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Natural Resources - The Wyoming Supreme Court Articulates a Test for Minerals - Miller Land and Mineral Company v. State Highway Commission of Wyoming

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NATURAL RESOURCES—The Wyoming Supreme Court Articulates a Test for Minerals. *Miller Land and Mineral Company v. State Highway Commission of Wyoming,* 757 P.2d 1001 (Wyo. 1988).

John L. Miller owned land west of Crowheart, Wyoming. At the time of his death in 1977, Miller owned both the surface and mineral rights to the real property.[1] Following Miller's death, his estate conveyed the real property involved in the dispute to Dale and Patricia Urbigkit.[2] Subsequently, the Urbigkits sold the property to the Mitchells. The deed to the property contained the following reservation:

> Reserving unto Grantor, all minerals and mineral rights existing under said above lands and premises or appurtenant thereto, together with the right to enter upon said lands to explore for and produce the same.[3]

Under the reservation, Miller's estate retained all of the mineral rights. Pursuant to an order in the decree of distribution, Miller's estate conveyed all of the mineral rights to the Miller Land and Mineral Company by an administrator's deed.[4]

When the Urbigkits still owned the property they contracted to sell gravel to the State of Wyoming for use on a highway project.[5] The Urbigkits assigned all of their rights under the contract to the Mitchells when the Mitchells bought the property.[6] The State of Wyoming agreed to pay the Mitchells approximately fourty-four cents per ton for the gravel.[7] Pursuant to the contract, the State removed approximately 105,000 tons of gravel from the Mitchell's land for use in the highway project.[8]

In October of 1985, Miller Land and Mineral Company (Miller) owner of the mineral rights, sent a letter to the State Highway Commission (State) stating that sand and gravel were minerals, and that Miller was the owner of the mineral rights. Miller further asserted that the royalties for the removal of the minerals should be paid to them. Miller sent a similar letter to the Mitchells.[9] The State replied in part that unless sand and gravel were specifically reserved to the grantor,

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1. Miller Land & Mineral Co. v. State Highway Comm'n, 757 P.2d 1001, 1002 (Wyo. 1988).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.* The materials agreement also provided for the sale of stone, sand or soil, as needed. *Id.* at 1005 n.2.
8. *Id.*
9. Brief for Appellees State of Wyoming, et. al. at 2, Miller Land & Mineral Co. v. State Highway Comm'n, 757 P.2d 1001 (Wyo. 1988) (No. 87-288).

or unless the land was subject to the Stock-Raising Homestead Act,[10] the sand and gravel were part of the surface estate.[11]

In September of 1986, Miller filed a claim against the State of Wyoming pursuant to the Wyoming Governmental Claims Act.[12] Miller and the Mitchells both moved for summary judgment. The trial court granted Mitchell's motion.[13]

Miller appealed this decision to the Wyoming Supreme Court, which affirmed summary judgment. The court held that the mineral reservation expressed an "unambiguous intent by the grantor to reserve all the minerals, whatever they may be."[14] The court further held that gravel is not a mineral and "insofar as gravel is concerned" the court adopted the "ordinary and natural meaning" test for determining what constituted a mineral.[15]

This casenote contemplates the advisability of the Wyoming Supreme Court's adoption of the "ordinary and natural meaning" test to determine whether a substance is a mineral. Specifically, it considers such an adoption in light of Wyoming's precedence of using extrinsic evidence to construe reservations of minerals, and the historical role taken by the court in Wyoming in interpreting a written instrument for the conveyance or reservation of a mineral interest.

BACKGROUND

Prior to *Miller* the Wyoming Supreme Court has interpreted reservations or conveyances of mineral interests by the use of extrinsic evidence. Three decisions in Wyoming prescribe law on the interpretation of a reservation or conveyance of a mineral interest. The first important case interpreting such a reservation was *Houghton v. Thompson.*[16] In *Houghton* the Wyoming Supreme Court decided that facts showing the relationship of the parties, the surrounding circumstances,

10. 43 U.S.C. § 299. This portion of the Stock-Raising Homestead Act provides that entries and patents issued under the provisions of the Act are subject to a mineral reservation held by the United States. The Act calls for the reservation of "coal and other minerals in the lands so entered and patented, together with the right to prospect for, mine and remove the same."

11. Brief for Appellees State of Wyoming at 2.

12. Stipulation of Facts at 6, Miller Land & Mineral Co. v. State Highway Comm'n, No. 24325 civ. (9th Dist. Wyo. 1988). The Wyoming Governmental Claims Act is codified at WYO. STAT. §§ 1-39-101 to 1-39-120 (1977). The purpose of the Act is to balance the respective equities between persons injured by the government with the taxpayers of Wyoming. The Act allows people to sue the government of the State of Wyoming.

13. *Miller,* 757 P.2d at 1001.

14. *Id.* at 1002-03.

15. *Id.* at 1004. The "ordinary and natural meaning" test that the State uses is articulated in Heinatz v. Allen, 147 Tex. at 518, 217 S.W.2d 994 at 997 (1949).

16. 57 Wyo. 196, 115 P.2d 654 (1941). This case was an appeal from the lower court's denial to order specific performance of a contract which conveyed an interest in oil and gas. The contract called for conveyance of a certain percentage of the profits earned from the production of "petroleum, oil, gas or other hydrocarbons thereon encountered". The court allowed extrinsic evidence in to interpret the contract. However, the court found that the extrinsic evidence was favorable to the defendant, therefore upheld the lower court.

and the purpose for making the contract should be considered, as well as the writing itself, in interpreting a contract for the conveyance of a mineral interest.[17]

The court affirmed this position later in *Dawson v. Meike.*[18] In *Dawson,* the Wyoming Supreme Court decided that a deed reserving "oil, gas and kindred minerals" did not include uranium. The court stated that in interpreting a mineral reservation the question to be discerned is the intent of the parties.[19] The court, however, showed their reluctance to actually admit extrinsic evidence where the terms of the deed were sufficiently clear to determine its meaning.[20]

Recently, in *Cheyenne Mining and Uranium Company v. Federal Resources Corporation,* the Wyoming Supreme Court continued its commitment to use of extrinsic evidence in the case of an ambiguous mineral conveyance.[21] The court asserted that the basic purpose of contract interpretation was to determine the intent of the parties and that extrinsic evidence may be used to determine the intent when interpreting a conveyance of a mineral interest.[22]

The Tenth Circuit has also considered cases where construction of reservations of mineral interests was the major issue. The cases break down into two broad categories, those which hold that the reservation of the mineral interest is ambiguous[23] and those which hold that the

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17. *Id.* at 658.

18. 508 P.2d 15, 18 (Wyo. 1973). In *Dawson,* plaintiffs sought to recover a share of monies from the rental of a mineral lease. The district court granted summary judgment to defendant. On appeal the Supreme Court held that the deed in question, reserving interests in "oil, gas and kindred minerals" did not reserve an interest in uranium. Therefore, the plaintiffs could not share in returns from uranium. The court quoted *Houghton* with favor, but found that in this case there was no claim that the surrounding facts had any bearing on the parties intention. Thus the court found the reservation here clear enough to convey the meaning without looking to the surrounding circumstances.

19. *Id.*

20. *Id.*

21. 694 P.2d 65 (Wyo. 1985). At issue in *Cheyenne,* was a contract for the purchase and sale of unpatented uranium mining claims. The royalty owner under this contract sued the purchaser seeking to rescind the contract or in the alternative to enforce the term of the contract. The District Court awarded $3,306 to the royalty owner. Royalty owner appealed to the Wyoming Supreme Court contending that the lower court improperly limited the award because of its interpretation of the contract. The Supreme Court reversed and remanded and said that in interpreting a conveyance of a mineral interest a court may consider extrinsic evidence.

22. *Id.* at 70.

23. The Circuit, using primarily Wyoming law, in Lazy D Grazing Association v. Terry Land and Livestock, 641 F.2d 844 (10th Cir. 1981) found that sand and gravel were not part of a reservation of "other minerals valuable as a source of petroleum". The court said that the use of the word "valuable" was ambiguous in that case as it applied to minerals, but unambiguous with respect to all other minerals. The court allowed testimony from persons who participated in the negotiation of the sale in order to learn the intent of the parties.

In United States v. 1253.14 Acres of Land, 455 F.2d 1177 (10th Cir. 1972) the 10th Circuit, applying Colorado law, found that extrinsic evidence should be used in construing a reservation of "all minerals". The court held that the reservation was inherently ambiguous and admitted a letter into evidence showing the intent of the parties.

reservation is unambiguous.[24] By ambiguous, the court means that the reservation or conveyance is subject to many different and perhaps inconsistent meanings. In contrast, when the court finds a reservation unambiguous, it means that the language is clear enough for the court to determine exactly what is reserved. When the Tenth Circuit has held reservations of minerals to be ambiguous, they have used extrinsic evidence to interpret what the parties meant to reserve.[25]

Many state cases have relied on extrinsic evidence to construe reservations of minerals.[26] One of particular note is *Puget Mill v. Duecy.*[27] In *Puget Mill,* the Supreme Court of the State of Washington concluded that the word "minerals" was not a concrete or definite term, but instead was susceptible of many different meanings. The court found that the term could, therefore be limited or extended according to what the intention of the parties was in using the term. The court called for the use of extrinsic evidence and a rule that all cases should be decided on "the language of the grant or reservation, the surrounding circumstances and the intention of the grantor if it can be ascertained."[28]

There are also many cases which hold that general reservations of minerals are not ambiguous. An interesting contrast to *Puget* is an Arizona case, *Spurlock v. Santa Fe Pacific R. Co.*[29] In *Spurlock* the Court of Appeals of Arizona took the opposite approach of the *Puget* court. The *Spurlock* court found that the best approach when dealing with mineral reservations was to treat the term "minerals" as unambiguous. The court explicitly rejected using extrinsic evidence to determine the meaning of a mineral reservation. The court's rationale was that in this manner the court could determine the extent of the reservation as a matter of law, rather than get caught up in "a complex and hopeless search for the 'true intentions' of the original contracting parties."[30] The intent of the court was to avoid the situation where similar or identical reservations produce opposite results. Finally, the court concluded that general reservations of minerals in Arizona retained "all commercially valuable substances which are distinct from the soil."[31]

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24. In Amoco Production Company v. Guild Trust, 636 F.2d 261 (10th Cir. 1980) the court affirms the District Court's conclusion that deed language reserving "coal and other minerals" is not ambiguous, and that such language reserves oil and gas. The Circuit Court goes so far as to say the if the Wyoming Supreme Court had to decide the issue they would decide the same. With this statement the court is referring specifically to the holding that oil and gas are reserved. However, the court may also be implying that the Wyoming Supreme Court would rather hold that reservations of minerals are unambiguous.

25. Lazy D Grazing Assoc. v. Terry Land and Livestock, 641 F.2d 844, 848-49 (10th Cir. 1981); United States v. 1253.14 Acres of Land, 455 F.2d 1177, 1180 (10th Cir. 1972).

26. West v. Godair 538 So. 2d 322 (La.App. 3 Cir. 1989); Continental Group Inc. v. Allison, 404 So. 2d 428 (La. 1981); Resler v. Rogers, 272 Minn. 502, 139 N.W.2d 379 (Minn. 1965); Carlson v. Minnesota Land and Colonization Co., 13 Minn. 361, 129 N.W. 768 (1911).

27. 1 Wash. 2d 421, 96 P.2d 571 (1939).

28. *Id.* at 427, 96 P.2d at 574.

29. 143 Ariz. 469, 694 P.2d 299 (1984).

30. *Id.* at 478, 694 P.2d at 309.

31. *Id.* at 479, 694 P.2d at 311.

Courts which have found the use of "minerals" in a reservation unambiguous have relied on other means to determine what "minerals" encompasses. The Supreme Court of Texas embraced a rule which it believed would give effect to the intent of the testator. The Texas Supreme Court followed the "ordinary and natural meaning" test in *Heinatz v. Allen,* and argued that in this case, the testator, who reserved the minerals was presumed to be familiar with the "ordinary and natural meaning" of the words she used to devise her mineral estate.[32] The question in *Heinatz* was whether commercial limestone was included in a devise of "mineral rights" in a plot of land. When it decided this question, the Texas Supreme Court stated that, "[W]e must look to the evidence as to the nature of the limestone, its relation to the surface of the land, its use and value, and the method and effect of its removal."[33] The court went on to say that if there was nothing that manifested an intention to use "mineral" in its scientific or technical sense, then the words "mineral rights" would be construed as to their "ordinary and natural meaning."[34] The court also made a point that it did not consider gravel or limestone to be a mineral, unless it had a special value.[35] The court stated, "In our opinion substances such as sand, gravel and limestone are not minerals within the ordinary and natural meaning of the word unless they are rare and exceptional in character or posses a peculiar property giving them special value . . . ."[36]

Later, in *Moser v. United States Steel*[37] the Supreme Court of Texas modified the "ordinary and natural meaning" test to eliminate the economic element in some instances. The court held that a severance of minerals in an "oil, gas and other minerals" clause incorporated all matter within the ordinary and natural meaning of those words whether their value or existence is known at the time of the severance.[38]

PRINCIPAL CASE

In *Miller*, the court was faced with the question of whether a reservation which reserved "minerals" included gravel.[39] The Wyoming Supreme Court focused on the proper way to interpret a written instrument which conveyed a mineral interest.[40]

The court stated that if the instrument was unambiguous the court could look exclusively to the instrument to determine the intent of the parties.[41] The court, however, also admitted that in Wyoming, even if

32. Heinatz v. Allen 147 Tex. 512, 217 S.W.2d 994 (1949).
33. *Id.* at 517, 217 S.W.2d at 995-96.
34. *Id.* at 518, 217 S.W.2d at 997.
35. *Id.*
36. *Id.*
37. 676 S.W.2d 99 (Tex. 1984).
38. *Id.* at 102.
39. *Miller,* 757 P.2d at 1001.
40. *Id.* at 1002.
41. *Id.* In addition, interpretation of an instrument to determine whether it is ambiguous is a question of law for the court to decide.

the instrument was unambiguous the court could consider extrinsic evidence if it wanted to.[42]

In contrast the court noted that when the terms of an instrument were ambiguous, courts had to resort to extrinsic evidence to determine the intent of the parties.[43] However, the court stated that courts which have found a reservation of "all minerals" inherently ambiguous have traveled down a "long and torturous" path in attempting to determine the subjective intent of the grantor. This long and tortuous path led to the use of inconsistent and confusing approaches. These approaches led to varied results and as a consequence, the term "minerals" meant whatever the particular court said it meant in each case.[44] The court also noted that, finding a reservation of "minerals" ambiguous created title uncertainty and the need to relitigate in many instances.[45]

Based on these conclusions the court decided that in order to avoid such pitfalls, they would not consider extrinsic evidence to construe the meaning of "minerals". Instead the court held that the reservation expressed a clear and unambiguous intent by the grantor to reserve all minerals "whatever they may be".[46] Therefore, in the estimation of the court, the question became whether gravel is a mineral, not whether the grantor intended to reserve gravel.[47]

The driving force behind the Wyoming Supreme Court's decision was that it did not like the results of deciding that the reservation of "all minerals" was inherently ambiguous. The court stated that holding a reservation ambiguous only led to a futile search for the intent of the parties and the need to relitigate each general reservation of minerals.[48]

The court summarily considered such tests as surface destruction, special value and manner of enjoyment.[49] It concluded that these tests were confusing and spawned inconsistent results.[50] Since this particular issue was one of first impression in the State, the court was free to adopt any test it chose. The court held that gravel was not a mineral

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42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.* at 1003.
47. *Id.*
48. *Id.* at 1002.
49. *Id.* at 1004 n.2. The surface destruction test states that a grant or reservation of a mineral should not include a substance that must be removed in a manner that will destroy the surface estate.

The special value test states that any substance that was reserved that was of value at the time of the reservation, is a mineral.

The manner of enjoyment is a test that was first articulated by Professor Kuntz, former Professor of Law at the University of Wyoming. Kuntz's theory states that the only way one can enjoy a mineral is to extract it, thus anything extractable from the ground that you can sell is a mineral under this theory.

50. *Id.* at 1003-04.

and adopted the "ordinary and natural meaning" test in the belief that a "clear rule of law" is of great importance in order to cut down on litigation of similar factual issues and to minimize title uncertainty.[51]

Justice Rooney filed a concurring opinion wherein he commended the majority for attempting to set forth a rule that would minimize litigation and title uncertainty. However, Rooney expressed his displeasure with the "ordinary and natural meaning" test. He doubted that this test would in deed accomplish the stated objectives.[52] Rooney instead advocated application of the usual rules of construction previously used by Wyoming to interpret reservations of mineral interests.[53]

Justices Thomas and Cardine filed specially concurring opinions. Justice Thomas liked the end result of finding gravel is not a mineral, however he expressed displeasure with the "ordinary and natural meaning" test. Thomas advocated an "inherent value" test whereby any mineral, that at the time of the conveyance had inherent value, would be recognized as included in a general reservation of minerals.[54]

Justice Cardine offered the approach of simply holding that gravel is not a mineral. He advised parties wishing to reserve gravel to do so in the reservation. Such a holding he argued, would be without ambiguity and easily applied.[55]

The court held that a mineral reservation "[r]eserving unto Grantor, all minerals and mineral rights existing under said . . . lands" expressed a clear and unambiguous intent by the grantor to reserve all minerals whatever they may be.[56] A majority of the court held that gravel was not a mineral, but the Court did not reach an agreement as to what test to apply. The court agreed the question was whether gravel is a mineral, not whether the grantor intended to reserve gravel.

ANALYSIS

The court felt compelled to abandon the intentions of the parties, so as to articulate a "clear rule of law."[57] The policy considerations in favor of a clear rule of law are significant in that the rule will minimize title uncertainty and continued litigation.[58] The clear rule of law set forth by the court is the "ordinary and natural meaning" test. Just as many of the other tests summarily rejected by the court[59], this test is confusing and inconsistent. Furthermore the test does not achieve

51. *Id.* at 1004.
52. *Id.* at 1005 (Rooney, J., concurring).
53. *Id.* Namely the rules concerning extrinsic evidence as set out in *Dawson, Houghton,* and *Cheyenne.*
54. *Id.* at 1007 (Thomas, J., concurring).
55. *Id.* at 1008 (Cardine, J., concurring).
56. *Miller,* 757 P.2d at 1004.
57. *Id.*
58. *Id.* at 1003-04.
59. *Id.* at 1004 n.2.

the desired ends — a clear rule of law, cutting down on the need to litigate and title uncertainty.

The court's first major objective was to establish a clear rule of law.[60] The "ordinary and natural meaning" test is anything but a clear rule of law.[61] One never knows how the ordinary and natural meaning is to be determined and at what time this determination is to be made. Within the last 100 years oil and natural gas have come to play a key role in our economy and energy needs. In 1850, oil and gas certainly were not of the import that they are now. It became ordinary and natural to think of oil and gas as minerals as they became imperative to society. When society depletes fossil fuels in the future so that they fall to minor importance, the ordinary and natural meaning of the term minerals may no longer include oil and gas. The scenario is speculation, but it points out that contrary to the objectives of the Wyoming Supreme Court, the "ordinary and natural meaning" test is not a clear rule of law. Rather, the test is time specific and nebulous.

Texas has had nothing but problems since it adopted the "ordinary and natural meaning" test. The test as set out in *Heinatz* was a multifaceted test. The test encompassed elements which took into account the economic value of the mineral and whether removal would destroy the surface.[62] The Texas Supreme Court in *Moser* cut back on the ordinary and natural meaning test by eliminating the element of value. The court stated that whether the substance was of value or not was irrelevant.[63]

The Wyoming Supreme Court adopted the test as it was first set out in *Heinatz,* thus the court adopted the complex version of the test. This test encompassed elements which the court specifically rejected. The test in *Heinatz* included an element of economic value and surface destruction, in *Miller* the Supreme court rejects both of these tests summarily.[64] The court by adopting a complicated and unworkable test is in the same position Texas was in before it modified the test. Even with modification and simplification the "ordinary and natural meaning" test will not solve any of the problems the Wyoming Supreme Court claims it will.

The court's second major objective in adopting the ordinary and natural meaning test was to minimize litigation and title uncertainty.[65] The "ordinary and natural meaning" test will do neither. *Miller* by its narrow holding may in fact lead to increased litigation, "[W]e join the vast majority of courts and hold that gravel is not a mineral, and,

60. *Id.* at 1004.

61. Lowe, *What Substances are Minerals?* 30 Rocky Mtn. Min. L. Inst. § 2.05[1] at 2-20 (1984).

62. Heinatz v. Allen 147 Tex. 512, 217 S.W. 2d 994 (1949).

63. *Moser,* 676 S.W.2d at 102.

64. *Miller,* 757 P.2d at 1004. See *supra* notes 16-48 and accompany text for an enumeration of the tests the Wyoming Supreme Court rejected.

65. *Id.*

insofar as gravel is concerned, we adopt . . . the ordinary and natural meaning test. . . ."[66] The holding reads as if the only substance the "ordinary and natural meaning" test applies to is gravel! If the court's objective truly is to minimize title uncertainty, it failed. If someone wants to know whether a reservation of minerals includes other substances such as, limestone they cannot be certain the same test will apply. Under its holding the court could articulate different tests for other substances. Thus an owner will not be certain of his status until a test for the particular substance he is interested in has been articulated. The Wyoming Supreme Court recognized the problem when it said that courts which have relied on various doctrines to determine what is a mineral "spawn confusion, inconsistent results, and litigation to resolve questions of fact".[67]

One commentator has suggested that, "The only way to be certain of title to an unnamed substance is to litigate."[68] The court, however, criticizes use of the extrinsic evidence test for increasing litigation. This argument fails in the face of the reality, that application of all existing tests may produce increased litigation.

The more persuasive argument for defining minerals, in this light, is Justice Rooney's concurring opinion in *Miller.* Rooney argued for using the extrinsic evidence test.[69]Rooney stated that the "least defective, best, and more accurate approach for such purpose is through application of the usual rules of construction and established Wyoming precedent.[70] In *Puget Mill* the Supreme Court of Washington, in rejecting a "comprehensive" test to define minerals recognized that "[t]he better rule is that each case must be decided on the language of the grant or reservation, the surrounding circumstances and the intention of the grantor if it can be ascertained."[71]

Wyoming precedent directs the court to use extrinsic evidence when construing the meaning of minerals in a reservation. Thus, the Wyoming Supreme Court need not articulate a new test at all. Extrinsic evidence would do at least as much to further the Wyoming Supreme Court's goals as the "ordinary and natural meaning" test does.

CONCLUSION

Despite precedence for using extrinsic evidence to interpret a reservation of minerals the Wyoming Supreme Court applied the "ordinary and natural meaning" test. The court felt compelled to articulate a clear rule of law to minimize title uncertainty, and cut down on the need to litigate every reservation of minerals. The "ordinary and natural

66. *Id.* at 1004 (emphasis added).
67. 757 P.2d at 1003-04.
68. Lowe, *supra* note 58.
69. *Id.*
70. *Id.* at 1005.
71. Puget Mill v. Duecy 1 Wash.2d 421, 96 P.2d 571 at 574 (1939).

meaning " test does not accomplish these objectives. The court should not have embraced such an ambiguous and inconsistent standard. The court should have admitted extrinsic evidence in this case to determine the intent of the parties when they reserved the minerals. Allowing extrinsic evidence would do much more to further the court's objective to articulate a clear rule of law and minimize litigation and title uncertainty.

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