IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

DELMA E. PRATHER, as Trustee of THE DELMA E. PRATHER REVOCABLE TRUST,

Plaintiff-Appellant,

No. 29,812

v.

PATRICK H. LYONS, COMMISSIONER OF PUBLIC LANDS OF THE STATE OF NEW MEXICO,

Defendant-Appellee,

and

MAINLINE ROCK & BALLAST, INC.,

Additional Defendant.

Appeal from the Seventh Judicial District Court, Torrance County
No. D-722-CV-2006-228
The Honorable Matthew G. Reynolds, District Judge, Division II

LAND COMMISSIONER'S RESPONSE TO AMICUS CURIAE BRIEF

John L. Sullivan
Associate Counsel
New Mexico State Land Office
310 Old Santa Fe Trail
P.O. Box 1148
Santa Fe, New Mexico 87504-1148
(505) 827-5713
Attorney for Defendant-Appellee Patrick H. Lyons, Commissioner of Public Lands for the State of New Mexico

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INTRODUCTION

The New Mexico Farm and Livestock Bureau's Amicus Curiae Brief largely repeats erroneous and unfounded arguments made by Plaintiff. Ignoring the District Court's correct application of the fact-specific standard required by *Bogle Farms, Inc. v. Baca*, 1996-NMSC-051, 122 N.M. 422, 925 P.2d 1184, which looks to the intent of the parties to the particular transaction in which the minerals were reserved, Amicus erroneously suggests that the District Court's Partial Final Judgment has drastic consequences for other lands conveyed by the State with a reservation of the mineral rights. *See* discussion *infra* at 3-5. Moreover, Amicus provides no evidence to show that there is a significant amount of surface mining on split estates where the State owns the mineral estate, or the prospect of significant amounts of mining given State mineral lessee's obligation to pay for surface damages. *See* discussion *infra* at 6-10. Amicus misleadingly paints a picture of the State insisting on mining over the objection of the surface owner,[1]

[1] To some extent, the commonly used shorthand referring to "surface owner" or to the "surface estate" is a misnomer. As demonstrated by the patent at issue here, Plt. Exh. 4, the patent conveyed a fee estate and does not use the word "surface." In conveying a full fee estate with a mineral reservation, the patent conveys to the patentee and its successors the right to occupy areas below the surface, provided that such occupation is consistent with the State's dominant mineral estate. *See generally*, annot., "Surface owner's right of access through solid mineral seam or vein conveyed to another, or through the space left by its removal, to reach underlying strata, water, oil, gas, etc.," 25 *A.L.R.2d* 1250 (1952).

when in fact *Plaintiff initiated the mining at issue in this case.* *See* discussion *infra* at 7-9.

Contrary to the *Bogle Farms* Court's admonition that title to State trust land is not conveyed by implication, Amicus' proposed "surface destruction doctrine" improperly presumes that the State patent conveyed minerals that appear to some extent on the surface or are obtained by surface mining. *See* discussion *infra* at 10–12. Finally, in arguing incorrectly that the "surface destruction doctrine" is the prevailing rule in construing a mineral reservation in a conveyance, Amicus ignores the fact that the most pervasive and most salient comparable situation – the federal government's reserved mineral estate ownership on millions of acres of split estate created under the Stock-Raising Homestead Act and Small Tract Act. That reservation, effected by language that is, if anything, narrower than the reservation at issue here, includes ownership of surface sand, gravel and rock. *See* discussion *infra* at 12-14.

By the same token, the State's mineral reservation does not specify or require that the reserved minerals be located below the surface, and, consistent with the dominant nature of the mineral estate, the patent specifically states that mineral reservation includes "the right to prospect for, mine, produce and remove the [minerals], and perform any and all acts necessary in connection therewith, upon compliance with the conditions and subject to the limitations of the laws of the State of New Mexico . . . ." Plt. Exh. 4; *see generally*, 58 C.J.S. *Mines and Minerals* § 214. Thus, while the term "surface owner" or "surface estate" is a useful shorthand, use of the term does not connote ownership of reserved minerals which may be present on the surface.

ARGUMENT

I. THE DISTRICT COURT JUDGMENT IS SPECIFIC TO THE SUBJECT PROPERTY.

The District Court's Partial Final Judgment is specific to the subject property and mineral resource at issue, and is based on the specific circumstances evidencing the intent of the parties to the particular patent at issue. Indeed, the District Court properly applied the case-by-case, intent-of-the-parties standard that the New Mexico Supreme Court's decision in *Bogle Farms* requires when determining the scope of a general reservation of minerals. Ignoring both the nature of the judgment and the *Bogle Farms* standard, Amicus mistakenly assumes that the judgment impliedly establishes State mineral estate ownership of commercially produced crushed rock on all split estates, regardless of the differing circumstances that may exist with respect to other conveyances of state trust land.

In *Bogle Farms*, the Supreme Court held that there must be a case-by-case determination of whether a general reservation of minerals in a state land purchase contract or patent includes minerals such as sand, gravel or caliche, "based on the principle that in contract cases the role of the court is to give effect to the intention of the contracting parties." *Id.*, 1996-NMSC-051, ¶¶ 21-22; *see also New Mexico v. General Elec. Co.*, 335 F.Supp.2d 1185, 1203 (D.N.M. 2004) ("Whether the

State has retained an ownership or trust interest in the minerals, including sand and gravel, underlying parcels of state land that have been sold and conveyed to others is a fact-specific determination under New Mexico law, and is not determined by a blanket state property law rule."), and discussion in Answer Br. at 6-8. This transaction-specific and fact-specific standard allows other patentees and their successors the opportunity to show either that the reservation in their patents has a different meaning based on the circumstances of the transaction or that the reservation does not include the particular resource at issue.

Consistent with *Bogle Farms*, the District Court's 22 pages of extensive findings of fact and conclusions of law focus specifically on the on the circumstances evidencing the intent of the parties to the particular transaction in which the minerals were reserved and the nature of the mineral resource at issue. RP 732-754. The District Court correctly recognized that the construction of the State's reservation of "all minerals of whatsoever kind" is a factual issue that should be resolved by examining the intent of the parties to the patent. RP 752-753 (¶¶ 11-14). In determining the parties' intent, the Court thoroughly examined the parties' language and conduct, the objectives they sought to accomplish and the surrounding circumstances. RP 752 (¶ 11). To the extent one party's intent differed from the other's, the Court in its fact-finder role properly gave the mineral

reservation the meaning it found most reasonable, considering all the circumstances, including the intentions of the parties, the words the parties used, the purposes the parties sought to achieve, custom in the trade, the parties' course of dealing, the parties' course of performance, and whether one party knew or should have known that the other party interpreted the terms differently. RP 753 (¶ 15). *See* Rules 13-804 and 13-825 NMRA.

The Amicus Brief contains a single, offhand reference to *Bogle Farms*, and omits any mention of the *Bogle Farms* standard for determining the scope of a mineral reservation. Contrary to *Bogle Farms*, Amicus urges the Court to adopt a presumption that a general mineral reservation does not include unspecified minerals when found on the surface or extracted by surface mining.[2] This presumption would preclude a more fact-specific examination of the intent of the parties and have profound implications for other cases arising from disparate circumstances. Because the presumption is completely contrary to the fact-specific intent-of-the-parties standard adopted in *Bogle Farms*, the Court should reject it.

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[2] In Amicus' formulation of the "surface destruction doctrine," a general mineral reservation does not include any material that cannot be removed without destroying some unspecified portion of the surface estate, "absent a specific language to the contrary, or other showing that the parties intended otherwise." Amicus Br. at 4-5.

II. PLAINTIFF INITIATED AND IS BENEFITTING FROM THE MINING AT ISSUE, AND ANY MINING OF STATE-OWNED MINERALS ENTAILS AN OBLIGATION TO PAY THE SURFACE OWNER FOR SURFACE DAMAGES.

Amicus misleadingly paints a picture of the State insisting on large amounts of mining over the objection of surface owners. First, Amicus cites no evidence of significant amounts of surface mining on split estates. In addition, Amicus ignores the fact that *Plaintiff initiated the mining at issue in this case by issuing a mineral lease permitting mining on the Prather Ranch*. The State had no knowledge of the Prather lease and no involvement whatsoever in locating a quarry on Plaintiff's ranch. The Commissioner simply made a royalty claim after discovering that mining was being conducted where the State owns the mineral estate. Moreover, pursuant to state statute and State Land Office regulation, the Rule 5 Mining Lease[3] issued by the Commissioner requires that the mineral lessee have in place an agreement with Plaintiff to pay for surface damages.

Contrary to the suggestion that this case demonstrates the hazards of mineral estate ownership of minerals extracted by surface mining, Plaintiff initiated the mining activity by issuing a mining lease. Def. Exhs. R-1 through R-6, S, T, and T-1. Thus, under the circumstances presented here, Plaintiff's position

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[3] Rule 5 refers to 19.2.5 NMAC, the State Land Office rule relating to leases to mine, among other things, sand, gravel, and stone.

is that she should be able to issue a lease for the removal and sale of millions of tons of a mineral resource, *see* Def. Exh. KK, free of any claim from the state, notwithstanding the fact that her predecessors had been asked to, and did, disclaim any interest in exploiting any mineral resources, *see* Plt. Exhs. 1-3, and despite the fact that the State's sale contract and patent reserved such rights in the broadest possible terms, *see* Plt. Exhs. 3-4. The District Court correctly concluded that Plaintiff's position is contrary to the evident intent of the parties to the State's patent.

Despite the fact that split estates are common and Section 16 lands often are school lands, Plaintiff and Additional Defendant Mainline Rock & Ballast, Inc. ("Mainline") entered into a mining lease and Mainline began its mining operation on the subject property without investigating whether the State owned the mineral estate. 03/23/09 Tr. 11:33:32-42, 5:21:23-33. Conversely, Mainline made a conscious decision not to construct the quarry where the federal government owns the mineral estate. 03/23/09 Tr. 11:33:08-31. After the Commissioner made a royalty claim, the Commissioner and Mainline entered into a Settlement Agreement and Rule 5 Mining Lease in which Mainline agreed to pay the State royalties on rock removed and sold from the quarry. Def. Exhs. II and JJ. In

accordance with NMSA 1978, Section 19-10-27 (1925)[4] and 19.2.5.12(B)(1)(b) and (B)(4) NMAC (surface damage bond requirement), the Rule 5 Mining Lease states that Mainline "has separately contracted with the owner of the surface estate of the lands described herein, which contractual arrangement . . . includes certain responsibilities relating to operations, reclamation, surface protection and damages." Def. Exh. JJ at 1; *see also id.* at 3, ¶ 10 (re lessee's agreement with surface owner re surface protection and damages); *see generally* discussion in Answer Br. at 16-19.[5] Mainline has continued to pay Plaintiff a royalty (albeit at a

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[4] Section 19-10-27 requires that the State's mineral lessee provide security, per NMSA 1978, § 19-10-26 (as amended through 1979), for the use and benefit of surface owner to cover damages to livestock range, water, crops or tangible improvements resulting from mineral exploration or development. In *Dean v. Paladin Exploration Co., Inc.*, 2003-NMCA-049, 133 N.M. 491, 64 P.3d 518, the Court held that the surface damage bond provision in the State's statutory oil and gas lease supercedes general common law rule that a mineral lessee is not liable for reasonable damages to the surface estate incident to mineral exploration and production. *Id.* at ¶¶ 11-14. That holding likely would extend to other mineral leases, such as the one at issue here, where a surface damage bond is required by both statute and rule.

[5]The state law surface owner protection provisions are similar to federal law provisions governing mining on split estates created by Stock-Raising Homestead Act patents. *See* 43 U.S.C. § 299; 43 C.F.R. § 3814.1; *cf. Watt v. Western Nuclear, Inc.*, 462 U.S. 36 (1983) (discussing Stock-Raising Homestead Act and holding that statutorily required reservation of "all coal and other minerals" includes materials such as sand and gravel that are (i) inorganic; (ii) can be removed from the soil; and (iii) can be used for commercial purposes; and that there is no reason to suppose were intended to be included in the surface estate); *Holmes v. United States*, 2009 WL 35175, *4 & n. 3 (D. Idaho) (discussing SRHA

lower rate determined unilaterally by Mainline), and Plaintiff has never sued Mainline to recover unpaid royalties or to prevent continued mining. 3/23/09 Tr. 3:42:37-3:43:40; 3/23/09 Tr. 5:06:01-5:08:06; 3/23/09 Tr. 5:14:40-55; 3/23/09 Tr. 5:16:44-5:17:29. Thus, this case did not arise because the State insisted on exploiting a mineral resource against the surface owner's objection. Plaintiff sought, enjoyed and continues to enjoy the benefits of mining on the subject property.

In many, if not, most instances, the obligation to pay for surface damages will dissuade a potential mineral lessee from mining relatively low value, widely available common variety minerals where there is a split estate. In addition, a State Land Office witness testified that State Land Office practice requires the mineral lessee to attempt to work out an arrangement with the surface owner regarding surface use and reclamation, and that he is unaware of any mineral lease being issued over the objection of the surface owner. 3/24/09 Tr. 9:14:22-9:18:03. Because of the relatively low value of aggregates such as sand, gravel and crushed rock, and the opportunity to mine them where there is no surface damage payment obligation, mining those minerals on split estates over the objection of the surface owner will be limited. Because the potential impact of surface mining on the

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surface owner protection provisions).

surface owner already is accommodated by statute, the Court should not adopt a new rule that gives the surface owner control over the extraction and sale of mineral resources which it did not bargain or pay for, and in fact expressly disclaimed an interest in.

III. BECAUSE THE STATE'S INTERESTS IN TRUST LANDS ARE NOT CONVEYED BY IMPLICATION, THE COURT MUST NOT PRESUME THAT THE STATE'S PATENT CONVEYED THE STATE'S INTEREST IN MINERALS OBTAINED BY SURFACE MINING.

In overruling *Roe v. State ex rel. State Highway Dept.*, 103 N.M. 517, 710 P.2d 84 (1985), *cert. denied sub nom. Baca v. Roe*, 476 U.S. 1141 (1986), which held that the State's mineral reservation does not include sand and gravel unless they are specifically mentioned, the *Bogle Farms* Court said, "[T]itle to state trust lands should not be conveyed by implication." *Id.* at ¶ 34 (citation omitted). Similarly, in specifically rejecting the surface destruction doctrine as inapplicable to the federal government's reservation of mineral rights when it conveys public lands, the federal courts have recognized that the doctrine is inconsistent with the statutes governing the conveyance of public land and the circumstances existing when such conveyances are made by agencies managing millions of acres. *See New West Materials LLC v. Interior Bd. of Land Appeals*, 398 F.Supp.2d 438, 449 (E.D. Va. 2005) (stating that "principle that a reservation of minerals does not

include sand and gravel if they comprise a significant part of the soil" applies only "in the context of private transactions involving a specific piece of land with a definite soil composition"), *aff'd*, 216 Fed.Appx. 385 (4th Cir. 2007), *cert. denied*, 128 S.Ct. 863 (2008)[6]; *Chugach Natives, Inc. v. Doyon, Ltd.*, 588 F.2d 723, 727 n. 13 (9th Cir. 1978) (holding that sand and gravel were part of the mineral estate for all purposes under Alaska Native Claims Settlement Act, and stating that mineral reservation in conveyance of public land by a deed from the United States "requires a different analysis than would be the case with private parties contracting for the conveyance of private land in which the seller reserves the subsurface or mineral estate"). Thus, a presumption that the State's mineral reservation does not include rock found to some extent on the surface or surface mining of rock is contrary to *Bogle Farms* and inappropriate with respect to a conveyance of state trust land.

Here, the subject property was among millions of acres of state trust land administered by the Commissioner of Public Lands, and the state and federal statutes requiring the mineral reservation, *see* Answer Br. at 26-23, were generally applicable and broad in the scope of the minerals to be reserved. Therefore, the

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[6]Significantly, the *New West Materials* court was construing a Small Tract Act patent issued as part of a bargained-for sale, not a homestead grant.

Court cannot presume that the parties to the patent at issue intended to exclude from the State's mineral reservation rock that appeared to a limited extent on the surface of the land or that is obtained by surface mining.

IV. FEDERALLY OWNED MINERALS ON SPLIT ESTATES INCLUDE SURFACE SAND, GRAVEL AND ROCK.

It is not, as Amicus suggests, aberrant or unusual for the mineral estate to include surface minerals or surface mining. In fact, the most pervasive and most salient comparable situation – the federal government's reserved mineral estate ownership on millions of acres of split estate created under the Stock-Raising Homestead Act and Small Tract Act – is one where the mineral estate includes surface sand, gravel and rock.

There are approximately 9.5 million acres of federal mineral ownership on split estates in New Mexico pursuant to the SRHA and Small Tract Act. *Public Land Statistics 2009* at Table 1-3 (http://www.blm.gov/public_land_statistics/pls09/pls1-3_09.pdf).[7] Federal ownership of "all coal and other minerals" as reserved under Stock-Raising Homestead Act (SRHA) patents (*see* 43 U.S.C. §

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[7] *See also* Benjamin Horace Hibbard, *A History of the Public Land Policies* 402 (1939) (as of 1923, 7,727,850 acres had been entered in New Mexico pursuant to the SRHA); H.R. Rep. 103-44 at 7-8 (1993), reprinted in 1993 U.S.C.C.A.N. 92, 95 (13,751,047 acres patented with a SRHA federal mineral reservation in New Mexico, Oklahoma and Kansas; 69 million acres nationally).

299(a)) and federal ownership of "oil, gas, and all other mineral deposits" as reserved in patents issued pursuant Small Tract Act of 1938[8] includes, as a matter of law, sand, gravel and rock, regardless of whether they appear on the surface of the land. *See Western Nuclear*, 462 U.S. at 53 (1983) (holding that SRHA reservation includes materials such as sand and gravel); *Sunrise Valley, LLC v. Kempthorne*, 528 F.3d 1251, 1252 (10th Cir. 2008) (following *Western Nuclear*), *cert. denied*, 129 S.Ct. 2377 (2009); *Hughes v. MWCA, Inc.*, 12 Fed.Appx. 875, 877 (10th Cir. 2001) (holding that there is "no question" that common variety scoria (volcanic cinders) "meets the Court's definition of minerals reserved to the United States under the SRHA"); *New West Materials LLC*, 398 F.Supp.2d 445-53 (extending *Western Nuclear* and holding that reservation of "oil, gas, and all other mineral deposits" in a patent issued pursuant to the Small Tract Act of 1938 included sand and gravel). Thus, mineral estate ownership of surface sand, gravel, and crushed rock is a common feature of land ownership in New Mexico by virtue of the SRHA and the Small Tract Act.

Amicus would have the Court put the State on a different footing than the federal government, notwithstanding the fact that the wording of the State's

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[8] *See* 43 U.S.C. § 682a (1970), repealed by Pub.L. No. 94-579, § 702, 90 Stat. 2789 (1976).

reservation ("all minerals of whatsoever kind, including oil and gas") is, if anything, even broader than the SRHA and Small Tract Act reservation. Amicus' position is mistaken, and the Court should reject it.

CONCLUSION

For the foregoing reasons, and those stated in the Commissioner's Answer Brief, the Court should affirm the District Court's Partial Final Judgment.

Respectfully submitted,

John L. Sullivan
Associate Counsel
New Mexico State Land Office
310 Old Santa Fe Trail
P.O. Box 1148
Santa Fe, New Mexico 87504-1148
(505) 827-5713
Attorney for Defendant-Appellee Patrick H. Lyons, Commissioner of Public Lands for the State of New Mexico

CERTIFICATE OF SERVICE

I certify that on this 5th day of August, 2010, I caused a true and correct copy of the foregoing pleading to be served by causing the same to be deposited in the U.S. mail, first-class, postage pre-paid, addressed to:

Michael W. Brennan, Esq.
Brennan & Sullivan P.A.
128 E. DeVargas Street
Santa Fe, NM 87501-2702

Michael R. Comeau, Esq.
Stephen J. Lauer, Esq.
Comeau, Maldegan, Templeman & Indall, LLP
P.O. Box 669
Santa Fe, NM 87504-0669

Stuart R. Butzier, Esq.
Andrea K. Robeda, Esq.
Modrall, Sperling, Roehl, Harris & Sisk, P.A.
P.O. Box 2168
Albuquerque, NM 87103-2168

John L. Sullivan