

**RELINQUISHMENT ACT LANDS
AND OWNERS OF THE SOIL:
STATUTORY FRAMEWORK
AND CASE LAW UPDATE**

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What are Relinquishment Act Lands?

- Any public free school or asylum lands, whether surveyed or unsurveyed, sold with a mineral classification or reservation *between September 1, 1895, and August 21, 1931*. 31 Tex. Admin. Code § 10.1(a)(9).
- Estimated to total between 6.4 and 7.4 million acres

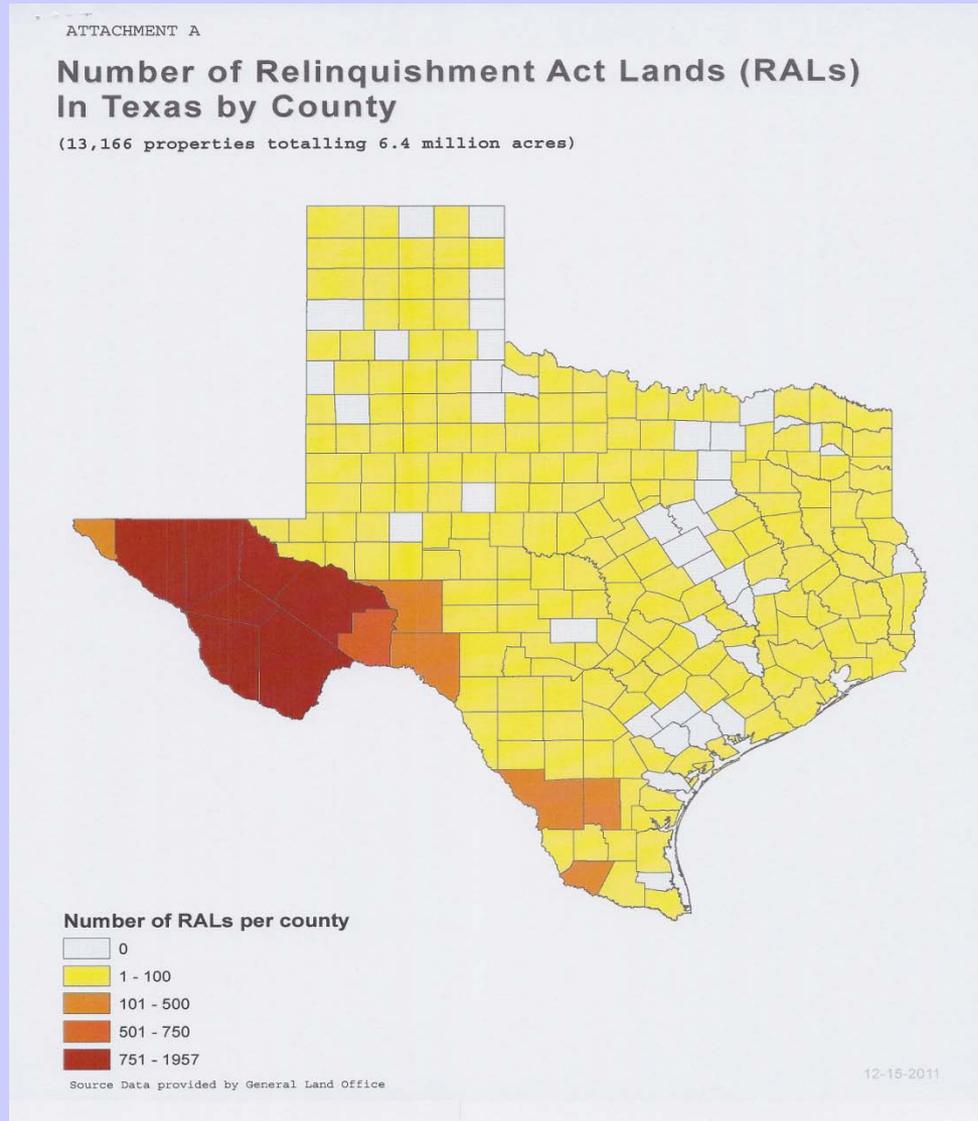
What are Relinquishment Act Lands?

- Proceeds from Mineral Development go to Permanent School Fund
- Mineral Reservation creates two estates:
 - Surface estate – Owned by the “Owner of the Soil” or the “Surface Owner”
 - Mineral Estate – Owned by the State of Texas

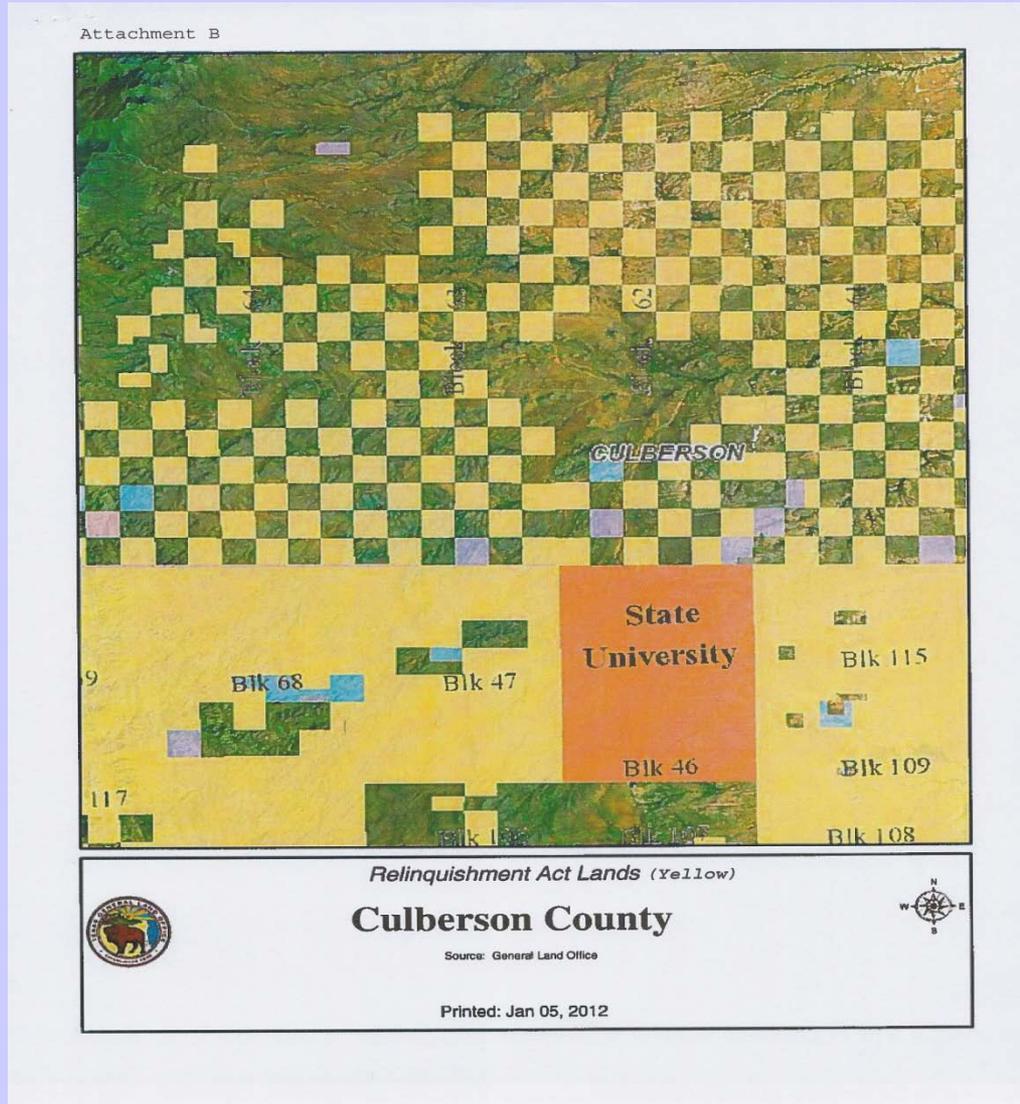
Where are Relinquishment Act Lands?

- All over the State of Texas
- High concentration in West Texas and South Texas Counties:
 - El Paso
 - Hudspeth
 - Culberson
 - Jeff Davis
 - Reeves
 - Stockton
 - Presidio
 - Brewster
 - Terrell
 - Crockett
 - Valverde
 - Webb
 - Duval
 - Starr

Where are Relinquishment Act Lands?



Where are Relinquishment Act Lands?



Why do we care about Relinquishment Act Lands?

- Located where many quarries operate
- State of Texas (General Land Office) claims to own the surface materials, including:
 - limestone
 - granite
 - sand
 - gravel
 - caliche

Regulatory Definition of “Minerals”

Any naturally occurring inorganic or organic substance formed through geological processes having a definite chemical composition or a range of characteristic chemical compositions, and distinctive physical properties or molecular structure, or an aggregate thereof, that may be extracted from the earth with an expectation of profit. This includes, ***but is not limited to***, base and precious metals; industrial minerals, such as gypsum, sulfur, talc, *etc.*; coal and lignite; ***construction materials*** such as *granite, limestone, rhyolite* and other ***rock that may be quarried for dimension stone or crushed for aggregate***; or ***sand, gravel, caliche, clay*** and ***borrow material***.

31 Tex. Admin. Code § 10.1(a)(5) (adopted December 4, 2009)

El Paso Court of Appeals Definition of “Minerals”

State of Texas v. Cemex Construction Materials South, L.L.C., 350 S.W.3d 356 (Tex. App. – El Paso 2011, pet. filed)

- Holds that the following substances were reserved as minerals to the State of Texas on Relinquishment Act Lands owned by Cemex:
 - sand
 - gravel
 - caliche
 - limestone
 - granite
 - dirt
 - “any other mineral substances of whatever kind or character having commercial value”

Why is this Controversial?

- Out of step with Texas Common Law regarding meaning of “other minerals”
- Results in potential liability for value of surface materials produced by “Owners of the Soil” and their predecessors:
 - State is not barred by:
 - Statute of Limitations
 - Equitable Defenses such as Waiver, Laches or Estoppel

Out of Step with Texas Common Law

- Multitude of cases analyzing what the term “other minerals” includes in private conveyances
- Texas courts have followed two different approaches
 - “Ordinary and Natural Meaning”
 - “Surface Destruction Test”
- Texas Courts have been consistent – sand, gravel, limestone, soil and other surface materials **ARE NOT MINERALS**

Out of Step with Texas Common Law

- Ordinary and Natural Meaning Test:
 - “mineral” used in a conveyance of “oil, gas and other minerals” means *all substances within the ordinary and natural meaning of that word*, whether their presence or value is known at the time of the severance.

Gifford-Hill & Co., Inc. v. Wise County Appraisal Dist., 827 S.W.2d 811, 815 (Tex, 1991); *Moser v. U.S. Steel Corp.*, 676 S.W.2d 99, 102 (Tex. 1984).

- Applies to conveyances executed on or after June 8, 1983.

Moser v. U.S. Steel Corp., 676 S.W.2d 99, 103 (Tex. 1984)

Out of Step with Texas Common Law

- Ordinary and Natural Meaning Test:
 - Sand, gravel, limestone, caliche and dirt are not minerals under ordinary and natural meaning approach
 - 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 possess a peculiar property giving them special value, as for example sand that is valuable for making glass and limestone of such quality that it may profitably be manufactured into cement. *Such substances, when they are useful only for building and road-making purposes, are not regarded as minerals in the ordinary and generally accepted meaning of the word.*

Heinatz v. Allen, 147 Tex. 512, 217 S.W.2d 994, 997 (1949)(emphasis added).

Out of Step with Texas Common Law

- Ordinary and Natural Meaning Test:
 - Using a broader or “*scientific*” definition would make the grant of “land” meaningless
 - We have reached the conclusion that sand and gravel was not included in the reservation, which we base upon the following considerations: While the word ‘minerals’ includes, in a technical sense, all natural inorganic substances forming a part of the soil . . . ***such a definition is obviously too broad . . . to apply the word in the signification in which it is employed in the scientific division of all matter into the traditional three kingdoms, to a grant of land containing an exception of the minerals, would be absurd, since all land belongs to the mineral kingdom, and the exception could not be given effect without destroying the grant.***

Psencik v. Wessels, 205 S.W.2d 658, 659 (Tex.Civ.App.—Austin 1947, writ ref’d).

Out of Step with Texas Common Law

- Ordinary and Natural Meaning Test:
 - Using a broader or “*scientific*” definition would make the grant of “land” meaningless
 - It has been pointed out in several decisions that *the scientific or technical definition of minerals is so broad as to embrace* not only metallic minerals, oil, gas, stone, sand, gravel and many other substances, but *even the soil itself*. In one decision it is said that *it is rare, if ever, that mineral is intended in the scientific or geological sense in the ordinary trading transactions about which deeds and contracts are made*.

Heinatz v. Allen, 147 Tex. 512, 217 S.W.2d 994, 996-997 (1949).

Out of Step with Texas Common Law

- Surface Destruction Test:
 - Provides that a substance belongs to the surface estate, and is not a “mineral,” if it is found “near the surface” (meaning within 200 feet of the surface) *and* it is shown that any reasonable method of production, at the time of the conveyance or thereafter, would consume, deplete or destroy the surface.
 - If a substance is “near surface,” its part of the surface estate at all depths its found

Reed v. Wylie, 597 S.W.2d 743, 747 (Tex. 1980)

- Applies to conveyances made prior to June 8, 1983

Moser v. U.S. Steel Corp., 676 S.W.2d 99, 103 (Tex. 1984)

Out of Step with Texas Common Law

- Surface Destruction Test:
 - First announced in 1971 case – *Acker v. Guinn*, 464 S.W.2d 348 (1971)
 - Held – Near surface iron ore – not a mineral
 - Subsequent cases held near surface coal and lignite were not minerals
 - *Reed v. Wylie*, 554 S.W.2d 169 (Tex. 1977) and *Reed v. Wylie*, 597 S.W.2d 743, 747 (Tex. 1980)

Out of Step with Texas Common Law

- Surface Destruction Test:
 - Finally rejected in *Moser v. U.S. Steel*, 676 S.W.2d 99 (Tex. 1984)
 - Readopted “ordinary and natural meaning” test and held near-surface uranium was a mineral as a matter of law
 - Reaffirmed that some substances belonged to surface as a matter of law:
 - building stone and limestone;
 - caliche and surface shale;
 - water;
 - sand and gravel; and
 - near surface lignite, iron and coal

Schwarz v. State, 703 S.W.2d 187 (Tex. 1986)

- Involved Near Surface Lignite
- Twist: Located on Relinquishment Act Land
- Schwarz obtained legislative waiver of State's Sovereign Immunity
- Sued for Declaration that he as the "Owner of the Soil" owned the lignite, not the State

Schwarz v. State

- Case upon which the State bases its claim that its “mineral reservation” includes surface materials
- Held that the “Surface Destruction Test” does not apply to Relinquishment Act Lands
- Held that lignite and coal, at whatever depths found on Relinquishment Act Lands, were intended to be reserved by the State of Texas

Schwarz v. State

- Land sold by the State of Texas in 1907 to original purchasers, the Alexanders
 - Sold subject to provisions of 1895 Land Sales Act
- Subsequent Patent from State of Texas to Alexanders in 1947
 - “[A]ll of the minerals in the above described lands are reserved to the State.”

Schwarz v. State

- Texas Supreme Court held:

If the legislature intended to convey the surface estate and retain minerals, the mining of which would destroy the surface, then we must give effect to that intention. We **hold** that the legislature did so intend.

...

We **hold** that the proper interpretation of the conveyance between the Alexanders and the State of Texas is that the State of Texas meant to withhold from conveyance all of the **coal or lignite** located on or under the surface of the land granted, whether or not recovery of such would destroy or deplete the surface estate.

...

For the above reasons we **hold** that all of the **lignite** located on or under the Schwarz tract belongs to the State of Texas.

Schwarz v. State, 703 S.W.2d 187, 189-191 (Tex. 1986).

Schwarz v. State

- Texas Supreme Court
 - Distinguished *Reed* and other surface destruction cases:
 - Did not involve a private conveyance
 - Surface destruction test is a rule of construction for interpreting ambiguous conveyances
 - Applied rule of construction that ambiguities in legislative grants must be construed in favor of the State
 - “whatever is not unequivocally granted in clear and explicit terms is withheld”

Schwarz v. State

- Texas Supreme Court
- Also quoted Mining Act of 1895
 - Listed “coal” among other substances

Schwarz v. State

- Texas Supreme Court
 - Concluded that “coal” was a mineral
 - State intended to reserve coal regardless of surface destruction
 - Thus, after tracing the history of mineral reservations in public land grants, it is clear that the sovereign in Texas has always claimed *all of the substances commonly classified as “minerals”* and only gives away those substances by an express release or conveyance.

Mining Act of 1895

- Allows for applicants to purchase and obtain patent to lands containing following substances by paying mineral price of \$15 p/ acre:

kaolin, baryta, salt, marble, fire clay, iron ore, *coal*, oil, natural gas, gypsum, nitrates, mineral paints, asbestos, marl, natural cement, clay, onyx, mica, precious stones, and *any other non-metallic mineral and stones valuable for ornamental or building purposes or other valuable building material.*

1895 Tex. Gen. Laws 127, § 10, 10 Gammel 927;
Art. 3490, Texas Revised Civil Statutes, 1895

Mining Act of 1895

- States that “where application is made to buy any of the lands herein named except under this act, the purchaser shall swear that there are none of the minerals named in this act on said lands.”

1895 Tex. Gen. Laws 127, § 10

- Requires applicants buying such land pursuant to the Land Sales Act (i.e. those paying a non-mineral price) to make oath and swear that to the best of his knowledge there are no “minerals in this act” and requires that sale of land be with a reservation of minerals thereon.

1895 Tex. Gen. Laws 127, § 14

Mining Act of 1895

- Most settlers bought land as “Grazing” or “Agriculture” land
- Paid \$1.00 or \$1.50 p/acre, not \$15.00 p/acre
- Executed Mineral Waiver Affidavits

Mining Act of 1895

1122-1205-5111

THE STATE OF TEXAS }

COUNTY OF El Paso }

BEFORE ME, the undersigned authority, on this day personally appeared Eli Nations who after being by me duly sworn according to law, deposes and says that to the best of his knowledge and belief there are no minerals embraced in Title LXXI of the Revised Civil Statutes of 1895, on

SECTION	BLOCK	CERTIFICATE	GRANTEE	ACRES	
271	=	# 7266	Eli Nations	509.5	El Paso Co

That said land has heretofore been classed as mineral land, and believing there to be no mineral thereon, and hereby waiving all rights to the minerals on said section to the State of Texas, should there be any mineral deposits of any character hereafter found in or on said land, and in the event of a sale to me of the foregoing land, it is expressly agreed and understood that I acquire no right, title or interest in or to any minerals that are now, or may hereafter be known or found to exist, in or on said land.

Sworn to and subscribed before me this 26th day of March 1906
Eli Nations

Attorney General Opinions

- 1937 Attorney General Opinion addressed whether surface materials are “minerals” reserved by the State

Op. Tex. Att’y Gen. No. 197, p. 273, 280 (To Honorable William H. McDonald, Commissioner, General Land Office, February 17, 1937) (not appearing in Tex. Att’y Gen. Biennial Rep.)

Attorney General Opinions

- Question Addressed:

Is granite, building stone, gravel or caliche subject to be classified or considered as minerals by this department under any provision of the law and in particular under either article 5310, wherein provision is made for the sale of lands with the reservation of the oil, gas, coal and all other minerals that may be therein to the fund to which the land belongs; or article 5388 pertaining to the development of lands containing valuable mineral bearing deposits and rock carrying metallic or non metallic substances of value . . . ?

Attorney General Opinions

- Answer:

Returning to the specific inquiry contained in your letter we are of the opinion, in view of the foregoing authorities, and you are accordingly advised, that *the term “minerals”* as used in Article 5310 and Article 5388, when viewed in conjunction with the language used in said statutory enactment, *does not include gravel, sand, building stone, granite and caliche* found lying upon the surface of the land and subject to quarrying operations.

Attorney General Opinions

- Why?
 - Would be absurd to apply scientific or technical definition
 - Would Destroy the Grant

Attorney General Opinions

- 1945 Attorney General Opinion:
 - advised the GLO that *soil* from public school lands containing chemical compounds, which was sold commercially to fruit orchards, was not a “mineral” reserved to the State of Texas.

See Op. Tex. Att’y Gen. No. O-6838 (1945)

Attorney General Opinions

- Cited by Texas Courts holding that surface materials are not minerals:
 - *Psencik* - “[t]he opinion gives a very thorough digest and review of the authorities on the subject and the reasoning is cogent.”
 - *Heinatz* - “well-considered”

Statutory Framework

- Texas Natural Resources Code Chapter 53, Subchapter C (§§ 53.061 – 53.081)
 - Owner of the Soil is State's Agent for leasing minerals other than oil and gas - § 53.061
 - Must use lease forms prepared by General Land Office - § 53.063
 - Lease must provide for at least 1/16th production royalty to the State - § 53.065 (c)

Statutory Framework

- For leases executed after September 1, 1987
 - Owner of the Soil receives 20% lease bonus, rentals and royalties
 - State receives 80% lease bonus, rentals and royalties

§53.065 (b)

- Split is 60% to State, 40% to Owner of Soil for leases of coal, lignite, sulphur, thorium, uranium or potash executed after September 1, 1999

§53.065 (c)

Statutory Framework

- Prohibition Against Self-Dealing
 - Owner of the Soil may not lease to:
 - Himself/Herself/Itself
 - Relatives/Affiliates

§ 53.074(a)

Statutory Framework

- Fiduciary Duty
 - Owner of the Soil:
 - Owes the State a Fiduciary Duty and Duty of Utmost Good Faith
 - Must fully disclose facts affecting State's interest and act in best interest of the State
 - Put interests of the State before his/her own interest
 - Owes the State all common-law duties of executive rights holder

§ 53.074(b)

Statutory Framework

- Fiduciary Duty/ Prohibition against Self-Dealing
 - Breach by Owner of Soil punishable by:
 - Suit (in Travis County) to force Owner of the Soil to Perform Duties or forfeit agency rights
 - If agency rights are forfeited, State may lease to whomever it chooses as if it owned the land in fee

§ 53.074(c) and (d)

Statutory Framework

- Lease by Owner of the Soil
 - Owner of the Soil may voluntarily waive agency rights and apply for lease of property from the School Land Board
 - Owner of the Soil may not receive any lease benefits (bonus, rental, royalty payments)

§ 53.081

How do I know if I own Relinquishment Act Land?

- Look at your deeds – is there a reference to a mineral reservation by the State?
- Determine when your property was sold by the State:
 - Prior to September 1, 1895 – no problem
 - Between September 1, 1895 and August 21, 1931 – could be
 - If deeds contain mineral reservation language, the minerals are reserved
 - Even if it says “1/16th of the oil, gas and other minerals” - still means all the minerals

How do I know if I own Relinquishment Act Land?

- Ultimate question – was it classified as mineral when it was originally sold?
- Can only find out for sure in the State Archives at the General Land Office
 - 1700 N. Congress Ave., Austin, Texas
- Can do a search on GLO's Land Grant Database

<http://www.glo.texas.gov/cf/land-grant-search/index.cfm>

Need some information for that:

Property Abstract Number, Name of Original Grantee, Name of Original Patentee

Conclusion:

- State claims that sand, gravel, limestone, granite, caliche and soil on Relinquishment Act lands are minerals reserved by the State of Texas;
 - State's claim is contrary to common law definitions of "minerals" in Texas;
 - Eliminate distinction between surface and mineral estate;
 - El Paso Court of Appeals opinion in *State v. Cemex* and GLO regulatory definition support that claim;
 - No Texas Supreme Court authority on point
- Check your titles

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