of a mineral. A finding in one state that uranium is a mineral would not be conclusive in another state. The task of characterizing a substance depends upon the transaction. The Tenth Circuit articulated this point in *Bumpus v. United States:*

4. 1 WILLIAMS & MYERS, OIL AND GAS LAW § 201, at 18 (1959).

> "Mineral" is a word of general language, and not *per se* a term of art. It does not have a definite meaning. It is used in many senses. It is not capable of a definition of universal application, but is susceptible to limitation or expansion according to the intention with which it is used in the particular instrument or statute.[5]

As we shall see, courts offer different ways to solve this dilemma.

Wyoming law specifically states that the intention of the parties, and especially that of the grantor, determines how a certain substance will be classified.[6] Wyoming courts first attempt to discern the parties' intent from what might be plain and unambiguous language contained in the instrument. This four corners rule is worthless, however, when the instrument is ambiguous.[7] Wyoming courts are then instructed to consider not only the terms of the writing but also the surrounding circumstances, attendant facts showing the relation of the parties, the nature and situation of the subject matter, and the apparent purpose of the contract.[8] Such extrinsic evidence should be resorted to only when the instrument is susceptible to multiple meanings.[9] So when an instrument clearly discloses the parties' intent or is phrased in plain language, the court will as a matter of law determine the parties' intent.

Many jurisdictions enumerate factors which courts should appraise when grappling with ambiguous instruments. These factors are usually similar to Wyoming's. For example, the Tenth Circuit requires that, "[R]egard must be had to the language of the instrument in which it occurs, the relative position of the parties interested and the substance of the transaction which the instrument embodies."[10] New Mexico courts consider "the facts of [the] case . . . the statutes applicable thereto, the mineral reservation as expressed and the commonly understood meaning of the word, 'mineral.' "[11]

Courts pondering an ambiguous instrument generally employ a construction device as its approach to analysis.[12] These construction aids originated in western courts and typically anoint "other minerals" language with broad meanings.[13] Therefore, these devices usually favor grantors, which is contrary to the general rule that ambiguous instruments should be interpreted to the detriment of the drafter, who typically is the grantor.

---

5. Bumpus v. United States, 325 F.2d 264, 266 (10th Cir. 1963).
6. Dawson v. Meike, 508 P.2d 15 (Wyo. 1973); Holland v. Windsor, 461 P.2d 47 (Wyo. 1969); Forbes v. Volk, 358 P.2d 942 (Wyo. 1961).
7. "An ambiguous contract is one capable of being understood in more ways than one. It is an agreement which is obscure in its meaning, because of indefiniteness of expression, or because a double meaning is present." Bulis v. Wells, 565 P.2d 487, 490 (Wyo. 1977). *See also* Shepard v. Top Hat Land and Cattle Co., 560 P.2d 730 (Wyo. 1977).
8. Dawson v. Meike, 508 P.2d 15, 18 (Wyo. 1973).
9. *Id.*
10. Bumpus v. United States, 325 F.2d 264, 266 (10th Cir. 1963).
11. Rickelton v. Universal Constructors, Inc., 91 N.M. 479, 481, 576 P.2d 285, 287 (1978).
12. Amoco Production Co. v. Guild Trust, 461 F. Supp. 279 (D. Wyo. 1978).
13. *Id.*

Within this group of construction aids courts can employ extrinsic evidence regarding intent in one of two ways. Some courts declare the "other minerals" construction question to be one of fact, so they utilize the approaches as a means to discern the parties' intent.[14] The extrinsic evidence itself answers the fact question. Other courts declare a substance as mineral or non-mineral as a matter of law; they generally use their construction devices only if extrinsic evidence fails to identify a definite intent.[15] They realize that extrinsic evidence may be inconclusive, and will not assist them when the parties did not reach a cogent agreement regarding these "other minerals." Some of these courts, however, assume that the extrinsic evidence will be inconclusive, and barely consider the evidence at all.

The earliest construction aid classified all materials as either animal, vegetable or mineral. The United States Supreme Court in 1903 discredited this system as being too broad because it would result in all land being considered mineral. The Court also decided that limiting "mineral" to metallic and precious metals was too narrow, since it failed to include many items which were popularly considered minerals.[16]

Today, courts continue to struggle with what should and should not be considered minerals within a reservation or grant of "other minerals." The oldest analysis approach still in use is the "comprehensive meaning test," which has been deemed the general rule since the 1800's.[17] Courts subscribing to this view declare that "other minerals" is all-inclusive, that it includes all substances that can conceivably be considered mineral, unless restrictive language is used in the instrument to indicate that the parties comtemplated something less than all mineral substances.[18] One court, deciding whether "minerals" included oil and natural gas, said:

> The deed is not so ambiguous as to authorize resort to extrinsic evidence as an aid to its construction. The language used clearly imports an intention to convey only the surface rights and to reserve all minerals. In other words, the deed separated the minerals estate from the surface. The word "minerals" in a deed embraces oil and gas unless the language of the deed discloses an intention to exclude them.[19]

The obvious advantage of this system is certainty of title. The full sub-surface estate generally will be severed, as a matter of law, when the magic word "minerals" is used. However, this often works a bonus for

14. *See infra* text accompanying notes 41-49.
15. *See infra* text accompanying notes 17-40.
16. Northern Pacific Railway Co. v. Soderberg, 188 U.S. 526 (1903).
17. Annot. 17 A.L.R. 156 (1922); 86 A.L.R. 983 (1933).
18. Pariani v. State, 105 Cal. App. 3rd 923, 164 Cal. Rptr. 683 (1980); New Mexico and Arizona Land Co. v. Elkins, 137 F. Supp. 767 (D.N.M. 1956). North Dakota used to follow this method. *See* MacMaster v. Onstad, 86 N.W.2d 36 (N.D. 1957). Now, according to N.D. CENT. CODE § 47-10-25 (1978), North Dakota requires all grants or reservations to specifically name the minerals involved. Thus, since 1978 in North Dakota, the words "other minerals" have no meaning.
19. Maynard v. McHenry, 271 Ky. 642, 644, 113 S.W.2d 13, 14 (1938).

grantors by giving them unanticipated materials. Further, by calling for scrutiny of the instrument alone before resort to the rule, the rule may slight the parties' intent which could be discovered by examination of extrinsic evidence. The rule mandates a hasty assumption that a general reference to minerals was meant as a matter of law to be a general reservation. Finally, it results in such a broad definition of mineral that anything inorganic, solid and earthly is a mineral despite the fact that the Supreme Court maligned the animal/vegetable/mineral trichotomy early in this century.[20]

Another construction aid, which can be viewed as a refinement of the all-inclusive rule, is the "special value test." The test defines substances which can conceivably be considered minerals as those with "rare or exceptional character," possessing a "peculiar property giving [them] special value."[21] To find special value courts appraise the material's plentifulness,[22] its intended use[23], its quality[24], and its relative market price.[25] For example, one court considering whether sand and gravel were included in an "all the coal and other minerals in the lands" reservation held that they did not have special value because they were useful only for road building purposes, and because in that case they could be used in their exposed states.[26]

The special value test tends to hinder the title examiner, who cannot be sure how a court will decide a special value question. Discovery of and argument over facts could be extensive. It is not clear which factors will be applied and when. Also, these courts quickly assume that a general reference to minerals almost automatically warrants a special value determination. Again, extrinsic evidence and the parties' intent may be given short shrift. Another potential disadvantage of this scheme is that to truly honor the parties' intent, the court should determine the commonly understood perception of a substance's special value at the time of severence. This leads to further uncertainty since many instruments may be litigated fifty or more years after drafting. One strength of this approach, however, is its reasonable definition of mineral. It does not automatically vest grantors with full sub-surface estates. By requiring special qualifications of minerals it recognizes that grantees can be taken advantage of when grantors insert "other minerals" language into instruments.

---

20. Northern Pacific Railway Co. v. Soderberg, 188 U.S. 526 (1903).

21. State *ex rel.* State Highway Comm'n v. Trujillo, 82 N.M. 694, 696, 487 P.2d 122, 124 (1971). *See also* Rickelton v. Universal Constructors, Inc., 91 N.M. 479, 576 P.2d 285 (1978); Holland v. Dolese Co., 540 P.2d 549 (Okla. 1975); W.S. Newell, Inc. v. Randall, 373 So. 2d 1068 (Ala. 1979).

22. Holland v. Dolese Co., 540 P.2d 549 (Okla. 1975); United States v. Coleman, 390 U.S. 599 (1968).

23. State *ex rel.* State Highway Comm'n v. Trujillo, 82 N.M. 694, 487 P.2d 122 (1971).

24. Melluzzo v. Morton, 534 F.2d 860 (9th Cir. 1976).

25. Brubaker v. Morton, 500 F.2d 200 (9th Cir. 1974).

26. State *ex. rel.* State Highway Comm'n v. Trujillo, 82 N.M. 694, 695, 487 P.2d 122, 124 (1971).

The third prominent approach is found in states that have adopted the maxim "ejusdem generis" to deal with "other minerals" language.[27] Ejusdem generis is defined as "of the same kind, class or nature,"[28] and means that where there is an enumeration of particular items followed by a general clause or phrase, the scope of the general clause is limited to substances of the same nature as those specifically named. For instance, a grant of "oil, gas and other minerals" was held to exclude gypsum rock.[29] Of course, courts have been careful to point out that ejusdem generis gives way to clear indications of intent by the parties.[30]

Ejusdem generis, like the other methods, fails to provide the degree of certainty that a diligent title examiner would desire. Questions of affinity among substances are not always easily answered. Further, despite the common intent to do so, this method of interpretation makes it very difficult to sever the entire mineral estate, since "other minerals" does not necessarily mean the full sub-surface estate. The same deficiency from a different perspective is that ejusdem generis may limit the scope of a reservation more than the grantor had intended. One could argue, however, that a limited list of specifically named minerals indicates intent to reserve less than the mineral fee, and that the ejusdem generis rationale thus conforms to most parties' intents.

To its credit the ejusdem generis rule does strike a relatively fair balance between the surface and mineral estates. Grantors do not automatically receive full sub-surface estates whenever "other minerals" language is used, but they do end up owning more than what was specifically listed. The rule also properly employs intent evidence, since factual extrinsic evidence controls before the court resorts to legal affinity questions.

The mineral/surface estates conflict provided a focus for an important and well-reasoned article by former University of Wyoming College of Law Professor Eugene Kuntz in 1948.[31] Kuntz criticized courts for purporting to arrive at the parties' intent; he scoffed at the variety of results and tests which flow from this approach and suggested that parties often do not form a specific intent regarding the substance in question. He said that specific expressions of intent where found should decide cases, but that courts err in creating artificial tests and presumptions in defining what was a non-existent intent.

Kuntz's "manner of enjoyment test" essentially places the two estates on an equal footing. Which estate a certain substance belongs to depends on "the purposes of the grant or reservation in terms of manner of enjoy-

27. Sloan v. Peabody Coal Co., 547 F.2d 115 (10th Cir. 1977); Keller v. Ely, 192 Kan. 698, 391 P.2d 132 (1964).

28. BLACK'S LAW DICTIONARY 464 (rev. 5th ed. 1979).

29. Conkhite v. Falkenstein, 352 P.2d 396 (Okla. 1960).

30. *See, e.g.*, Continental Group, Inc. v. Allison, 404 So. 2d 428 (La. 1981) (vendor's refusal to limit the reservation foreclosed resort to ejusdem generis).

31. Kuntz, *The Law Relating to Oil and Gas in Wyoming*, 3 WYO. L.J. 107 (1948).

ment intended in the ensuing interests."[32] In other words, the general intent will always be to "sever the entire mineral estate from the surface estate,"[33] so that the mineral estate encompasses "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."[34] If extraction of a substance would unreasonably interfere with enjoyment of the surface estate, then the mineral owner would have to compensate the surface owner for either the reduction in the value of the surface, or for the depletion of substances belonging to the surface estate. This feature makes the two estates mutually dominant and servient.

The Kuntz approach possesses its elegance, yet suffers from deficiencies as do the other methods. It provides certainty, for example, in including coal in an "oil, gas and other minerals" reservation. However, certainty is served to the detriment of the parties' intent and nuances of meaning. Kuntz's legal definition of mineral is so broad that it includes all substances anyone might care about, simulating the discredited and simplistic animal/vegetable/mineral trichotomy.[35] Also, it evades the basic question of what a mineral is in particular cases, and so disregards the fact that the meaning of mineral depends on the context of its use. Recall the well-accepted principle that the word mineral is not a term of art when used in contracts. Its meaning depends on such things as the intent with which it is used, the instrument's language, the relative positions of the parties, and the substance in question.[36]

The next major approach, the "surface destruction test," was first expounded in Texas. It holds that a broad grant or reservation of minerals includes all non-specified substances "unless removal will in effect, consume or deplete the surface estate."[37] In other words, the surface estate owner retains the rights to a certain substance if he establishes that *any* of the disputed material lies at or near the surface. This rule is based on the intriguing assumption that a surface owner would not have intended to convey a mineral the extraction of which would severely damage his estate. If the reservation included minerals that could be extracted only by destroying the surface, the reservation might engulf the grant, leaving the surface estate owner with an empty property right.

The rule has several faults. First, as illustrated by the Tenth Circuit:

> The rule would carry itself beyond its rationale. If only a small portion of the mineral lies at the surface, the removal process

32. *Id.* at 112.
33. *Id.*
34. *Id.* at 113.
35. Northern Pacific Railway Co. v. Soderberg, 188 U.S. 526 (1903).
36. Bumpus v. United States, 325 F.2d 264 (10th Cir. 1963).
37. Acker v. Guinn, 464 S.W.2d 348, 352 (Tex. 1971). *See also* Reed v. Wylie, 554 S.W.2d 169 (Tex. 1977) (overruled by Reed v. Wylie, 597 S.W.2d 743 (Tex. 1980)); Holloway Gravel Co. v. McKowen, 200 La. 917, 9 So. 2d 228 (1942); Wulf v. Schultz, 211 Kan. 724, 508 P.2d 896 (1973); Farrell v. Sayre, 129 Colo. 368, 270 P.2d 190 (1954); Carson v. Missouri Pacific Railroad, 212 Ark. 963, 209 S.W.2d 97 (1948).

> might not unreasonably interfere with the use of the surface. Whenever a mineral estate is severed from the surface, the surface owner must expect that even underground mining could affect his use of the surface to some degree.[38]

Therefore, the Tenth Circuit precedent for Wyoming relating to this rule finds it arbitrary and a bonus for the surface owner in that it may confer minerals on the surface estate that should belong to the mineral estate.

Another problem with the surface destruction test is that it does not provide certain enough results for the conscientious title examiner.[39] The rule requires resort to geological data and judgments to determine whether extraction would deplete the surface estate. It also requires a legal determination of whether the surface estate would in fact be depleted. Further, this rule can do violence to the parties' intent, because the parties may have expected the mineral owner to reasonably use the surface; this comports with the general rule that the mineral estate owner possesses an easement on the surface as is reasonably necessary to extract the minerals.[40] The Texas rule creates a presumed, artificial intent which either may not correspond at all to the parties' perceived but unarticulated intent, or which may exist in a vacuum when the parties have not formulated any specific intent.

In varying degrees, the surface destruction test, the Kuntz approach, ejusdem generis, special value, and the comprehensive meaning methods all potentially slight the parties' intent by imposing artificial intent presumptions. They de-emphasize extrinsic evidence of intent in order to declare a substance mineral or not as a matter of law. Two other construction methods directly employ extrinsic intent evidence, so whether a substance is a mineral or not is a fact question.

The first method in which construing instruments is a fact question says that "other minerals" language is inherently ambiguous.[41] It resolves the ambiguity by mandating use of facts such as "what that word means in the vernacular of the mining world, the commercial world and land owners at the time of the grant, and whether the particular substance was so regarded as a mineral."[42] It also permits immediate resort to extrinsic intent evidence,[43] as well as the language of the instrument and the surrounding circumstances of the transaction.[44]

This "inherently ambiguous approach" laudably seeks to effectuate the parties' actual intention by swinging the doors open to extrinsic

---

38. Lazy D Grazing Association v. Terry Land and Livestock Co., 641 F.2d 844, 847 n.7 (10th Cir. 1981).

39. Prendergast, *The Texas Enigma—When is a Mineral Not a Mineral?*, 23 ROCKY MTN. MIN. L. INST. 865 (1977).

40. Williams & Myers, *supra* note 4, § 218, at 186.

41. Morrison v. Socolofsky, 43 Colo. App. 212, 600 P.2d 121 (1979); United States v. 1,253.14 Acres of Land, 455 F.2d 1177 (10th Cir. 1972).

42. Farrell v. Sayre, 129 Colo. 368, 373, 270 P.2d 190, 193 (1954).

43. United States v. 1,253.14 Acres of Land, 455 F.2d 1177 (10th Cir. 1972).

44. Puget Mill v. Duecy, 1 Wash. 2d 421, 96 P.2d 571 (1939).

evidence. Ideally, the two estates will only be as big as intended. As we have seen, many of the other approaches settle on a presumed intention to judicially construct the instrument. However, the parties may not have composed a specific intent, or the intent may be vague,[45] or they may simply disagree. This approach then amounts to blind groping since there is no back-up resolution method. Further, uncertainty for the title examiner abounds in this approach. He is forced to conduct costly interviews and investigations. Finally, disputes that go to trial are likely to be expensive and time-consuming.

The other fact-oriented method for assigning meaning to "other minerals" language in a grant or reservation is "the community knowledge test." The rule is that the scope of minerals is a fact question, and the important determination is whether at the time of the reservation the substance in question was known to exist in the area and was considered to be a mineral.[46] If a mineral does not meet this two-fold test, then it does not pass with the mineral estate.[47]

The extremely debilitating aspect of this approach is its complete lack of uniformity and certainty. For example, within state one court ruled that oil and gas does not pass with the mineral estate,[48] while another court held that gas does but oil does not.[49] The rule fosters costly litigation, as determinations must be made of various historical perceptions of different substances on perhaps a county by county basis.

These major construction aids sometimes work well to give meaning to "other minerals" language; however, they can also violate or slight the parties' intent, promote instability in the legal system, and lead to costly litigation. Most courts are skilled enough to avoid mechanical reliance on any one construction aid. And most courts employ one or more construction aids in conjunction with additional analysis tools. For instance, a court considering whether limestone would be included in "other minerals" language probably would collect as many references to limestone as possible.[50] It might utilize a dictionary definition of the particular substance in its analysis.[51] It might also use a geology dictionary[52] or a geology reference book.[53] The attorney embroiled in an "other minerals" case

45. Kuntz, *supra* note 31, at 112.

46. Ahne v. Reinhart and Donovan Co., 240 Ark. 691, 401 S.W.2d 565 (1966); Missouri Pacific Railway Co. v. Strohacker, 202 Ark. 645, 152 S.W.2d 557 (1941).

47. Richardson v. Citizens Gas & Coke Utility, 422 N.E.2d 704 (Ind. 1981). For a contrary view, see Spurlock v. Santa Fe Pacific Railroad Co., 143 Ariz. 469, 694 P.2d 299 (1984).

48. Missouri Pacific Railway Co. v. Strohacker, 202 Ark. 645, 152 S.W.2d 557 (1941).

49. Ahne v. Reinhart and Donovan Co., 240 Ark. 691, 401 S.W.2d 565 (1966).

50. Charles T. Parker Constr. Co. v. United States, 433 F.2d 771 (Ct. Cl. 1970).

51. *Id.*

52. *See, e.g.*, U.S. DEPARTMENT OF THE INTERIOR, A DICTIONARY OF MINING, MINERAL, AND RELATED TERMS (Thrush ed. 1968).

53. *See, e.g.*, Houston, *Some Basic Geologic Concepts and Thoughts on the Evolution of Mineral Deposits Through Time*, in INSTITUTE ON MINING EXPLORATION FOR LAWYERS AND LANDMEN, (1980) (sponsored by the Rocky Mountain Mineral Law Foundation).

should note that courts do employ those non-legal definitions adduced at trial in their decisions.[54]

In examining the properties, value and character of bentonite, one Wyoming court[55] looked to U.S. Geological Survey bulletins[56] and treaties[57] to facilitate its analysis. Another Wyoming court,[58] in mulling whether oil and gas should be included in "coal and other minerals" language, heard testimony by petroleum historians and geologists who said that oil and gas were considered minerals as early as the 1870's. The court also consulted general circulation journals, newspapers, and scientific and government publications to interpret the transaction at the time it was made.[59] In general, courts tend to apply these additional analysis tools to unearth information directly describing the material in question. This helps them to avoid sweeping rulings[60] and to stick to their predeliction for ruling on as little as possible to decide a case.

WYOMING PRECEDENT

We have seen thus far only inklings of Wyoming precedent in this field of jurisprudence; it is time to conduct a thorough survey of case law. Only a few cases on point have been handed down by Wyoming courts, but several more have been decided in federal courts in Wyoming. A Wyoming court that finds the state court opinions uninstructive would probably rely on the federal district court and Tenth Circuit cases for guidance. However, as we shall see, the Wyoming court would discover a mixed bag of decisions.

In *Dawson v. Meike*,[61] the grantor sought ownership of a parcel's uranium based on a deed reserving "oil, gas and kindred minerals . . . together with the right to receive a share in monies received from mineral leases." The court ruled that this second clause did not retain in the grantor the entire mineral estate, so it looked solely to the "oil, gas and kindred minerals" clause. Then, without discussion, it held that uranium was not "kindred" and thus was not reserved. The "kindred minerals" language in the reservation clearly called for an ejusdem generis type of analysis, and the court in effect obliged. Yet *Dawson* fails to set a precedent for Wyoming courts for any one analysis approach. The case appears to say that "oil, gas and kindred minerals" is unambiguous, and that by the commonly understood meaning of such language, uranium is not in-

54. *See, e.g.*, Foster v. United States, 607 F.2d 943 (Ct. Cl. 1979); Downstate Stone Co. v. United States, 712 F.2d 1215 (7th Cir. 1983).

55. Chittim v. Belle Fourche Bentonite Products Co., 60 Wyo. 235, 149 P.2d 142 (1944).

56. U.S. GEOLOGICAL SURVEY, GEOLOGICAL SURVEY BULLETINS (1904).

57. *E.g.*, I LINDLEY ON MINES, § 92.97 (3rd ed. 1914); AMERICAN INSTITUTE OF MINING AND METALLURGICAL ENGINEERS, INDUSTRIAL MINERALS AND ROCKS ch. 6, p. 129 (1937); BUREAU OF MINES, U.S. DEP'T OF INTERIOR, TECHNICAL PAPER 609 (1940).

58. Amoco Production Co. v. Guild Trust, 461 F. Supp. 270 (D. Wyo. 1978), *aff'd*, 636 F.2d 261 (10th Cir. 1980).

59. The *Guild Trust* court, in essence, was applying the community knowledge test.

60. For example, a ruling that a reservation of "coal and other minerals" severs the entire mineral estate may be unnecessarily broad.

61. 508 P.2d 15 (Wyo. 1973).

cluded. The *Dawson* court peered only at the four corners of the instrument, seeing no need to resort to a construction aid for the uranium issue.

The *Dawson* court also scolded the trial court for ruling as a matter of law that coal is kindred to oil and gas, finding insufficient evidence advanced to support that conclusion. This illustrates that the Wyoming court believed that a reservation clause may unambiguously exclude one mineral (uranium), and that the same clause may ambiguously refer to another (coal). *Dawson* vaguely suggests that Wyoming courts employ the inherently ambiguous approach for substances that arguably could be included in grant or reservation language, while also showing that construction aids are unnecessary when the instrument's four corners provide answers.

An earlier Wyoming case hinted at use of the special value test. Although not construing the term "mineral" in the context of a grant or reservation, the court in *Chittim v. Belle Fourche Bentonite Products Co.*[62] held that bentonite was a mineral. It grounded its decision on these tests: "the character of the deposit as occurring independently of the mere soil, valuable in itself for commercial purposes, that is, near enough to a market to have value,"[63] and "any form of earth, rock, or metal of greater value while in place than the enclosing country or superficial soil."[64] These tests, however, are much more generous in bestowing mineral status than is the special value construction aid. They offer such vague precepts for construing "other minerals" language that they are almost tautological in nature; they seem to say that anything that is a mineral is a mineral. A Wyoming court today troubled by "other minerals" language surely should ignore this open-ended precedent.

Wyoming courts would certainly consult federal court decisions of cases arising in Wyoming. Of course, federal district courts typically apply the law of the pertinent state, and when there is none, decide the case according to how they believe the state court would rule. This latter scenario presented itself in two federal court cases.

The first case, *Amoco Production Co. v. Guild Trust*,[65] queried whether oil was included in a reservation of "[a]ll coal and other minerals within or underlying said lands." The court first, in accord with generally accepted methodology,[66] sought to give life to the parties' intent by examining the instrument's four corners. It then heard intent evidence before eventually disregarding it and deciding the case without extrinsic evidence. In other words, the court ruled that the reservation language was unambiguous, reasoning that a Wyoming court probably would follow the vast majority of other state courts in holding that "coal and other minerals" unambiguously includes oil and gas.[67] Its precise and more

62. 60 Wyo. 235, 149 P.2d 142 (1944).
63. *Id.* at 146.
64. *Id.*
65. 461 F. Supp. 279 (D. Wyo. 1978), *aff'd*, 636 F.2d 261 (10th Cir. 1980).
66. *See supra* text accompanying note 6.
67. *Guild Trust*, 461 F. Supp. at 282.

general holding was that "coal and other minerals" unambiguously severs the entire mineral estate unless evidence exists that the parties intended a more restrictive meaning.[68] This is the comprehensive meaning test. To be sure, the *Guild Trust* court did not pull this holding out of a hat. It said that two federal cases "control" the decision.[69] It professed the policies of certainty of title and conservation of judicial resources to justify its entire mineral estate severance holding. Finally, it pointed to now dated Wyoming statutes and cases which, at least vaguely, suggest that holding.[70]

The other case, *Lazy D Grazing Association v. Terry Land & Livestock Co.*,[71] plainly employed the ejusdem generis principle to rule that coal was reserved in "[a]ll gas, casinghead gas, oil and other minerals valuable as a source of petroleum in and under said lands."[72] The Tenth Circuit affirmed the district court's determination that the clause unambiguously excludes minerals not valuable as petroleum sources, and that the clause was inherently ambiguous regarding substances valuable as petroleum sources. This ambiguity paved the way for extrinsic evidence revealing that the parties intended the clause to reserve all minerals with present or future value as sources of petroleum. Yet the court found that extrinsic evidence inconclusively dealt with the mineral owner's assertion that the reservation corralled into his estate even those minerals serving as a depository for petroleum in the ground, so it resorted to a construction aid. The court held that under ejusdem generis[73] the parties intended the general language to include only those minerals that are similar to petroleum, or those which may be converted into petroleum.

Note that on appeal to the Tenth Circuit the grantee argued that coal was not reserved because it could only be extracted by strip mining, "a method of extraction that would destroy the value of the surface for the grazing and agricultural purposes for which the land was purchased."[74] The court rejected the surface destruction argument because the grantee failed to prove that the coal necessarily could only be removed by surface destructive techniques. Thus, the *Lazy D* court did not absolutely foreclose using the surface destruction rationale. However, the court in a footnote said that no Wyoming case had embraced the surface destruction rule,

---

68. *Id.* at 283.

69. *Id.* Those cases are Burke v. Southern Pacific Railroad Co., 234 U.S. 669 (1914), in which petroleum was held to be a mineral according to the ordinary and popular sense of mineral, and Skeen v. Lynch. 48 F.2d 1044 (10th Cir. 1931), where oil was reserved under a Stock Raising Homestead Act patent reserving "coal and other minerals."

70. *Guild Trust,* 461 F. Supp. at 282-83. The court cited Van Horn v. State, 5 Wyo. 501, 40 P. 964 (1895); State *ex rel.* School District No. 1 v. Snyder, 29 Wyo. 163, 212 P. 758 (1923); 1888 Territorial Statutes, i.e. Sess. Laws, ch. 40 § 1; WYO. CONST. § 3 art. 15.

71. 641 F.2d 844 (10th Cir. 1981).

72. *Id.*

73. *Id.* (quoting Sloan v. Peabody Coal Co., 547 F.2d 115 (10th Cir. 1977)). The court said that "general terms in a reservation clause are construed to include only minerals that are similar in nature to minerals that are specified."

74. *Lazy D,* 641 F.2d at 846.

"and we will accept the implication from the ruling of the experienced Wyoming trial judge that local law does not follow the Texas (surface destruction) rule."[75]

The *Lazy D* case suggests that Wyoming law follows the majority in shunning extrinsic evidence when the instrument is unambiguous regarding a certain substance. It also suggests that Wyoming might follow the ejusdem generis principle.[76] Finally, it illuminates how Wyoming courts might, or probably would, resolve the conflict between the competing surface and mineral estates. The rejection of the surface destruction test shows that Wyoming courts are not prepared to extend partial treatment to surface owners.

A more expansive explanation of the surface/mineral estates conflict was announced in *Holbrook v. Continental Oil Co.*[77] The deed given to a United States patentee provided that a mineral interest owner "may reenter and occupy so much of the surface thereof as may be required for all purposes reasonably incident to the mining." The court rejected the patentee's complaint that separation tanks, worker dwelling units, sump holes, pipe lines, roads and so forth caused more damage than the deed allowed. The court quoted with approval United States Supreme Court language that Congress intended "to make the latter (surface) servient to the former (mineral), which naturally would be suggested by their physical relation and relative values."[78] Of course, this is merely a restatement of the general rule that the mineral owner has a right to use so much of the surface as is reasonably necessary to exploit his estate.

A Suggested Approach

The underlying tension that all the above approaches seek to reconcile is between favoring the parties' intent, and promoting certainty by set rules. The tests placing a premium on the parties' intent—the inherently ambiguous and community knowledge tests—result in title uncertainty. This leads to wasted judicial resources and reduced mineral development, while also ignoring Kuntz's point that parties often had no specific intent for a certain substance. Those honoring certainty by set rules—the surface destruction, comprehensive meaning, Kuntz and special value approaches—often sacrifice the parties' intent. A mineral severance or reservation, like any legal agreement, generally should be construed according to the parties' wishes.

The expected flood of this sort of litigation has not yet occurred in Wyoming, so courts of this state will have a chance to expound a new and better rule. The Wyoming legislature could go one step further by enacting laws designed to promote both certainty and the parties' intent. Perhaps a synthesis of some established principles will provide a sound

75. *Id.* at 847.

76. Of course, a Wyoming court facing an "other minerals" construction could declare that the *Lazy D* exposition of ejusdem generis is incorrect and void of precedential value.

77. 73 Wyo. 321, 278 P.2d 798 (1955).

78. *Id.* at 805 (citing Kinney-Coastal Oil Co. v. Kieffer, 277 U.S. 488 (1927)).

methodology for Wyoming courts. A tiered, step-by-step approach can incorporate desirable features of different approaches.

First, Wyoming courts should continue to initially apply the four corners rule to effectuate to the parties' intent. Courts should glean only specific and concrete declarations of intent from the instrument at this level. Most disputes can be resolved at this simple level of analysis. Departing from established law, Wyoming courts should employ the ejusdem generis principle at this stage if it is applicable. So a reservation of "oil, gas, coal and other minerals" would include casinghead gas, but would exclude limestone. It is safe to assume that ejusdem generis will honor the parties' specific intent. The principle only includes in the grant or reservation those materials which are positively implied.

Throughout this entire tiered system, doubts should be resolved against deciding an issue at the present level of analysis. For example, courts should proceed to the next step of analysis if any reasonable question exists whether a certain substance is reserved or granted by the instrument's four corners. Likewise, if a substance arguably is not sufficiently similar to specifically named minerals in the instrument, ejusdem generis should not be invoked. Resolving doubts in this manner promotes certainty for title examiners, attorneys, litigants and courts. Only cases particularly suited for a certain level of analysis will be decided at that level.

Second, if the four corners/ejusdem generis method is inappropriate, Wyoming courts should examine extrinsic evidence to determine if and what specific intent existed regarding the material in question. Present case law adequately describes what the courts should look for, namely "the surrounding circumstances, attendant facts showing the relations of the parties, the nature and situation of the subject matter, and the apparent purpose in making the contract."[79] This would necessitate testimony by the parties, the drafters and other involved parties. Courts should identify parties' intent at this level only as a matter of law. In other words, courts at this stage should first determine whether the parties formed a cogent intent regarding the particular substance. Only if specific intent exists should the court employ this sort of extrinsic evidence.

Tiering levels of analysis should generally effectuate the parties' intent as well as promote title certainty. Instruments vary on the type and degree of articulation of intent, so under this method courts will revitalize only those intents which really existed. Certainty of title and fairness should be the methodological goals once specific intent cannot be honored. Still, any artificial assumptions that are made should be based on how the parties likely would have resolved the ambiguity; this is the fairness principle.

Third, Wyoming courts should apply a legal definition of "mineral." Cases at this stage would be decided as a matter of law, since it would

79. Dawson v. Meike, 508 P.2d 15, 18 (Wyo. 1973).

be unnecessary to use a construction aid to discern a non-existent intent. The legal definition would be employed as a last resort.

The remaining issue is how to serve certainty of title while also applying an artifical assumption that is not repugnant to past and future grantors and grantees. Professor Kuntz argues for a type of comprehensive meaning test, positing that grantors and grantees intend that each enjoy his estate to its full extent. In other words, the grantor who reserves "oil, gas and other minerals" should retain limestone because one should assume he meant to convey only the surface estate. However, this effects a bonus for the mineral owner in the same way that the surface destruction test heaps a bonus on the surface owner. Surface owners would argue in response to Kuntz that using "other minerals" as magic words should not vest the grantor/reserver with everything under the top soil. Grantors/reservers should only retain what is specifically listed. "Other minerals" should not mean every inorganic, earth-like substance. "Mineral" has a narrower meaning; one that connotes value and superiority beyond common substances below the top soil. Therefore, Professor Kuntz's approach promotes certainty of title over fairness and what most grantors and grantees would have felt about the term "minerals" had they thought about it.

Fairness can be served by employing a narrower meaning of "other minerals" than everything under the surface. Therefore, it is submitted that Wyoming courts should employ the special value test at this stage of analysis. To reiterate, minerals would be those substances with "rare or exceptional character, possessing a peculiar property giving [them] special value."[80] Of course, title examiners and litigants cannot be sure of how a court will rule on a disputed "special value" question. Yet creative courts or the legislature can develop sound standards. And this sort of artificial assumption is the most fair to all concerned. Employing this legal definition only after two other levels of analysis have failed means that this test will not be overworked, nor be overly uncertain.

Finally, improving instrument drafting practices can help alleviate the whole "other minerals" problem. Drafters, grantors and grantees should spend more time considering all substances which potentially might come in question, and accounting for them in their instruments. If a grantor wishes to reserve all substances under the surface, and the grantee accedes, the instrument should read "reserving the entire sub-surface estate," or "reserving all earthly substances with value apart from the topsoil," or something to that effect. On the other hand, grantees must learn to be wary of nebulous "other minerals" language. They should insist on only specific enumerations of minerals without open-ended "other minerals" clauses if they so desire.

CONCLUSION

The Wyoming legislature or courts should incorporate this three tiered test for interpreting "other minerals" language into Wyoming jurispru-

80. State *ex rel.* State Highway Comm'n v. Trujillo, 82 N.M. 694, 487 P.2d 122 (1971).

dence. By doing so they would promote the twin goals of title certainty and fairness, while avoiding most of the inconsistencies and questionable assumptions found in other states' jurisprudence. Likewise, grantors, grantees and drafters should exercise more care and thought in order to simply avoid "other minerals" language. All this might deprive legal commentators of a pet topic, but there are other legal quagmires to roll around in.

CHARLES A. ARMGARDT