North Dakota Law Review

Volume 52 | Number 4 Article 1

1975

And Other Minerals as Interpreted by the North Dakota Supreme Court

Robert E. Beck

"AND OTHER MINERALS" AS INTERPRETED BY THE NORTH DAKOTA SUPREME COURT

ROBERT E. BECK*

Since *Adams County v. Smith*[1] was decided in 1946, the North Dakota Supreme Court has dealt with the phrase "and other minerals" or a variant thereof in six different cases.[2] This article explores the court's approach to the phrase in *Adams County* and the six subsequent opinions in an effort to determine what the phrase means, with a special focus on whether or not and when coal is included. Only five of the seven cases involved coal;[3] another involved uranium,[4] and the remaining case involved gravel.[5] Under some circumstances coal has been included; under other circumstances coal has not been included. What makes the difference?

Three of the cases interpret the phrase as statutory language;[6] two of the cases involve the language as part of a "reservation or exception;"[7] one of the cases involves the language in a grant;[8] and in one it is contained in a lease.[9] The immediate question arises whether these contexts make any difference in interpreting the language and whether they ought to.

---

* Professor of Law, University of North Dakota, School of Law; LL.B., 1960, University of Minnesota; LL.M., 1966, New York University.

1. 74 N.D. 621, 23 N.W.2d 873 (1946).

2. MacMaster v. Onstad, 86 N.W.2d 56 (N.D. 1957); Salzseider v. Brunsdale, 94 N.W.2d 502 (N.D. 1959); Abbey v. State, 202 N.W.2d 844 (N.D. 1972); Christman v. Emineth, 212 N.W.2d 343 (N.D. 1973); Olson v. Dillerud, 226 N.W.2d 363 (N.D. 1975); Reiss v. Rummel, 232 N.W.2d 40 (N.D. 1975).

Other variations can be found in North Dakota cases that did not involve any issue as to the interpretation of the language. *See, e.g.*, Kadrmas v. Sauvageau, 188 N.W.2d 753, 754 (N.D. 1971) ("All oil, gas, uranium and all other minerals"); Convis v. State, 104 N.W.2d 1, 3 (N.D. 1960) ("all coal, oil, natural gas and other minerals").

While not all cases involving this phrase involve a mineral severance or potential severance, many cases do. For a recent discussion of North Dakota severed mineral interests, *see* Fleck, *Severed Mineral Interests*, 51 N.D.L. REV. 369 (1974).

3. Adams County v. Smith, 74 N.D. 621, 23 N.W.2d 873 (1946); Abbey v. State, 202 N.W.2d 844 (N.D. 1972); Christman v. Emineth, 212 N.W.2d 343 (N.D. 1973); Olson v. Dillerud, 226 N.W.2d 363 (N.D. 1975); Reiss v. Rummel, 232 N.W.2d 40 (N.D. 1975).

4. MacMaster v. Onstad, 86 N.W.2d 56 (N.D. 1957).

5. Salzseider v. Brunsdale, 94 N.W.2d 502 (N.D. 1959).

6. Adams County v. Smith, 74 N.D. 621, 23 N.W.2d 873 (1946); Salzseider v. Brunsdale, 94 N.W.2d 502 (N.D. 1959); Abbey v. State, 202 N.W.2d 844 (N.D. 1972).

7. Christman v. Emineth, 212 N.W.2d 343 (N.D. 1973); Olson v. Dillerud, 226 N.W.2d 363 (N.D. 1975).

8. Reiss v. Rummel, 232 N.W.2d 40 (N.D. 1975).

9. MacMaster v. Onstad, 86 N.W.2d 56 (N.D. 1957).

I. THE CASES IN CHRONOLOGICAL ORDER

A. *Adams County v. Smith.*[10]

In 1941, the North Dakota Legislative Assembly passed a law stating in part that in county land transfers "there shall be reserved to such county transferring such land fifty percent (50%) of all oil, natural gas, and/or mineral which may be found on or underlying such land."[11] The scope of a land transfer by a county subsequent to this statute was at issue in this case. Although the court concluded that the type of land transfer involved the case, a tax deed, is not subject to this statute, it also decided the issue whether "mineral" included coal. Had the court asked and answered first the question whether the statute applied to the type of transfer involved, it would not have reached the coal issue; instead it asked first whether coal was included and preceeded to the question of applicability of the statute only after determining that coal was included.

What is learned from the court's opinion about the meaning of "mineral" in this statute? The court stated that the term is not susceptible of a rigid definition but rather its definition depends upon the intent with which it is used. The court then pointed out that the North Dakota Legislative Assembly had previously indicated that it considered coal to be a mineral and noted that the assembly

---

10. 74 N.D. 621, 23 N.W.2d 873 (1946).

11. 1941 N.D. Sess. Laws ch. 136, § 1. This language was repealed by 1951 N.D. Sess. Laws ch. 112, § 1. The history of the section follows.
The first indication of a mineral reservation by a county upon transfer of county land occurs in 1937 N.D. Sess. Laws ch. 123, § 1 when the board of county commissioners is given authority so that it "may on sale of any land reserve to the County all or any part of the oil, gas, coal and/or mineral rights therein." Then on March 14, 1941, the Act involved in the *Adams County* case became effective which required the reservation of fifty percent of "all oil, natural gas, and/or mineral which may be found on or underlying such land." [Apparently the "s" was inadvertently omitted after the word "mineral."] Note that coal is not mentioned specifically although it had been in the 1937 law. Apparently this law was to be read in conjunction with the 1937 law in such a way that the board of county commissioners could reserve all of the mineral rights but had to reserve at least fifty percent. That is the interpretation codified into the 1943 Code. Furthermore, the singular "mineral" is turned into the plural "minerals." N.D. REV. CODE § 11-2704 (1943). Then in 1946 came the *Adams County* case. Effective February 26, 1949, the legislative assembly approved a law allowing the county to make a transfer to the United States, its agencies or agents free of the mineral reservation. Power was also given to release previous reservations. These provisions remain codified as N.D. CENT. CODE §§ 11-27-04.1 and 11-27-04.2 (1960). Then in 1951 the basic 1941 law was repealed by means of a Legislative Research Committee bill. 1951 N.D. Sess. Laws ch. 112, § 1. The only comment in the LRC report about the bill is as follows:

> This section has been held to be ineffective on purely technical grounds because of conflict with other sections. Such difficulty could be resolved and the practical consideration as to whether the reservation should be made is of more importance.

Rep. N.D. Leg. Res. Comm. 22 (1951). The conflict referred to was with the specific code provisions on how tax forfeited lands were to be disposed of. The Court in *Adams County* and subsequent cases held that this reservation provision did not apply to tax forfeited lands. *See* Kershaw v. Burleigh County, 77 N.D. 932, 47 N.W.2d 132 (1951); Kopplin v. Burleigh County, 77 N.D. 942, 47 N.W.2d 137 (1951); State v. California Co., 56 N.W.2d 762 (N.D. 1953); Steen v. Fay, 66 N.W.2d 528 (N.D. 1954). However, the statute could have had force and effect as to disposition of county lands other than those acquired through tax forfeiture.

was aware of that at the time it passed the 1941 law. After next noting that all cases that have had to decide whether coal is a mineral have held it to be a mineral, the court concluded that coal is included within the term mineral as used in this statute.

It is of importance that the court did not rely exclusively on the mere fact that coal commonly is considered a mineral. It specifically referred to the legislative assembly's earlier use of mineral to include coal and its contemporaneous knowledge of this earlier use as significant. Yet while it seemed to recognize the point that "mineral" may or may not include coal depending on legislative intent, a reader of the case gets a strong impression that the court did not apply that approach. Rather it appears to have applied a more simplistic approach. Coal is a mineral. This statutes applies to minerals. Therefore this statute applies to coal.

Perhaps interpretations that favor public ownership of an important resource should be favored policy; in that context this decision could be supported. It is difficult to support on the limited analysis that the court gave to the question.

B. *Mac Master v. Onstad*[12]

Mac Master involved the interpretation of a lease executed in 1956 containing the following language, "oil, gas, casinghead gas, casinghead gasoline, and all other minerals."[13] The specific question was whether or not uranium was included within "other minerals." The trial court held it was not included on the basis of *ejusdem generis*, that this was an oil and gas lease and the phrase "other minerals" should be interpreted in that context and uranium had nothing to do with oil and gas. While affirming the conclusion that uranium was not included, the North Dakota Supreme Court rejected the trial court's *ejusdem generis* reasoning and supported the conclusion instead on the basis of the 1955 law which stated that a lease did not convey "gravel, coal, clay or uranium unless the intent to convey such interest is specifically and separately set forth in the instrument."[14] The court found that no intent to convey uranium had been specifically and separately set forth.

---

12. 86 N.W.2d 36 (N.D. 1957).
13. *Id.* at 39.
14. 1955 N.D. Sess. Laws c. 235, § 1. The full text of the 1955 law was as follows:
    No lease or conveyance of mineral rights or royalties separate from the surface rights in real property in this state shall be construed to grant or convey to the grantee thereof any interest in and to any gravel, coal, clay or uranium unless the intent to convey such interest is specifically and separately set forth in the instrument of lease or conveyance.
Id. It was codified as N.D. REV. CODE § 47-1024 (1957 Supp.). In 1957 a law was passed that dealt separately with leases and conveyances. The portion dealing with leases read as follows:
    No lease of mineral rights in this state shall be construed as passing any interest to any minerals except those minerals specifically included and set

The question arises whether this statutory provision could ever be satisfied without the word "coal" or "uranium" or "gravel" or "clay," or a recognized synonym, actually appearing somewhere in the document. *Mac Master* appears to say that such specification is required.

What then do we learn about coal as an "other mineral" from this uranium lease case? The 1955 law, which became effective July 1, 1955, applied equally to coal and there appears to be no reason why a court should distinguish coal from uranium for this purpose. Thus, leases executed after July 1, 1955, must refer to "coal" or some recognized equivalent, such as perhaps "lignite," in order to transfer any interest in coal.

Ejusdem generis is rejected on the facts of this case as a concept for interpreting "other minerals." It appears necessary to emphasize the facts of this case because of the court's analysis of the concept. The trial judge had held that the lease included only those minerals that could be produced in connection with and as an incident to the production of oil and gas through means of a well.

A primary reason for rejecting this interpretation, even though the document was titled, "Oil and Gas Lease," appears to be that the lease specifically contemplated the production of sulphur by specifying a 50 cent per ton royalty and the production of other minerals by specifying a 1/10th royalty.[15] Not all sulphur is produced from wells. The royalty on oil and gas was 12½ percent. In further support of its decision to reject the *ejusdem generis* approach, the court stated:

> forth by name in the lease. For the purposes of this paragraph any mineral so named shall be deemed to include the by-products of such mineral and in the case of oil and gas, all associated hydrocarbons produced in a liquid or gaseous form so named shall be deemed to be included in the mineral named. The use of the words "all other minerals" or similar words of an all-inclusive nature in any lease shall not be construed as leasing any minerals except those minerals or their by products set forth in the lease.

1957 N.D. Sess. Laws ch. 245, § 1. The law remained in that form until 1969 when it was amended to read as follows:

> No lease of mineral rights in this state shall be construed as passing any interest to any minerals except those minerals specifically included and set forth by name in the lease. For the purposes of this paragraph the naming of either a specific metalliferous element, and if so stated in lease, shall be deemed to include all of its compounds and byproducts, and in the case of oil and gas, all associated hydrocarbons produced in a liquid or gaseous form so named shall be deemed to be included in the mineral named. The use of the words "all other minerals" or similar words of an all-inclusive nature in any lease shall not be construed as leasing any minerals except those minerals specifically named in the lease and their compounds and byproducts.

1969 Sess. Laws ch. 403, § 1. It remains codified as N.D. CENT. CODE § 47-10-24 (Supp. 1975).

15. The clause read as follows:

> 4th. To pay or deliver to lessor, on all other minerals mined and marketed, one-tenth either in kind or value at the well *or mine, at* lessee's election, except that on sulphur the royalty shall be fifty cents (50 cents) per long ton.

86 N.W.2d at 40, (Emphasis added). The court said this paragraph was "of most important significance." *Id.* at 41.

> We do think there is significance in the fact the lease authorized the lessee to produce not simply oil and gas and other minerals but oil and gas and *all* other minerals. No word is more inclusive than "all". . . .[16]

This meant *all* other minerals, not just those associated with oil and gas in some way. What the court was purporting to do was to find the intent of the parties. What did they intend when they used the phrase "other minerals?" Thus just as the court recognized legislative intent as crucial to interpreting the phrase in the *Adams County* case, so here it recognized the intent of the parties to the lease as crucial to its interpretation. This is consistent with the observation in *Adams County* that the word mineral does not have a fixed meaning. In this case the inclusion of sulphur and the use of the word "all" in the context of "all other minerals" played a key role in establishing intent.

The court also rejected "hydrocarbons" as a class for applying *ejusdem generis* since sulfur was specifically mentioned in the lease and is not a hydrocarbon. But the court made it clear for the first time that the word mineral is not to be interpreted so broadly as to include everything that is not animal or vegetable on the basis of the common animal-vegetable-mineral classification. The court cited favorably cases where gravel, limestone, and sand were held not within the word mineral either because they were "a part of the soil"[17] or because mining of them would "destroy the surface."[18]

The court concluded:

> It is thus clear that it would be not only impractical, but impossible to attempt to catalogue all the minerals which are, and which are not, included in the grant in the lease under consideration. Decision as to whether any specific mineral is included in the lease must await a case in which an issue as to that mineral is raised.[19]

This reasoning would seem most appropriate for interpreting whether coal is included in leases executed before July 1, 1955, when the statute involved in *Mac Master* became effective.

---

16. *Id.* at 41. (Emphasis added).
17. Witherspoon v. Campbell, 219 Miss. 640, 69 So. 2d 384 (1954); Psencik v. Wessels, 205 S.W.2d 658 (Tex. Civ. App. 1947).
18. Heinatz v. Allen, 147 Tex. 512, 217 S.W.2d 994 (1949); Eldridge v. Edmonson, 252 S.W.2d 605 (Tex. Civ. App. 1952).
19. 86 N.W.2d at 43. In Evangelical Luth. Church v. Stanolind Oil and G. Co., 251 F.2d 412 (8th Cir. 1958), the federal court dealt with essentially the same lease form as that involved in *MacMaster*, the difference in the two cases being that the lease in this case was executed before the effective date of the 1955 statute requiring specification of coal, uranium, gravel, and sand. The court held that based on *MacMaster* the trial judge was correct in denying plaintiff's request that "other minerals" be limited to those that are produced through a well as an incident of oil and gas production. The court did not make a specific determination as to what constitutes "minerals."

C. *Salzseider v. Brunsdale.*[20]

This case involved the interpretation of a contract for deed from the state which contained a reservation of "fifty (50%) percent of all oil, natural gas, or minerals."[21] The reservation was included pursuant to a state statute first enacted in 1939 requiring such a reservation. The court concluded that since what the deed language intended to accomplish was the statutory requirement, this was really a statutory interpretation case. The statute provided for a reservation of "fifty percent of all oil, natural gas, or minerals. . . "[22] The specific question was whether gravel had been reserved to the state. Despite what might have been interpreted as a policy of favoring governmental ownership in the *Adams County* case, the court chose not to extend it. This statutory reference to "minerals" in connection with state lands would not include gravel whereas the one relating to county lands in *Adams County* would include coal. What distinguished the two? In *Salzseider*, as in *Adams County*, the court emphasized legislative intent as the key to interpretation, while reiterating its *Mac Master* conclusion that they can adopt neither an

20. 94 N.W.2d 502 (N.D. 1959).

21. *Id.* at 503.

22. 1949 N.D. Sess. Laws ch. 149, § 1. It became effective March 13, 1939, as an emergency measure. *Id.* § 2. The full text read as follows:

> In all transfers of land hereafter made by the State of North Dakota or any of the State departments or lands now owned by the State of North Dakota or which may hereafter be acquired by the State of North Dakota, or any of its departments by deed, quit claim deed, foreclosure or by any other method, and whether such transfers made by the State of North Dakota or any of its departments are made by deed, contract or lease, there shall be reserved to the State of North Daokta five per cent (5%) of all rights to any oil, natural gas or minerals which may be found on or underlying such land. Any transfer, deed or lease which does not contain such reservation shall be null and void and of no effect.

Id. § 1. The law was amended in 1941 to substitute "fifty (50%) per cent of all oil, natural gas or minerals" for "five per cent (5%) of all rights to any oil, natural gas or minerals" and to provide that "any transfer, deed or lease which does not contain such reservation shall be construed as if such reservation were contained therein." 1941 N.D. Sess. Laws ch. 165 § 1. This became effective as an emergency measure on February 20, 1941. *Id.* § 2. In 1943 these two laws were codified as follows:

> In every transfer of land, whether by deed, contract, lease, or otherwise, by the state of North Dakota, or by any department thereof, fifty percent of all oil, natural gas, or minerals which may be found on or undrlying such land shall be reserved to the state of North Dakota. Any deed, contract, lease, or other transfer of any such land made after February 20, 1941, which does not contain such reservation shall be construed as if such reservation were contained therein. The provisions of this section shall apply to all lands owned by this state or by any department thereof regardless of how title thereto was acquired.

N.D. REV. CODE § 38-0901 (1943). It now appears as N.D. CENT. CODE § 38-09-01 (1972). However in 1949 the legislative assembly provided that land could be transferred free of this reservation to the United States or its agencies or agents. 1949 N.D. Sess. Laws ch. 311, § 1. N.D. CENT. CODE § 38-09-01.1 (1972). It further provided that prior reservations could be released. 1949 N.D. Sess. Laws ch. 311, § 2; N.D. CENT. CODE § 38-09-01.2 (1972). In 1951 the legislative assembly provided that land would be transferred free of this reservation when it was sold "to any person, from whom the state derived the title to such lands, or to his spouse or to his lineal descendants in the first degree." 1951 N.D. Sess. Laws ch. 231, § 1; N.D. CENT. CODE § 38-09-01.3 (1972). A corrollary provision providing for a release of previous reservations in favor of similar persons was held unconstitutional in Solberg v. State Treasurer, 53 N.W.2d 49 (N.D. 1952), as a violation of N.D. CONST. § 185 prohibiting donations by the State in aid of individuals.

animal-vegetable-mineral approach nor a hydrocarbon, non-hydrocarbon approach, since one would include the soil itself and the other would exclude oil, gas, and coal.

Again, as in *Mac Master*, the court cited cases from other jurisdictions and noted that in most of them sand and gravel were considered not to be in the "ordinary and natural meaning" or trade understanding of mineral.[23] Cases are again referred to that exclude sand and gravel because their extraction would destroy the surface or because they are indistinguishable from the soil in general. Having concluded that the legislative assembly intended to adopt the ordinary understanding of minerals as used in conveyances and wills, the court further concluded that gravel was not within the term.

D. *Abbey v. State.*[24]

A patent from the state in plaintiff's predecessor in 1948 reserved "all rights and privileges vested in the State of North Dakota under the provisions of the constitution and laws of said state."[25] At that time the North Dakota law provided for a reservation in every transfer of land of "fifty percent of all oil, natural gas, or minerals."[26] The questions were (1) whether the patent language constituted a sufficient reference of the reservation and (2) whether it included coal. The court answered both questions yes.

In the course of its opinion the court stated:

> [Mrs. Abbey] contends that whether coal is a mineral is a question of fact and not a question of law and that, therefore, evidence is required to establish that fact. With this contention we do not agree.[27]

What appears to be confusing here is the point, not that a factual question is involved, but rather that one of intent is involved. Coal may be a mineral, but did the legislature intend to include coal when it used the word mineral in this statute? Do private parties intend to include coal when they use the word mineral in a convey-

---

23. 94 N.W.2d at 504.

24. 202 N.W.2d 844 (N.D. 1972). The *Abbey* holding was approved without further discussion in Haag v. State, 219 N.W.2d 121 (N.D. 1974).

25. *Id.* at 855.

26. N.D. REV. CODE § 30-0901 (1943.) The history of this provision is discussed in note 22, *supra*. Until amended in 1960, the North Dakota Constitution prohibited the sale of those of the lands granted to North Dakota from the United States for common school support that constituted "coal lands." N.D. CONST. § 155. The question arose whether the fifty percent reservation requirement applied to those lands that turned out to be coal lands but which were disposed of before that condition was known. In Permann v. Knife River Coal Mining Co., 180 N.W.2d 146 (N.D. 1970), the court held that it did not. In Haag v. State, 219 N.W.2d 121 (N.D. 1974), the court overruled *Permann* and held that it did apply. The constitution now provides with reference to these common school lands that on the sale of any such lands all minerals, "including but not limited to oil, gas, coal, cement materials, sodium sulphate, sand and gravel, road material, building stone, chemical substances, metallic ores, uranium ores, or colloidal or other clays," be reserved and excepted on behalf of the State, N.D. CONST. § 155.

27. 202 N.W.2d at 855.

ance? That intent is the key was established in the three previous cases discussed in this article. The court quoted at length from the *Adams County* case, including the language about legislative intent, and then concluded: "Applying that reasoning to the instant case, we conclude . . . that the word 'minerals' include coal."[28] Since the legislative assembly had made a major amendment to the statute in 1941, the same year it adopted the law involved in *Adams County*, it could be argued that the court's conclusion about legislative intent in *Adams County* applied equally to the instant case. It would have been better, however, had the court recognized that this statute was enacted first in 1939 and reached a conclusion as to legislative intent at the time.

The court does not mention the *Salzseider* opinion where it had dealt with the statute here in question, although on a problem involving gravel. Again the court specifically rejected the organic/inorganic approach to defining mineral.

E. *Christman v. Emineth.*[29]

In *Christman* the court had to interpret language in a 1943 deed excepting and reserving "fifty percent of all right and title in and to any and all oil, gas and other minerals in or under the foregoing described land."[30] The court concluded that this language severed fifty percent of the coal. This was the first case in which the court interpreted the language in the context of a deed between private parties, and the court wrote an extensive opinion dealing with several arguments.

First, the court reiterated some conclusions reached in the non-deed cases, that whether lignite coal is a mineral is not a fact question,[31] that lignite is a mineral,[32] and that mineral is not to be interpreted on the basis of the animal-velgetable-mineral distinction.[33] The court then noted that grants, being contracts, are to be interpreted "to give effect to the mutual intention of the parties,"[34] so again intent was emmphasized as in all of the previous cases. The court then turned to a discussion of the intent of the parties. It rejected the *ejusdem generis* argument because while there may be some dissimilarities between oil and gas on the one hand and coal on the other hand, such as liquid versus solid, it felt that there probably were more similarities, such as hydrocarbon composition. The

28. *Id.* at 856.
29. 212 N.W.2d 543 (N.D. 1973).
30. *Id.* at 546.
31. *Id.* at 548, *citing* Abbey v. State, 202 N.W.2d 844 (N.D. 1972).
32. 212 N.W.2d at 549, *quoting* Adams County v. Smith, 74 N.D. 621, 23 N.W.2d 873 (1946).
33. 212 N.W.2d at 549, *quoting* Salzseider v. Brunsdale, 94 N.W.2d 502 (N.D. 1959).
34. 212 N.W.2d at 549, *quoting* N.D. CENT. CODE §§ 47-09-11 (1960) and 9-07-03 (1975).

court then asked what was to be the basis for the *ejusdem generis* distinction. It failed entirely to analyze the case on the basis of the distinction raised in *Mac Master* although rejected therein as inapplicable. This was that "other minerals" should be interpreted to refer to those associated with oil and gas production through well extraction. That argument was rejected in *Mac Master* because the lease there specifically provided for a separate royalty for sulphur and other minerals, a situation that did not exist here. The reason that lead to the rejection of this *ejusdem generis* argument in *Mac Master* simply was not present in *Christman.*

The second argument as to the intent of the parties rejected by the court was that coal would have to be developed through surface mining leading to a destruction of the surface and it would appear unlikely that the parties intended the grantor be able to destroy the surface that he had conveyed to the grantee knowing it was to be used for agricultural purposes. The court gave no direct response to this powerful argument. Instead it said that the North Dakota Legislative Assembly had enacted a reclamation law designed to prevent destruction of the surface. What bearing does a 1969 statute have on the intent of the parties to a 1943 instrument of conveyance? None, unless they divined in 1943 that the legislative assembly would some day pass such a law. The court also interpreted the instrument which read *"all* oil, gas and other minerals" as being the same as "oil, gas . . . and *all* other minerals" intrepreted in *Mac Master* and then merely quoted *Mac Master* as to how inclusive the use of the word "all" is. However, the court gave no authority for this reading. It was reasonable to conclude in *Mac Master* that as used therein "all" meant "every kind." However, that intrepretation does not hold for *Christman.* It is entirely possible that the word "all" as used in *Christman* meant "100%" instead of "every kind." It is silly to read into *Christman* "every kind of oil." It makes sense to read into it "100%" of the oil, 100% of the gas, and 100% of the other minerals that are included with the oil and gas." That is, the parties were reserving 50% of 100% and not 50% of 50%, a type of problem the court had to deal with in another recent case.[35] The use of the word "all" then had no bearing on what kind of minerals were being reserved, only on the amount of minerals being reserved.

An *ejusdem generis* intrepretation would be consistent with the developing modern approach to the respective interests of severed and surface estates, that of equal status.[36] It could be based either

35. Kadras v. Sauvageau, 188 N.W.2d 753 (N.D. 1971).

36. *See* Patton, *Recent Changes in the Correlative Rights of Surface and Mineral Owners,* 18 ROCKY MT. MIN. LAW INST. 19 (1973):

on those minerals associated with oil and gas production, as argued but rejected in *Mac Master*, or those minerals usually found with or associated with oil and gas formations. This approach would give meaningful effect to all the language used and would not go to either extreme.

The court's opinion, however, would appear to be consistent with the following North Dakota Century Code provision:

> A grant shall be interpreted in favor of the grantee, except that a reservation in any grant, and every grant by a public officer or body, as such, to a private party, is to be interpreted in favor of the grantor.[37]

However, the court did not refer to this provision as a basis for its decision. The presence of this code provision seems to leave no room for the standard rule of construction that a document is to be construed most strongly against the person who drafted it unless the drafter is the grantor.

Despite the court's rejection of these arguments as to intent, it remains important that the court recognized intent of the parties as the focal point in interpreting "other minerals." The conclusion that coal is included does not occur automatically but only after an analysis of intent. A case may arise wherein the court will say: "On the facts of this case, the parties did not intend to include coal when they used the phrase 'other minerals.' "

F. *Olson v. Dilllerud.*[38]

In this case the court dealt with a reservation and exception contained in a 1954 transfer wherein there was reserved "100% of all right and title in and to any and all oil, gas and other minerals in or under the foregoing described land."[39] The court concluded that this case could not be distinguished from *Christman* and that on the basis of that case they would conclude that "other minerals" as used in this transfer included coal. The court considered

---

There have been a number of judicial decisions in several jurisdictions in the past few years dealing with the correlative rights of the owners of the surface and the severed mineral estate in a given tract of land, the general trend of which has been to cut back on the rights of the mineral estate in favor of the surface owner. These cases have fallen into two general categories, one group holding that a grant or reservation of "oil, gas and other minerals" does not convey or reserve a particular mineral substance and the other group generally holding that certain activities of the mineral owner in attempting to produce his minerals constitute an unreasonable use of the surface estate and cannot be engaged in, at least not without compensation being paid to the surface owner.

37. N.D. CENT. CODE § 47-09-13 (1960). The only case discussed in this article that referred to this provision was Salzseider v. Brunsdale, 94 N.W.2d 502 (N.D. 1959), and in that case the court found the provision inapplicable.

38. 266 N.W.2d 363 (N.D. 1975).

39. *Id.* at 365.

and rejected two possible distinctions. First it was argued that the parties could not have intended coal to be severed since it involved farm land and the coal owner would have the power to destroy the surface through strip mining. The court noted that *Christman* involved farmland as well but then proceeded to qualify its *Christman* holding to make it clear that a mineral owner does not have the power to "destroy" the surface as contrasted with the power to "use" the surface.[40] The second argument centered around whether coal was a known resource, the attempt being to distinguish *Christman* on the basis that it relied on the knowledge of the existence of coal as indicative of an intent to include it when it was not specifically excluded. Here there was no evidence of such knowleldge. The court said it was not going to speculate about whether coal was known or unkown. This suggests that one who challenges the inclusion of coal has the burden of showing that coal was unknown; showing a negative is often more difficult than showing a positive. Perhaps the burden should be the other way. Regardless, the proper interpretation of *Christman* would appear to be that knowledge of the existence of strip mining of coal was relied upon as evidence that the parties contemplated strip mining, it having already been determined through other means that the parties intended to include coal.

G. *Reiss v. Rummel.*[41]

This case involved a 1967 conveyance of a 15/480 interest in "all the oil, gas, casinghead gas, casinghead gasoline and other minerals."[42] The specific question asked was whether this language included coal and uranium. The answer given was that it did not. The conveyance failed to meet the dictates of the North Dakota law which provides that coal, uranium, gravel, and clay will not pass by conveyance "unless the intent to convey such interest is specifically and separately set forth in the instrument."[43] The trial court had held that the use of the word minerals satisfied this requirement, but the supreme court specifically rejected that approach.

The court went on to state that an exception or reservation would not constitute a conveyance, and, therefore, this section would not apply to exceptions and reservations.

Since the court in *Christman* had held unconstitutional the speci-

40. *Id.* at 367.
41. 232 N.W.2d 40 (N.D. 1975).
42. *Id.* at 41.
43. N.D. CENT. CODE § 47-10-24 (1960). The 1955 origins of this law are discussed in note 14, *supra*. The basic language as to conveyance was not changed in 1955 when the legislative assembly created separate provisions on conveyances and leases. 1955 N.D. Sess. Laws ch. 245, § 1. No change occurred in this portion as a result of the 1969 amendments either. 1969 N.D. Sess. Laws ch. 403, § 1.

fic code provisions dealing with description of minerals in exceptions and reservations and since that decision was applied retroactively in *Olson*, there then existed no guides on the statute books as to interpreting non-governmental reservations and exceptions involving "other minerals." The 1975 legislative assembly remedied this gap in the law with the following statute:

> In any deed, grant, or conveyance of the title to the surface of real property executed after the effective date of this Act, in which all or any portion of the minerals are reserved or excepted from being transferred with the surface, the use of the word "minerals" or the phrase "all other minerals" or similar words or phrases of an all-inclusive nature shall be interpreted to mean only those minerals specifically named in the deed, grant, or conveyance and their compounds and byproducts.[44]

Reading of *Reiss* as to conveyances, *MacMaster* as to leases, and *Christman* as to exceptions and reservations suggests that since July 1, 1955, in order to transfer coal rights by conveyance or lease there had to be specific reference to or use of the word "coal" or some functional equivalent such as "lignite," but no such requirement existed as to exceptions and reservations until July 1, 1975, when the new law took effect.

A difference exists among the three provisions, however. The lease and exception and reservation provisions have reference to the inclusion of compounds and byproducts. The conveyance provision has no such reference.

II. THE CASES AS A COMPOSITE

What is learned from these cases as to the interpretation of the phrase "and other minerals" as it related to coal? Several basic points seem very clear.

First, no matter where the language appears it is to be interpreted according to the intent of the user whether a legislative assembly in a statute or private parties to a binding document. There is no automatic interpretation as to the scope of the phrase, so no automatic inclusion or exclusion of coal.

Second, unless a contrary intent is clearly expressed, the courts will not interpret the phrase so broadly as to distinguish it in the animal-vegetable-mineral context. Limiting factors include whether the product is separate from the soil and whether it can be removed without destruction of the surface. After having first indicated that

44. 1975 N.D. Sess. Laws ch. 422, § 1.

coal would constitute an exception to the destructibility limit,[45] the court later backtracked some by indicating that a subsurface coal owner would not be allowed to destroy the surface.[46] It is not clear whether it will simply be a limit on coal owners, or whether it will also be used as an element in determining whether coal is included in the phrase "and other minerals."

This limitation will however, be very important in another context. The North Dakota Public Service Commission has been given the power to deny coal mining permits if it finds that the surface land there involved could not be reclaimed.[47] A subsurface coal owner who owns nothing but coal might argue that his coal has been confiscated if he is not allowed to mine it. However, if he has no right to destroy the surface in the first place, the Public Service Commission will have prevented him from doing nothing that he had any right to do in the first place. Furthermore, counties are given the power to zone to conserve natural resources.[48] If a county zones an agricultural zone and thereby prevents severed coal owners from mining their coal, they too might argue that preventing them from using the only thing they own constitutes confiscation. However, if the basis for the county zoning is the conservation of the soil, certainly a natural resource and necessary to the economic base of the community, and if it has not been demonstrated that reclamation is feasible and there is, therefore, great danger that the surface will be destroyed, it would seem that the county action should be upheld since it prevents the coal owner from doing nothing that he has any right to do in the first place. At present it certainly is a rational argument that the feasibility of reclamation has not been proved.[49] Otherwise why are millions of dollars currently being spent in North Dakota by so many different agencies and companies?

Third, from July 1, 1955, onward, in order for nongovernmental leases and conveyances to transfer an interest in coal, there must be specific and special reference to it in the lease or conveyance. "And other minerals" will not suffice. This is true for exceptions and reservations from July 1, 1975, onward.

---

45. Christman v. Emineth, 212 N.W.2d 343 (N.D. 1973).
46. Olson v. Dillerud, 226 N.W.2d 363 (N.D. 1975).
47. N.D. CENT. CODE § 38-14-05.1(2) (Supp. 1975).
48. N.D. CENT. CODE § 11-33-03(5) (1960).
49. *See* Dietrich, *An Historical Overview of Strip Mine Reclamation in North Dakota*, in SOME ENVIRONMENTAL ASPECTS OF STRIP MINING IN NORTH DAKOTA 49 (Wali ed. 1973); Wali & Freeman, *Ecology of Some Mined Areas in North Dakota*, in SOME ENVIRONMENTAL ASPECTS OF STRIP MINING IN NORTH DAKOTA 25 (Wali ed. 1973); Sandoval, Bond, Power & Willis, *Lignite Mine Spoils in the Northern Great Plains—Characteristics and Potential for Reclamation*, in SOME ENVIRONMENTAL ASPECTS OF STRIP MINING IN NORTH DAKOTA 1 (Walli ed. 1973).