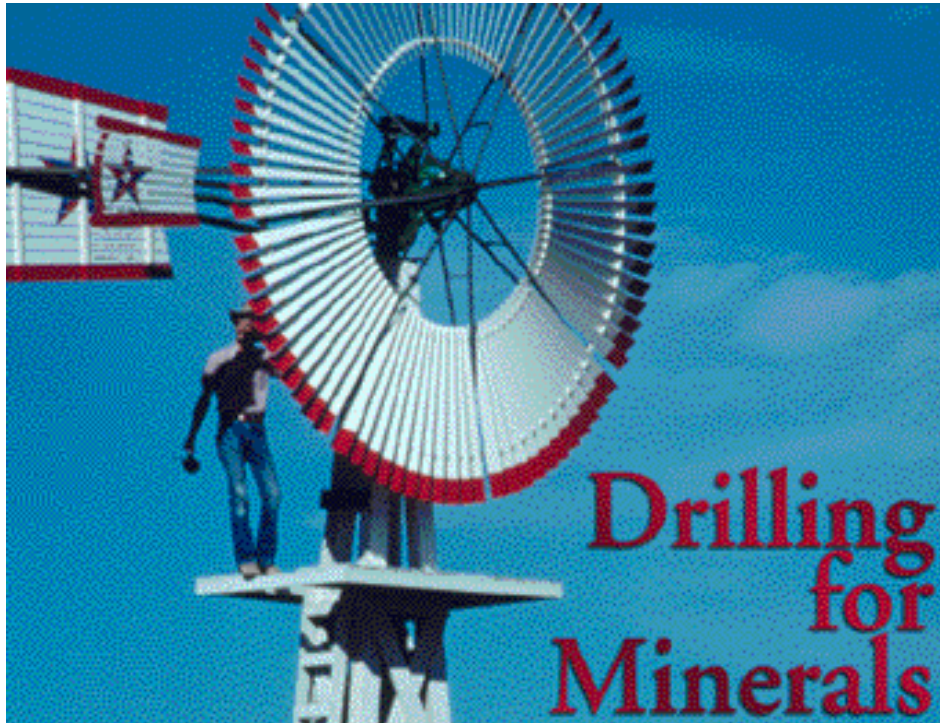


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By Judon Fambrough

Texas' legal interpretation of the term *minerals* is noteworthy.

A Fort Worth developer, Dyegard Land Partnership, prohibited "drilling for minerals of any kind" in the subdivision's deed restrictions. The landowners in the subdivision wanted to drill water wells on their lots. Dyegard claimed the wells violated the deed restrictions.

Eventually, the controversy reached the Civil Court of Appeals in Fort Worth (*Dyegard Land Partnership v. Hooper*, 39 SW 3d 300 [2001]). The appellate court affirmed the trial court and ruled that the term minerals does not include water, whether it is located on the surface or in the ground. The appellate court cited the prior case of *Fleming Foundation v. Texaco, Inc.*, 337 SW 2nd 846 (1960), to support its decision.

The Texas Supreme Court in *Moser v. U.S. Steel*, 676 SW 2nd 99 (1984), also cited Fleming when it decided what unnamed substances are included in the term minerals. The high

court held that oil, gas and uranium are minerals, but limestone, sand, surface shale, caliche, building stones, gravel and water are not. Likewise, coal, lignite and iron ore are not considered minerals when they lie on or within 200 feet of the surface and production will destroy or deplete the surface.

However, caveats apply to these opinions. First, in *Moser v. U.S. Steel* cited earlier, the high court ruled that the surface-destruction test applies to uranium for transactions involving "minerals" that occurred prior to June 8, 1983. After that, the surface-destruction test applies to coal, lignite and iron ore only.

Second, in all conveyances from the State of Texas where the minerals are reserved, the term "minerals" includes coal and lignite whether or not the recovery would destroy or deplete the surface. This rule applies primarily to what is known as Mineral Classified Land located in West Texas. The Texas Supreme Court rendered this opinion in *Schwarz v. State*, 703 SW 2nd 187 (1986).

Finally, the Moser and Fleming opinions failed to recognize two prior decisions in point. In *Union Sulphur Co. v. Texas Gulf Sulphur*, 42 SW 2nd 18 (1931), the appellate court held that sulphur was included in the term minerals. Also, in *Cowan v. Harde-man*, 316 SW 2nd 915 (1958), the court held that salt was included in the term minerals.

The case of *Anderson & Kerr Drilling Co. v. Bruhlmeier*, 136 SW 2nd 800 (1940), added an interesting twist. The reservation misspelled the word minerals as "Minerells." Here the court ruled that "Where it is perfectly plain that a word is misspelled, the courts will construe the deed according to the meaning of the word intended, rather than according to the meaning of the word actually used." ♣

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