Oil and Gas: *Ejusdem Generis*: Oklahoma's Approach to the Interpretation of "Other Minerals" After *Commissioners of Land Office v. Butler*

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NOTES

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Introduction

One of the most controversial issues plaguing the courts in energy producing states is the meaning of the word “minerals.” Whether standing alone or contained in a grant of “oil, gas and other minerals,” the term creates a great deal of interpretational difficulties. It is generally accepted that without qualifying language the meaning of “minerals” is uncertain in a mineral grant or reservation.1 Because of this uncertainty courts must employ various doctrines and tests to assist in determining the meaning of the term. Extrinsic evidence is also usually examined to determine whether a substance will be included in the mineral estate.2 The application of the varying doctrines and tests available has led to such a level of inconsistency and uncertainty that courts in the same jurisdictions, adjudicating similar grants, arrive at decisions which are seemingly irreconcilable.

Oklahoma is not immune to the problems associated with interpreting a mineral conveyance. Oklahoma’s early resolutions of such conveyances depended on a practical construction approach of ascertaining the plain intent of the grantor by the use of extrinsic evidence.3 Since then, Oklahoma has employed a variety of constructional aids to determine the meaning of ambiguous terms within mineral grants and reservations.4 The most recent Oklahoma Supreme Court decisions considering the meaning of “other minerals” have indicated the court’s willingness to rely exclusively on the doctrine of *ejusdem generis* as the preferred method of construction.

*Ejusdem generis* literally means “[o]f the same kind, class or nature.” The doctrine of *ejusdem generis* prescribes that where general words follow words of a particular and specific meaning, the general words are held to apply only to things of the same general kind or class as those specifically enumerated.5

2. *Id.* at 14.
4. Bell, *The Continuing Problem of “Other Minerals:” Oklahoma Needs a Uniform Rule of Construction*, 56 Okla. B.J. 2919 (Dec. 21, 1985) (Oklahoma has used at least four different tests: (1) practical construction, (2) practical construction coupled with *ejusdem generis*, (3) *ejusdem generis*, and (4) exceptional characteristics).
For example, gypsum, salt water, copper, silver and gold have been excluded from conveyances of oil, gas and other minerals.\(^6\)

In a recent Oklahoma Supreme Court case, *Commissioners of Land Office v. Butler ("Butler II")*,\(^7\) the court relied exclusively on *ejusdem generis* to interpret three mineral conveyances.\(^8\) This decision illustrates major problems with the doctrine of *ejusdem generis* as it is now being used by the Oklahoma courts.

This note’s analysis of *Butler II* will focus on the difficulties the case has created in three primary areas. The first difficulty was caused by the *Butler II* court’s application of *ejusdem generis*, a simple constructional aid, to over-ride seemingly clear legislative intent. A second difficulty was created when the court refused to admit relevant extrinsic evidence. Third, the court failed to explain what properties or chemical compositions of a substance determine whether the substance is similar enough to the named substances to be of like kind and character.\(^9\)

The difficulties created by the *Butler II* decision could be eliminated with the court’s adoption of either of two alternatives. First, if the court recognized the inherent ambiguity of an “other mineral” conveyance and admitted extrinsic evidence when available, the court could reach a conclusion more consistent with the intent of the contracting parties. Second, the court could avoid difficulties altogether with the adoption of a test which more nearly approximates the natural separation of the mineral from the surface estate.

An in-depth survey of the development of the “other minerals” terminology is beyond the scope of this note. A brief summary, however, of some of the reasons for the phrase and some of the problems attendant with its interpretation is critical to an understanding of *Butler II*. Additionally, some background on the development of *ejusdem generis* in Oklahoma is necessary to place *Butler II* in the proper context. Following the *Butler II* analysis, this note will examine several approaches which, if applied to the facts of *Butler II*, would prove more flexible when dealing with substances made valuable by advancing technology, yet more consistent in the separation of the mineral from the surface estate.

*The Ambiguities of “Oil, Gas, and Other Minerals”*

The meaning of the word “mineral” as it is used in a legal instrument, such as a mineral grant or lease differs from the meaning of “mineral” in

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8. Id.

its commonplace usage. A substance may be a mineral in the sense that it is a naturally occurring homogenous substance, neither vegetable nor animal, obtained from the ground for human use. This definition, however, has been recognized as overly broad within the context of a mineral conveyance. The soil itself would be included in this definition, destroying the distinction between the mineral estate and the land itself. Still, courts have resisted placing undue restrictions on the term, such as limiting it to only precious metals or metallic ores.

Generally, the issue of whether a particular substance is a mineral in the legal sense arises because the mineral estate has been severed from the surface estate, either by lease or by deed. The language of a mineral grant or reservation customarily includes “and other minerals” after specific minerals have been named. For example, many grants and reservations include the phrase such as “oil, gas and other minerals.” The trouble arises from the language “other minerals” when no language defines the term. The issue becomes whether a particular substance is a part of the surface estate or the mineral estate.

Often the dispute occurs because a surface owner attempts to prevent a mineral owner from extracting a particular substance. The surface owner may want to extract the substance directly or convey it through another grant, or the surface owner might fear damage to the surface estate if the mineral owner is allowed the right of extraction. Occasionally, a government agency grants or reserves some part of property entrusted to it; the question arises with respect to what minerals were either granted or reserved in the instrument. The dispute often ends with a court trying to establish and effectuate the intent of the parties to the original severance.

13. Id.
14. By conveyance the two estates have been separated from each other so that each is exclusive of and independent from the other.
15. Lowe, What Substances Are Minerals, 30 Rocky Mtn. Min. L. Inst. 2-1, 2-2 (1984). Professor Lowe cites three reasons drafters used the term “other minerals” in addition to specifically named substances: (1) legitimate concern that substances with substantial economic value would not be covered otherwise; (2) the inclusion of “other minerals” might have been a hedge against the discovery of other valuable substances. 3) a possible attempt at drafting a “Mother Hubbard” clause that would catch anything of value discovered in the future. Id. See also Bell, The Continuing Problem of “Other Minerals”: Oklahoma Needs a Uniform Rule of Construction, 56 Okla. B.J. 2919 (Dec. 21, 1985). “This question of whether coal is a mineral is an example of an issue circling back to its point of origin. Early oil and gas law largely developed by maintaining that the mineral reservations of ‘coal and other minerals’ included oil and gas.” Id.
16. Horse Creek Land & Mining Co. v. Midkiff, 95 S.E. 26, 27 (W. Va. 1918). The West Virginia court concluded that the term “mineral” included every inorganic substance which could be extracted from the earth for profit. See also Stowers v. Huntington Dev. & Gas Co., 72 F.2d 969 (4th Cir. 1934).
A court facing the issue must first look to the document itself, attempting to objectively ascertain the intent of the parties from the "four corners" of the instrument.¹⁸ Often an examination of the grant or reservation itself proves inconclusive because at the time the documents were drafted, the substance at issue may have been unheard of or lacking in commercial appeal.

When the parties' intent cannot be found in the documents themselves, the courts will turn to constructional aids and circumstantial tests to resolve uncertainties of language and intent.¹⁹ Oklahoma courts have resorted to constructional aids and circumstantial tests as they have struggled with the interpretation of conveyances and reservations which lack specificity.²⁰ Butler II is the latest in a series of cases which illustrate the difficulties Oklahoma has had in this area.²¹ Butler II also highlights the weaknesses of ejusdem generis as a constructional aid and illustrates how the doctrine may be misapplied to supercede legislative intent.

Ejusdem Generis in Oklahoma

Courts first applied the doctrine of ejusdem generis in Oklahoma to interpret a deed with three separate and confusing conveyance clauses.²² The doctrine's initial application, in Wolf v. Blackwell Oil & Gas Co., ²³ aided the court in determining what minerals were included in a mineral conveyance. The Wolf court applied ejusdem generis to two separate clauses in an oil and gas lease.²⁴ The court concluded that where "general words follow the enumeration of particular classes of minerals, the general words will be construed as applicable only to minerals of the same general character or class as those enumerated."²⁵

18. Id.
19. Lowe, supra note 9, at 118-19. Aids to construction of an ambiguous document include constructing the language against the grantor and ejusdem generis. Circumstantial tests include whether the community knowledge of the substance considered it a mineral at the time of the conveyance, looking to the exceptional characteristics of a substance to give it value as a mineral, the practical construction rule establishing the intent of the parties by their concomitant and subsequent actions, and considering the damage of extraction to the surface. Id. at 119. See also Reeves, supra note 10, at 453.
20. See Bell, supra note 15.
21. See Eike v. Amoco Prod. Co., 51 OKLA. B.J. 2686 (Nov. 12, 1980) (Eike I) (holding that salt water was a mineral and included in the mineral estate), opinion withdrawn, 53 OKLA. B.J. 2602 (Oct. 21, 1982), reversed without opinion, 54 OKLA. B.J. 414 (Feb. 8, 1983) (Eike II) (upholding trial court's ruling which found that salt water was a part of the surface estate and not a mineral to be included within a conveyance of "oil, gas, and other minerals"). It should be noted that both Eike I and Eike II used ejusdem generis as support for their conclusions. See also Cronkhite v. Falkenstein, 352 P.2d 396 (Okla. 1960); Panhandle Co. v. Cunningham, 495 P.2d 108 (Okla. 1971); Allen v. Farmers Union Coop. Royalty Co., 538 P.2d 204 (Okla. 1975); West v. Aetna Life Ins. Co., 536 P.2d 393 (Okla. Ct. App. 1974).
22. See West, 536 P.2d at 393, for early applications of ejusdem generis in Oklahoma.
23. 77 Okla. 1, 186 P. 484 (1920).
24. The granting clause contained language "all the oil, gas, and other minerals," and the royalty clause stated "all oil, or other minerals."
25. The court further held, "the general term 'other minerals' following the word 'oil' must be construed to be minerals of like character." Id. at 485.
Since *Wolf*, Oklahoma courts have often applied *ejusdem generis* to interpret conveyances of "oil, gas and other minerals." Several key cases subsequent to *Wolf* have firmly entrenched the doctrine of *ejusdem generis* in Oklahoma law. *Cronkhite v. Falkenstein* held that gypsum was not included in a grant of "oil, gas and other minerals." A caveat by the *Cronkhite* court, however, made it clear that *ejusdem generis* was not to be used if the result was contrary to the intent of the parties. Still more recent cases have held that copper, silver and gold were not included in a grant of "oil, gas and other minerals," nor was metallic ore or any mineral conveyed in a similar deed.

Case law involving the doctrine of *ejusdem generis* indicates that Oklahoma has followed an apparently logical progression toward the absolute adoption of the doctrine. However, the law's development on this issue has been plagued by difficulties which illustrate the infirmities associated with *ejusdem generis*. No doubt the problems with the doctrine are one reason why only a minority of states have applied it.

One difficulty with the doctrine is that the cases do not agree on whether a grant of "oil, gas and other minerals" is ambiguous. In the case of *Allen v. Farmers Union Cooperative Royalty Co.*, the court held a deed of "oil, gas and other minerals" to be ambiguous, despite an earlier case holding an identical deed unambiguous.

Another difficulty is that while the courts have ruled that "other minerals" are those produced as a constituent or component of oil and gas, the courts have provided no clear method of determining what those constituents or components might be. If the test for labelling a substance a "component" or "constituent" is whether the substance is produced from the same well bore, helium and carbon dioxide should fall within that classification because they can be produced from the same bore hole. However, saltwater, which often comes from the same borehole as well, has been ruled to be a part of the surface estate. If, on the other hand, the test is whether the substances are of similar chemical composition, then coal, which like oil and gas is a hydrocarbon, should be a component or constituent. Coal, however, has consistently been excluded from an "oil, gas and other mineral" reservation.

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27. *Id.*
28. *Id.* at 398-99.
29. *Panhandle Coop. Royalty Co.*, 495 P.2d at 108. The court specifically stated that *ejusdem generis* would not be used to ascertain the intent of the parties. However, the court recognized the doctrine as being a useful part of Oklahoma law when interpreting words of doubtful meaning. See *id.*
30. See *Allen*, 538 P.2d at 204.
32. 538 P.2d 204 (Okla. 1975).
33. *Id.* at 208.
Additional difficulties exist when attempting to define "minerals" standing alone in a grant or reservation. When interpreting deeds with the language "all mineral rights reserved," Oklahoma courts have taken diverse approaches to the issue. For example, Mack Oil Co. v. Laurence held that water was not a mineral.37 The court based its ruling on the fact that the commercial world and the mining industry do not ordinarily consider water to be a mineral.38 In addition, Holland v. Dolese39 excluded limestone from a grant of "mineral rights." The Holland court concluded that mineral rights were to be interpreted by their ordinary and natural meaning.40 A substance had to be rare and exceptional in character to be classified as a mineral.41

Oklahoma case law illustrates the inconsistent approaches taken by courts when faced with grants of "oil, gas and other minerals" or "minerals" or "all mineral rights." The Butler decisions in particular illustrate the inconsistency and difficulty inherent with the doctrine of ejusdem generis generally, and are conclusive evidence that no single approach used thus far in Oklahoma has proven satisfactory.

The Butler Decisions

The most recent Oklahoma Supreme Court case involving the doctrine of ejusdem generis is Butler II,42 which involved the supreme court's construction of patents issued by the state of Oklahoma.

Claude Butler owned land which his predecessor in interest had acquired through three separate patents from the Commissioners of the Land Office issued by public sale. The interests in land were part of a state administered trust for the benefit of Oklahoma's common schools.43 One patent reserved to the state "an undivided fifty percentum of all oil, gas and other mineral rights." The reservations of the other two patents read "an undivided fifty percentum of all oil, gas and other minerals and mineral rights."

38. Id. at 961.
40. Id. at 551.
41. Id.
42. Butler II, 753 P.2d at 1334.
43. As set out in 64 Okla. Stat. § 1 (1941), the Commissioners of the Land Office of the State of Oklahoma ("Commissioners") are charged with administering a federally created trust. This trust originated from lands and monies given to the state at the time of Oklahoma's admission to the Union. Butler 1, 53 Okla. B.J. at 133 n.3. The trust funds investments include farm mortgages within the state. Okla. Const. art. XI, § 6. In the event the mortgaged property is foreclosed, title to the land is vested in the state and the land becomes part of the corpus of the trust. The beneficiaries of the trust are the Oklahoma common schools. Id. at § 2. The Commissioners have statutory authority to sell the public land contained within the trust. 64 Okla. Stat. § 94 (1941). The terms of the sales contracts are controlled by 64 Okla. Stat. § 96 (1941), which provides in relevant part that "[t]he Commissioners . . . shall, in all cases, reserve and retain forever title to fifty (50%) per centum of all the oil, gas, and other mineral rights in and under lands so sold."
44. Butler II, 753 P.2d at 1335.
Butler brought an action to quiet title to the rights to coal on the property he had acquired. Butler claimed that the phrase "oil, gas and other minerals" had an established meaning in Oklahoma and that it included only oil, gas and minerals produced as a component or constituent thereof.44 Butler's position therefore, was that coal found on his property belonged to him; the state had not reserved coal in its "oil, gas and mineral rights" reservation.

The trial court considered the pleadings and briefs of the parties and pertinent documents. The documents included minutes of the Commissioners' meeting at which the sale of the lands in question was authorized.46 The Commissioners argued that these showed the intent of the Commissioners was to reserve fifty percent of all mineral rights, not just fifty percent of the oil, gas and like minerals.47

The trial court granted Butler summary judgment and quieted title to the coal rights in him. The court held that the language in the patents was clear and unambiguous with no distinctions between the three patents. The court determined the intent of the parties from the resolution and sale documents alone, finding no need for extrinsic evidence to determine the intent.48 The court concluded that the reservation of "other minerals" meant minerals produced as components or constituents of oil and gas.49

The Commissioners appealed, contending that the phrase "oil, gas and other minerals" was ambiguous and extrinsic evidence should therefore be admitted to show the intent of the original conveying parties.50 Additionally, the Commissioners asserted that differences in wording between the resolution to sell the property and the notice for sale,51 and the patents, supported the argument for the admission of extrinsic evidence. Finally, the Commissioners argued that the Oklahoma Constitution forbade them to diminish the corpus of the common school trust. The Commissioners argued that it was therefore beyond their authority to convey the coal rights without specific remuneration.52

The Initial Decision—Butler I

The Oklahoma Supreme Court first heard the Butler controversy in January of 1982 ("Butler I"), holding that the Commissioners were statutorily empowered to convey no more than fifty percent of all minerals in state-owned land.53

The court concluded that all of the statutory provisions dealing with the same general subject should be read together and their provisions harmoniz-

45. Id.
47. Id. at 132. The language "all mineral rights" contained in the resolution was subsequently changed, possibly from scrivener's error, to read "oil, gas, and other mineral rights" when notice of the sales was published. The patents and certificates of sale contained language similar to the notice of sale. Id.
49. Id.
50. Butler II, 753 P.2d at 1336.
51. Id.
52. Id. at 1339.
ed.\textsuperscript{54} In an analysis of the cluster of statutes under title 64, of the Oklahoma Statutes dealing with the sale of property owned by the public and administered by the Commissioners, the court held that the plain and ordinary language of the statutes required the Commissioners to reserve fifty percent of all the minerals, including coal.\textsuperscript{55} Consequently, with respect to the three patents involved in \textit{Butler}, the Commissioners were powerless to convey more than fifty percent of the coal rights to the owner’s predecessors, because they could not convey more than was statutorily authorized.\textsuperscript{56}

The court noted that the statute\textsuperscript{57} required the Commissioners to adopt a resolution authorizing the sale of any land under the statute. The court allowed the admission of extrinsic evidence, primarily the minutes of the meeting during which the resolution to sell had been passed, to conclude that the Commissioners’ original intent was to retain fifty percent of all minerals. The lower court had previously disallowed this evidence.\textsuperscript{58} The supreme court reasoned that although the intent of the Commissioners to retain a portion of all minerals was clear in the minutes of the meeting, that intent was reflected with less clarity by whomever was responsible for drafting the notice of sale.\textsuperscript{59}

Thus, without resorting to the doctrine of \textit{ejusdem generis}, \textit{Butler I} concluded that fifty percent of the coal was reserved to the state. The court held the doctrine inapplicable because its application would defeat what the court concluded was clear legislative intent. The court noted that the principle of \textit{ejusdem generis} was but one of many rules of statutory construction and it was not to be applied automatically to every problem of statutory construction.\textsuperscript{60} The court further noted that legislative intent is the cardinal rule of statutory construction and that if the rule of \textit{ejusdem generis} hindered or defeated the legislative intent or purpose, the rule was inapplicable.\textsuperscript{61} However,

\textsuperscript{54} Id. at 131.
\textsuperscript{55} Id. at 132. 64 Okla. Stat. § 82(d) (1941), provides in relevant part:

\begin{quote}
The Commissioners . . . shall reserve and retain forever the title to not less than forty (40\%) percentum of all the oil, gas, and other mineral rights in and under all lands sold; [and] are empowered to join in the execution of any oil, gas, or mineral lease on school lands, which have been sold and in which they have retained mineral interest. . . . Such reservation is to be set out and included in all Certificates of Purchase and Patents issued to cover lands hereafter sold by the Commissioners of the Land Office.
\end{quote}

Section 96 requires the Commissioners, in all cases, to reserve and retain forever title to fifty (50\%) percentum of “oil, gas, and other mineral rights in and under the land so sold.”

The \textit{Butler} court cited State v. Phillips Petroleum Co., 258 P.2d 1193 (Okla. 1953), in which it was held that sections 82(d) and 96, even though somewhat contradictory, should both be given effect. Thus, the fifty percent reservation requirement of section 96 controls. \textit{Butler II}, 753 P.2d at 1341.

\textsuperscript{56} Id. at 132.
\textsuperscript{57} 64 Okla. Stat. § 82 (1941).
\textsuperscript{58} See supra note 45 and accompanying text.
\textsuperscript{59} Butler I, 53 Okla. B.J. at 133.
\textsuperscript{60} Id. at 132.
\textsuperscript{61} Id. It is generally held that public grants receive a construction which supports the claim of the government. Conversely, private grants are frequently construed most strongly against the grantor. Reeves, supra note 10, at 441.
the court limited its conclusion by holding that *ejusdem generis* was inapplicable only in situations involving similar conveyances by the Commissioners.62

Justice Hargrave, in his concurring opinion, concluded that it was unfortunate that the majority apparently meant for private parties to depend solely on *ejusdem generis* as the means by which an ambiguous grant would be construed, while the state was excepted from the rule. He failed to see any reasons why extrinsic evidence should not be allowed to assist in resolving all ambiguities.63

Justice Hargrave emphasized that *ejusdem generis* was a rule of construction—not of property.64 He cited *Cronkhite v. Falkenstein*,65 for the authority that *ejusdem generis* should be utilized in conjunction with parol evidence. *Cronkhite*, as noted by Justice Hargrave, also stands for the conclusion that *ejusdem generis* is not to be used "where the result would be contrary to the plain and clear intention of the parties."66

**The Oklahoma Supreme Court and Butler II**

The supreme court granted a rehearing on the Butler controversy and in May, 1988, withdrew its previous opinion. In a 5-4 decision, the court completely reversed its earlier opinion to hold that the phrase "oil, gas and other minerals," as used in the patents, included only oil, gas and those minerals produced as components and constituents thereof; thus, coal would not be included in the reservation.67

Additionally, the court rejected the Commissioners' argument that the minutes of the meeting, recording the Commissioners' resolution to sell the property, should be admitted to show their clear intent to reserve fifty percent of all the minerals.68 Moreover, by noting that the land was sold for more than its appraised value, the court summarily set aside the Commissioners' argument that they were forbidden by the Constitution to reduce the corpus of the trust.69 The Commissioners had argued the corpus was diminished because the state received no direct remuneration for the coal rights.70

Justice Opala, author of the 5-4 majority opinion in *Butler I*, dissented in *Butler II*. In the dissent, he essentially restated the rationale of *Butler I*.71 Justice Wilson, in a separate dissenting opinion, raised the interesting theory

63. Id. at 134.
64. Id. at 136. A rule of construction would aid the court in determining the intent of the parties to the conveyance. A rule of law would dictate that the court's decision would be made according to established legal principles, allowing for no discretion in that decision. See BLACK'S LAW DICTIONARY 692 (5th ed. 1979).
66. Id. at 137 citing *Cronkhite v. Falkenstein*, 352 P.2d 396, 399 (Okla. 1960).
68. Id. at 1339.
69. Id.
70. Id. In order for the corpus of the trust to be diminished, the land would have had to sell for less than its appraised value.
71. Id. at 1340.
that the state conveyed fifty percent of only oil, gas and their constituents and components in the original patents, but did not convey any interest in any other minerals. Justice Wilson concluded that by reading the language of the granting clause, by considering the constitutional mandate, and by taking notice of legislative enactments consistent with the trust mandate, Butler's predecessor in interest was not offered nor did he or Butler ever receive, any interest whatsoever in coal. Consequently, according to Justice Wilson, the majority's view resulted in the constitutionally forbidden reduction of the trust corpus.  

The Problems with Butler  

The Butler decisions illustrate the problems generated by relying on ejusdem generis as the only method of construction used with respect to an "oil, gas and other minerals" grant or reservation. The problems are three-fold with the first being the court's use of ejusdem generis in the fact situation peculiar to Butler. The remaining two problems illustrate the difficulties with using ejusdem generis generally.

Ejusdem Generis Overriding Legislative Intent  

The first problem raised by Butler II is the court's conclusion that the phrase "oil, gas and other minerals" is unambiguous. This virtually establishes the meaning of the phrase as a rule of law in Oklahoma. The basis for the conclusions expressed in Butler I was the court's refusal to apply ejusdem generis if it would hinder or defeat legislative intent. However, Butler II has moved Oklahoma away from the mainstream of judicial thought by strictly applying ejusdem generis even if it defeats clear legislative intent.

A court's function as an interpretive body is to construe legislative enactments in such a way that the intent of the legislature is carried out. In recognition of this responsibility, numerous courts have applied the principle that, despite the existence of literal language that might dictate a contrary result, a court should interpret a statute in such a way as to effectuate clear legislative intent. Oklahoma case law recognizes this principle as well.

72. Id. at 1348. Justice Wilson's argument would have been far stronger if the statutes from which the authority for the original patents came were couched in terms of a fifty percent grant rather than a reservation of all minerals to the state. If termed a grant, by using ejusdem generis it could be argued that all the state intended to convey was fifty percent of the oil, gas, and substances of like or similar characteristics. Thus, in the same ejusdem generis analysis as Butler II, a court would hold that all the grantee received was a fifty percent interest in oil, gas, and those substances determined to be within the terminology of "other minerals." The state would retain all other mineral interests.

73. Id. at 1337.

74. See Annotation, Supreme Court's Application of the Rules of Ejusdem Generis and Noscitur a Sociis, 46 L.Ed. 2d 879 (1977).

75. United States v. Oates, 560 F.2d 45, 75 (2d Cir. 1977).


77. Butler II, 753 P.2d at 1341.
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Legislative intent is of critical importance to public interest. This intent is suggested by a careful reading of statutes governing transactions such as the one between the Commissioners of the Land Office and Butler's predecessor in interest. The titles to these statutes and the many references to mineral rights in general strongly suggest a legislative design to require the state to retain one half of all minerals in lands alienated through the Office of the Land Commission. This strengthens the argument that the Commissioners had no authority to convey more than fifty percent of all the minerals in the lands covered by the patents.

Additionally, a court's construction of a statute must be guided by the charge of advancing beneficial purposes desired by the legislature. The legislature, by requiring a reservation, intended to preserve valuable mineral interests in state owned lands. This purpose does not seem well served unless the statutorily mandated reservation includes all minerals retained in the subsurface estate. 78

_Ejusdem generis_ is simply a rule of construction and should never be applied if the grantor's intent would be altered or destroyed by its application. 79 This is particularly valid if the application of the doctrine overrides legislative design. 80 The majority in _Butler II_ failed to keep the doctrine in the proper perspective with respect to statutory and document construction.

The Commissioners of the Land Office have executed 11,000 patents, covering roughly 2,000,000 acres. 81 All contain reservation language similar to the _Butler_ document. Each time there is a question regarding a substance the ownership of which has not previously been determined, the issues in _Butler_ will rise again.

_The Court's Refusal to Allow Extrinsic Evidence_

The second problem with _Butler II_ is the court's seeming insensitivity to the reasoning of its own previous holdings, specifically _Cronkhite v. Falkenstein_. _Cronkhite_ held that parol evidence should be admitted when using _ejusdem generis_ to construct mineral conveyances. 82

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78. _Id._ at 1342.
79. _Cronkhite_, 352 P.2d at 399.
80. The logic behind restricting _ejusdem generis_ to the status of a constructional aid was eloquently addressed by the Utah Supreme Court in _Nephi Plaster & Mfg. Co. v. Juab County_, 33 Utah 114, 93 P. 53, 56 (1907):
   The doctrine of _ejusdem generis_ is, however, only a rule of construction, and, like all rules, is resorted to only as an aid to the courts in arriving at the true intent of the lawmaker. These rules must not be applied so as to make them masters, since they are servants merely. No rules of construction, however, can be permitted to override the fundamental principle underlying all rules which requires that all words contained within a statute [or instrument] must, if possible, be given their ordinary meaning, and that the intention of the lawmaker must be garnered from the language employed in the light of the context and of the subject-matter to which it is applied, and when such intention is clear it must prevail notwithstanding some rules to the contrary.
81. _Butler I_, 53 Okla. B.J. at 143.
82. _Cronkhite_, 352 P.2d at 399.
Generally, in other jurisdictions, coal is not included in a grant or reservation of "oil, gas and other minerals," absent evidence of contrary intent. In Butler II, the meeting minutes, statutes and notices pertaining to the patents and reservations indicated that fifty percent of all the minerals were intended to be reserved by the state. However, the court applied a strict ejusdem generis analysis. The court disregarded intent of the grantor even though evidence of that intent was within reach of the court through testimony, documents and other evidence.

Characteristics to Consider in Determining "Other Minerals"

Perhaps the most problematic aspect of Butler II is the confusion that will undoubtedly occur concerning what, exactly, are substances which the court would include in an "other mineral" portion of a grant. Butler II concludes that chemical traits are not the criteria by which the determination can be made. Instead, the court emphasized traits which a person of common understanding would find similar or dissimilar. How the court expects these traits to be determined is not clear.

On one hand, Butler II stands for the proposition that "oil, gas and other minerals" has a definite meaning in Oklahoma. Extrinsic evidence is not necessary with regard to the parties’ intent because an instrument with such language is not ambiguous—it simply does not include coal. Conversely, the court did not rule out the possibility of resorting to extrinsic evidence to establish what are, within the understanding of the common person, substances of like nature with oil and gas. The decision is also somewhat questionable because often parties to a mineral conveyance are far more knowledgable about the issue than a person of common understanding.

The Butler II court, by failing to deal with the issue of "other minerals" with more specificity, did nothing to reduce the litigious qualities of the terminology. Moreover, the court failed to clarify a standard by which future controversies, concerning substances not previously the focus of litigation, can be settled.

What is needed to correct the problems presented in Butler II is an approach which takes a more rational and consistent view with respect to the original intent of the parties to the conveyance. What is needed is a determination method which allows for a more natural separation between the surface and mineral estates.

Solutions

Extrinsic Evidence

Several approaches readily stand out as solutions to the difficulties presented by Butler II. First, regardless of the context in which "other mineral" terminology arises, courts should resort to extrinsic evidence if available to determine how the phrase should be defined. Only in the event extrinsic evidence

is not within reach of the court should a court resort to another method or aid to construction.

The application of *ejusdem generis* in a situation such as *Butler II*, in which extrinsic evidence was available to the court for determining the intent of the granting party, seemingly substitutes the convenience of the court for the parties' interest in obtaining a true and exact determination. Of course, with much of the extrinsic evidence available in *Butler II* being state statutes, minutes of a state agency, and testimony of state officials, its exclusion raises another issue. When a reasonable interpretation of outside evidence reveals legislative intent contrary to the result obtained by the use of a constructional aid, the legislative intent must prevail.

*The Separation of the Surface and the Mineral Estates*

The second approach which should be used in the event the actual intent of the parties to a conveyance is not ascertainable separates the surface from the mineral estate in such a way that all substances with value, or which become valuable through advancing technology, belong to the mineral estate. This would be true regardless of whether the minerals' presence is known at the time of the conveyance. This, of course, does not include the soil itself, which constitutes an integral part of the surface estate.

Several methods would achieve the purpose of separating the surface estate from the mineral estate. These methods would broaden the definition of minerals so that new substances, made economically attractive by advancing technology, will be easily accommodated without litigation.

*The General Intent Test*

The first method for separating the surface estate, the "general intent" test, advocates the separation of the surface estate completely from the mineral estate if there is no qualifying language in the mineral conveyance. The "general intent" test would regard a mineral conveyance which does not contain language specifically including or excluding a substance, as an attempt by the parties to the conveyance to separate the entire mineral estate from the surface estate.14

84. The "general intent" test was first advocated in Kuntz, *The Law Relating to Oil and Gas in Wyoming*, 3 Wyo. L.J. 107 (Spr. 1949), reprinted in, 34 Okla. L. Rev. 28 (1981). Professor Kuntz addresses the issue as follows:

The contradiction and conflict . . . arise from the very fact that the courts are seeking to give effect to an intention to include or exclude a specific substance when, as a matter of fact, the parties had nothing specific in mind on the matter at all. The intention sought should be the general intent rather than any supposed but unexpressed specific intent . . .

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 representative modes of enjoyment must be considered in arriving at the proper subject matter for each estate.
This test recognizes and validates the manner of enjoyment of the mineral estate through the extraction of valuable substances. Likewise, the test accommodates the manner of enjoyment of the surface estate through the retention of substances necessary for surface use. Absent language showing a specific intent to the contrary, this test would separate the surface estate from the mineral estate in such a way that the enjoyment of each would be in distinctly different and virtually exclusive manners. 85

The Western Nuclear Test

The second method for separating the surface estate from the mineral estate has its roots in case law and is similar to the "general intent" test. It arose coincidentally, in a setting similar to the situation in Butler, and many of the same issues were addressed. Therefore, it is particularly relevant to a discussion of Butler.

This method arose in Watt v. Western Nuclear, Inc. 86 The United States Supreme Court was charged with interpreting an "all coal and minerals" reservation in lands patented under the Stock-Raising Homestead Act of 1916 ("SRHA"). 87 In Western Nuclear, a mining company acquired a fee interest through its predecessor in interest, in land covered by a patent under the SRHA. 88 The mining company was engaged in mining and milling uranium ore in the same area in which it had the SRHA patent. The purpose of the company obtaining the SRHA lands was to take advantage of a local source of gravel for use in its mining operations and to pave the roads of a nearby company town. 89

The company was notified by the Bureau of Land Management ("BLM") that its removal of gravel constituted a trespass in violation of a Department of Interior regulation. 90 Western Nuclear filed suit in United States District Court seeking review of the decision made by the BLM. 91

Applying this intention, 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, and that nothing presently or prospectively valuable as extracted substances would be intended to be excluded from the mineral estate.

Id. at 33-34.

There have been recent attempts to adopt Professor Kuntz's test in Texas. See Note, "Oil, Gas, and Other Minerals" Clauses in Texas: Who's on First?, 41 Sw. L.J. 695 (1987); Note, Reformation of the "Other Mineral Provision" in Moser v. United States Steel Corporation, 10 T. Marshall L. Rev. 122 (1985).

85. Id.
87. Id.
88. Id. at 39.
89. Id.
90. Id. at 40. This regulation provides that "[T]he extraction, severance, injury, or removal of timber or mineral materials from public lands under jurisdictions of the Department of the Interior, except where authorized by law and the regulations of the Department, is an act of trespass." 43 CFR § 9239.0-7 (1982).
91. 462 U.S. at 41.
The District Court upheld the BLM decision, finding gravel to be a mineral within the SRHA reservations. Western Nuclear appealed and the Tenth Circuit subsequently reversed, finding that gravel was not a mineral. The case was heard by the Supreme Court in January, 1983.

The Supreme Court formulated a four-part test in concluding that gravel was part of the SRHA mineral reservation. The Court held that the mineral reservation includes substances (1) that are mineral in character (that is, inorganic), (2) that can be removed from the soil, (3) that can be used for commercial purposes and (4) that were not intended to be included in the surface estate. In its conclusion, the Court buttressed its opinion by citing "the established rule that land grants are construed favorably to the Government, that nothing passes except what is conveyed in clear language, and that if there are doubts they are resolved for the Government, not against it."

Coal is inorganic, it is removed from the soil for commercial purposes, and there is no reason for it to be included in the surface estate. Thus, under the Western Nuclear test, coal would ordinarily be included in the mineral estate. This is a better result than that reached in Butler II because it more nearly approximates the natural separation between the surface and mineral estates. The Western Nuclear test more logically conforms to the generally accepted definition of the term mineral. Moreover, absent evidence of the parties' specific intent, the Western Nuclear test remains faithful to the complete separation of the two estates.

Conclusion

Both the "general intent" test and the Western Nuclear test accomplish four goals the doctrine of ejusdem generis is not capable of resolving. First, the surface estate is separated from the mineral estate in a manner in keeping with the ordinary and common definitions of the two estates. Second, both tests allow for a broad definition of minerals, flexible enough to accommodate new substances made economically and commercially viable through newer technology. Third, the litigious qualities of the language "other minerals" would be removed, thereby stabilizing an otherwise troublesome area of mineral and title law. Fourth, the problems presented by Butler II would easily be resolved in a manner more consistent with legislative intent and public policy.

92. Id. at 42.
93. Id. at 36.
94. Id. at 53. For an Oklahoma application of the Western Nuclear Inc. test, see Millsap v. Andrus, 717 F.2d 1326 (10th Cir. 1983). The issue before the court was a mineral reservation of "oil, gas, coal and other minerals" on the Osage Indian Reservation in Oklahoma. The court held that there was nothing to indicate a mineral reservation should be limited. The court held that limestone and dolomite were inorganic substances which could be removed from the soil and used for commercial purposes, and there was no reason to suppose they were intended to be included within the surface estate. Id. at 1329.
95. 462 U.S. at 59.
The Butler II court concluded that the terminology “oil, gas and other minerals” is not ambiguous in Oklahoma, it has a definite meaning. Then the court applied ejusdem generis, a constructional aid necessary only to construe ambiguities, to determine the meaning of the phrase. Additionally, the court ruled out the use of extrinsic evidence, even if indicative of the grantor’s true intent. Then the court set the stage for admitting extrinsic evidence to determine what qualities make a substance of similar nature to the specifically named substances, thus including it in the “other mineral” portion of a mineral conveyance.

Butler II stands for the conclusion that coal is not to be included in an “oil, gas and other mineral” conveyance under any circumstances. Aside from that, nothing in the court’s opinion offers substance to the indefinite nature of components or constituents of the specific words preceding “other minerals.”

Far more important to the public interest than the vagueness of the Butler II court, however, is the court’s cavalier treatment of seemingly clear legislative purpose. The Butler II court failed in its duty to uphold statutes in a manner consistent with the intentions of the legislature. Moreover, the court’s holding severely damaged the state’s ability to care for the public trust. This interference with the public interest surely was not contemplated by the drafters of the supervisory legislation.

Ejusdem generis, in the majority of jurisdictions, is merely one constructional aid among many. In Oklahoma, however, ejusdem generis apparently exists for the convenience of the court, not as an aid to ascertain contractual intent. The Butler II court has elevated the doctrine to the lofty status of a rule of law without public or legislative mandate to do so.

There are solutions to the dilemma of an ambiguous mineral conveyance which will eliminate all of the ills so evident in Butler II. Perhaps, as more far-sighted jurisdictions adopt tests which are more consistent, fair, flexible, and protective of the public interests, the Oklahoma courts will abandon ejusdem generis in the interest of good law.

It is far more likely, however, that any change in Oklahoma’s interpretation of mineral conveyances, will come by legislative fiat. Perhaps, with the damage the Butler II court has done to the corpus of the common school trust, the motivation for change finally exists.

Don Strong