IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

No. 29,812
Seventh Judicial District Court
Torrance County
No. D-0722-CV-2006-228

DELMA E. PRATHER, AS TRUSTEE OF THE DELMA E. PRATHER REVOCABLE TRUST,

Plaintiff/Appellant,

vs.

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

Defendant/Appellee.

APPEAL FROM THE SEVENTH JUDICIAL DISTRICT COURT
TORRANCE COUNTY
MATTHEW G. REYNOLDS, District Judge

APPELLANT'S REPLY BRIEF

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Oral Argument Requested

May 7, 2010

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Statement of Compliance

Pursuant to Rule 12-213(G) NMRA, the undersigned counsel certifies that this Reply Brief complies with the type and volume limitations of Rule 12-213(F) NMRA. This Brief has been prepared in a 14-point Times New Roman proportionally-spaced typeface. The body of the Brief contains 4,271 words according to the word-count feature of the Microsoft Word 2003 software used to prepare the Brief.

Statement Regarding Citations to the Record Proper and Transcript of Proceedings

This Statement is included pursuant to Rule 12-213(A) (as amended 2007). References to the Record Proper are by volume number and page number, *i.e.,* 4 RP 628. The Transcript of Proceedings was provided on an "FTR" disk containing a file for each of the hearings and one for each of the three days of trial. For purposes of clarity, references to the Transcript are to the date of the proceeding and a time stamp, *i.e.,* "3/23/09 Tr. 9:16:34", pursuant to the FTR Courtroom Log filed with the audio CD. The playback software used was FTR Gold.

INTRODUCTION

The crux of this appeal is whether New Mexico should adopt the surface destruction doctrine. The State Land Office ("SLO") asserts the doctrine should not be followed because: (i) it is inconsistent with the decision of the Supreme Court in *Bogle Farms, Inc. v. Baca*, 1996-NMSC-051, 122 N.M. 422, 925 P.2d 1184; (ii) it should not be applied against a public agency grantor; and, (iii) the factual predicate for application of the doctrine was not established in the trial court. As we demonstrate below, SLO's first argument is flawed because *Bogle Farms* did not even consider the doctrine. Moreover, SLO nowhere disputes that the doctrine provides a useful means of conducting the analysis that *Bogle Farms* prescribes: determining the intent of long dead parties regarding transactions that occurred decades ago. The trial court erred in ignoring the doctrine and relying instead on "evidence" of intent that was created by non-parties to the transaction long after the state Patent was issued.

POINT I

SLO PROVIDES NO VALID JUSTIFICATION FOR REFUSING TO APPLY THE SURFACE DESTRUCTION DOCTRINE.

SLO's assertion that *Bogle Farms* precludes application of the surface destruction doctrine is wrong. *Bogle Farms* never considered the issue. "[C]ases are not authority for propositions not considered." *Fernandez v. Farmers Ins. Co.*

of Ariz., 115 N.M. 622, 627, 857 P.2d 22, 27 (1993) (citation and internal quotation marks omitted).

The surface destruction doctrine is designed to facilitate the inquiry mandated in *Bogle Farms*. *Bogle Farms* directs the district courts to ascertain whether "the parties to the original contract intended that the State reserve" the material in question. 1996-NMSC-051, ¶ 35. In *Bogle Farms*, most of the parties to the original contract were before the court, and subject to examination regarding their intent. It was unnecessary to consider the surface destruction doctrine. Here, the circumstances are far different. Commissioner Miles, the grantor of Section 16, and Grantee Shelton are long deceased and left no evidence of their intent other than the four transactional documents (Pl. Exs. 1-4) and the condition of the land itself. Thus, the doctrine provides a proxy for determining what the parties must have reasonably intended. Virtually all of the Western states utilize the doctrine in ascertaining intent. Br. Ch. at 12-19.

Where the original parties are unavailable, the surface destruction test has its greatest value. Where a general mineral reservation "would in reality effectuate a grant of very little or nothing to the surface owner . . . , the parties would not *intend* to negate the substance of their transaction." *Rysavy v. Novotny*, 401 N.W.2d 540, 542-43 (S.D. 1987) (emphasis added). Courts view it as "*unreasonable* to assume that a party *intended* to reserve the surface, and at the

same time to convey to the mineral owner the [material] on the surface with the right to remove it, thereby destroying all [that was] reserved." *Downstate Stone Co. v. United States*, 712 F.2d 1215 (7th Cir. 1983) (emphasis added). "[A]n interpretation rendering a contract such that a reasonable man would not enter into it is disfavored." *Smith v. Tinley*, 100 N.M. 663, 665, 674 P.2d 1123, 1125 (1984).

SLO (Answ. Br. at 19) states that we go too far by citing cases that apply the surface destruction doctrine to prevent the mineral rights owner from removing all of the "surface soil." Not so. We primarily cited those cases to illustrate the extreme nature of SLO's position, namely that even common, ordinary surface dirt may constitute a "mineral." *See* 3-24-09 TR 12:20:54-12:21:14.

SLO cites *Northern Pacific Railway Co. v. Soderberg*, 99 F. 506 (D. Wash.), *aff'd*, 104 F. 425 (9th Cir. 1900), *aff'd,* 188 U.S. 526 (1903) for the proposition that *any* stone or rock deposit is a mineral. However, it was the *Soderberg* case in the U. S. Supreme Court that criticized as "absurd" any attempt to define as mineral anything that is not animal or vegetable. *Id.* at 529. This outmoded "animal, vegetable and mineral" test has been criticized in New Mexico and virtually every modern jurisdiction that has considered it. *State ex rel. State Highway Comm'n v. Trujillo,* 82 N.M. 694, 695-96, 487 P.2d 122, 123-24 (1971), *overruled on other grounds*; *Champlin Petroleum Co. v. Lyman*, 103 N.M. 407, 708 P.2d 319 (1985); *Bambauer v. Menjoulet*, 29 Cal.Rptr. 874, 875-76 (Cal. App. 1963).

SLO argues that the surface destruction doctrine is not applicable to governmental grants. However, courts have applied the doctrine to government conveyances. *E.g., United States ex rel. Southern Ute Indian Tribe v. Hess*, 348 F.3d 1237, 1244 (10th Cir. 2003) ("*Hess II*"); *Whittle v. Wolff*, 437 P.2d 114, 117 (Ore. 1968); *State Land Bd. v. State Dep't of Fish & Game*, 408 P.2d 707, 708 (Utah 1965).

POINT II

THE UNDISPUTED SUBSTANTIAL EVIDENCE TRIGGERS THE SURFACE DESTRUCTION DOCTRINE.

SLO's Answer Brief strings together a summary of the "evidence" it presented at trial, states that the issue is one of substantial evidence, and then concludes, with little explanation or analysis, that the judgment must be affirmed. Answ. Br. at 33-46.

As previously noted (Br. Ch. at 29), substantial evidence is relevant evidence that a reasonable mind would deem adequate to support a conclusion. The evidence must, in a word, be "probative." *H.T. Coker Const. Co. v. Whitfield Transp. Inc.*, 85 N.M. 802, 806, 518 P2.d 782, 786 (Ct. App. 1974). Evidence claimed to be substantial must not only be legally relevant, it will also be tested by notions of common sense and logic. *See Getz v. Equitable Life Assurance Society of the United States*, 90 N.M. 195, 198, 561 P.2d 468, 471 (1977).

Bogle Farms prescribes the determination that must be supported by substantial evidence: the "original" parties must have intended that the state reserve the materials in question. 1996-NMSC-051, ¶ 35. The statements of Mrs. Prather in documents executed more than a half-century after the original transaction are not "probative" because they do not reflect upon the probable intent of Commissioner Miles and Mr. Shelton. *See* Answ. Br. at 12, 38-39.[1]

SLO's response is to cite cases from other jurisdictions that allow the use of so-called "backward-looking" evidence. Answ. Br. at 42-44. Those other jurisdictions, however, are not New Mexico, which requires proof of "original

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[1] SLO's Brief (at 13-14) asserts that the Prather Trust did not object to much of the non-contemporaneous evidence. To the contrary, we repeatedly objected. We filed a "Memorandum on the Inadmissibility of Developments Subsequent to Conveyance," (4 RP 659-62), where we objected to subsequent developments generally, citing the same cases (and others) we have relied on in this appeal, and rejecting "backward-looking evidence." We objected to relevance of subsequent "reclamation technology," on which SLO heavily relies in its Answer Brief (at 13-14, 18-22, 40). We noted that "[t]he rights of the parties are distinctly fixed" by the original instrument. 4 RP 661. We filed a separate Memorandum on the Inadmissibility of Expert Opinion concerning the Intent of the Parties, which sought to exclude expert testimony based on non-contemporaneous facts. 4 RP 655-58. In our trial brief, we asserted that the fact that a market for railroad ballast developed after the time of the original transaction was not probative. 3 RP 602-603, 606. And, we made the same points at various times in argument to the trial court, including, prominently, that the reasonable intent of the parties must be determined as of the date of the 1947 Patent. 3/25/09 TR 10:21:35-11:23:49; *see also* 3/24/09 TR 11:30:28-11:36:20. Both oral argument and briefing below suffice to satisfy preservation requirements. *See, e.g., Montgomery v. United Servs. Auto. Ass'n,* 118 N.M. 742, 743, 886 P.2d 981, 982 (Ct. App. 1994). We also reiterated these same points in proposed findings 16-18 and 25, 3 RP 612-15. No more is required.

intent." *Bogle Farms,* 1996-NMSC-051. Since it is unquestionable that SLO's post-transaction evidence is not probative of original intent, the trial court's findings on intent (Findings of Fact Nos. 65-69, 4 RP 749-750) cannot be supported by substantial evidence.

SLO's "course of performance" theory is also defective. SLO cites (Answ. Br. at 42) a jury instruction (UJI 13-828) stating that course of performance "by the parties" themselves may be indicative of a "common understanding." Mrs. Prather was not a party to the purchase contract or Patent. *See Garcia v. Garcia*, 86 N.M. 503, 505, 525 P.2d 863, 865 (1974) (uncertain word in deed may be clarified by "acts of the parties").

SLO seeks to remedy this defect by citing (Answ. Br. at 42) out-of-state authority which comments that, in proper cases, evidence of the course of performance of successors may be admissible. What SLO overlooks is that the Committee Commentary to the jury instruction it cites requires course of performance evidence to "describe more than just an isolated instance." In *Lafitte Co. v. United Fuel Gas Co.*, 177 F.Supp. 52, 59 (E.D. Ky. 1959), the course of performance was royalty payments made "over the years." SLO's other case, *Tarlow v. Arnston*, 505 P.3d 338 (Ore. 1973), involved recognition of an elevator agreement in circumstances extending over 40 years. In circumstances much closer to those presented here, the court in *Cushing v. State*, 434 A.2d 486, 499-

500 (Me. 1981) concluded that evidence of a course of performance "can apply only to the conduct of the parties who actually participated in the original conveyance, not to conduct many years later by subsequent grantees and by successors to the holders of public offices." Mrs. Prather's subscription to documents drafted by others years after the transaction in question were not probative or substantial.

The *pre*-transaction evidence all points in one direction: the parties to the 1930 purchase contract and the 1947 Patent could not have intended that the plainly visible common rock on Section 16 was "mineral."

A. The Transactional Documents.

These documents provide the most direct evidence of the parties' intent. Pl. Exs. 1-4. The Supreme Court, in *Rickelton v. Universal Constructors, Inc.*, 91 N.M. 479, 576 P.2d 285 (1978), had substantially the same set of transactional documents before it and concluded that sand and gravel involved there was not a "mineral." Although we contended (Br. Ch. at 28) that *Rickelton* "governed" the issues on this appeal, SLO's Answer Brief fails to discuss that case.

B. The Physical Characteristics of the Rock.

The Answer Brief (at 13, 44-46) cites various specifications and tests which serve only to prove that the rock was sufficiently "hard" to serve its function of supporting railroad tracks (ballast). *See* Br. Ch. at 2, 4, 9, 10. In *Hart v. Craig*,

216 P.3d 197 (Mont. 2009), the court considered similar evidence insubstantial to prove that the rock in question was a reserved "mineral." There, the surface owner was removing sandstone which was "orthoquartzite in character and tend[ed] to be somewhat harder than typical sandstone." *Id.* at 198. Finding that the rock was "not very special," the court sustained a determination that, as a matter of law, the rock was not a mineral. *Id.* Likewise, the use of rock from the Prather Ranch does not qualify it as "mineral," merely because the rock has a composition that makes it hard.[2]

The District Court found that the most reasonable meaning of "minerals" included "the industrial mineral known as crushed stone." Findings of Fact No. 72, 4 RP 750. Of course, the common country rock at issue here only becomes "crushed stone" after processing. Under the District Court's reasoning, all rock existing on and under the millions of acres that have been conveyed by the SLO is a "mineral," since, by processing, that rock can be turned into "the industrial mineral known as crushed stone." The consequences of such reasoning on the agricultural and grazing lands of this state would be devastating.

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[2] "Rocks are mixtures and therefore outside the mineral category." *Cumberland Min. Co. v. United States*, 513 F.2d 1399, 1401 (Ct. Cl. 1975).

C. The Attorney General Opinion.

SLO cites a 1945 Attorney General Opinion No. 4816 (Df. Ex. M) as contemporaneous evidence that sand, gravel and building stone[3] was regarded as a "mineral" in New Mexico at that time. What SLO fails to mention is that the Opinion noted the existence of "inconsistent [judicial] opinions" on the topic and recommended a declaratory judgment action to "conclusively" determine that question. *Id.* Commissioner Miles never followed that recommendation. How this fuzzy set of circumstances can be informative of the intent of the ordinary New Mexico rancher or the Land Commissioner remains unexplained. In New Mexico, attorney general opinions do not have the force of law. *See City of Santa Rosa v. Jaramillo*, 85 N.M. 747, 750, 517 P.2d 69, 72 (1973).

D. The Visual Evidence.

In our Brief-in-Chief (at 20), we referenced photographs of Section 16 as providing undisputed documentary evidence of significant surface outcropping of the rock on Section 16. We also cited cases making it clear that, as long as outcropping occurs on a "substantial portion" of a parcel, the surface destruction doctrine is properly invoked. *Id.* at 19, 20.

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[3] The rock at issue here is not sand or gravel. Neither is it "building stone." Building stone, such as marble or granite, is sometimes considered a mineral. *See Soderberg*, 188 U.S. at 367.

SLO, not surprisingly, interprets the photographs differently (Answ. Br. at 20-22)[4] and cites *Montoya v. Medina*, 2009-NMCA-029, ¶ 7, 145 N.M. 620, 203 P.3d 905 for the proposition that documentary evidence presents a factual issue where "visual explanation [is combined] with witness interpretation." Although SLO cites no visual explanation or witness interpretation, *Montoya* is inapposite for another reason. The visual evidence there was surveys, sketches, conflicting maps and the like in a boundary dispute, not photographs. Where an issue depends for resolution upon photographs, New Mexico appellate courts have considered them conclusive. *State v. Rendleman,* 2003-NMCA-150, ¶ 28, 134 N.M. 744, 82 P.3d 554 (absent other evidence, "photos may be viewed as undisputed facts."); *Ortega v. Koury*, 55 N.M. 142, 227 P.2d 941 (1951) (photograph of street showed no obstacles to prevent defendant from seeing child; court determined the physical facts left no room for a contrary conclusion). The photographs showing rock outcropping on Section 16 are, in reality, contemporaneous transactional evidence because the trial court found that the current condition of Section 16 is the same as it was in the 1930's. Findings of Fact Nos. 14, 70, 4 RP 737, 750.

[4] SLO attempts to minimize the extent of the rock outcropping on the surface and extending to the subsurface of Section 16 by asserting that Mainline's quarry has only destroyed "one-eighth" of the surface of Section 16 thus far. Answ. Br. at 1. SLO knows full well that Mainline's quarry operations may continue to expand for many years (Df. Ex. 1), and that the rock visible on the surface of Section 16, extending into the subsurface, occupies much more than the one-eighth of the surface currently destroyed. 3/23/09 TR 2:35:44-2:35:59.

E. The Market.

SLO asserts that, because there was a market for "crushed rock" in some parts of the U.S. in the 1930's and 1940's, it must be a mineral. Answ. Br. at 8, 24. However, there was no showing that a Torrance County market existed at that time for railroad ballast. If, at the time, no market existed, evidence of a market developing later is "irrelevant to the proper inquiry" and therefore insubstantial. *BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 185 (2004).

F. Technical Publications Are The Only Evidence From The 1930's and 1940's.

The technical publications relied on by SLO, The Minerals Yearbooks, are insubstantial because they list items like peat moss and Portland cement as "industrial minerals," notwithstanding that these substances are plainly not within the commonly understood meaning of the term. *See also United States v. Toole*, 224 F.Supp. 440, 448 and n. 13 (D. Mont. 1963) (rejecting use of a minerals yearbook because no consideration was given to the meaning of "mineral" from a legal standpoint); *Downstate Stone Co.*, 712 F.2d at 1219 ("Classification as a generic mineral resource, however, does not make limestone a mineral in legal contemplation or necessarily in the contemplation of the parties to the conveyance."). Moreover, if the technical publications are probative, then sand and gravel would always be a mineral, despite the legion of cases to the contrary,

because those technical bulletins invariably list sand and gravel as a mineral. *E.g.*, Df. Exs. K-1 at 603-15, K-2 at 289-97, L at 1034-48.

G. The Reclamation Bond Requirement.

In the trial court, SLO argued that the registration of the Section 16 quarry under the New Mexico Mining Act, NMSA 1978 §§ 69-36-1 *et seq.* (1993) precluded application of the surface destruction doctrine. 3 RP 579. After we cited cases in our Brief-in-Chief rejecting post-transaction reclamation requirements as a basis for determining the intent of the parties to the original transaction, SLO sought something more contemporaneous. It has raised, for the first time on appeal, a 1925 statute which required SLO lessees to post reclamation bonds. *See* NMSA 1978, §§ 19-10-26, 19-10-27.[5] Since the lessee must compensate for surface damages, the reasoning goes, there is no need for application of the surface destruction doctrine.

SLO's new position fares no better than its old one. Most mining operations go on for decades or longer. As noted previously, the surface destruction doctrine provides a means of ascertaining grantor-grantee intent. What reasonable grantee, paying dearly to purchase state lands at market value during the Great Depression,

[5] This statute was not mentioned in the trial court's Findings of Fact and Conclusions of Law. 4 RP 732-54. The findings relied exclusively upon post-transaction reclamation matters such as the 2004 zoning change proposal made by Mainline. Findings of Fact No. 45, 4 RP 744-45; Df. Ex. X.

would buy lands that could be taken out of productive use merely because of the possibility that restoration damages would be paid years later? That is why "it is immaterial that devices of restoration or reclamation were available" at the time of the original grant. *Reed v. Wylie*, 554 S.W.2d 169, 172. (Tex. 1977).[6]

POINT III

THE STATUTES AND REGULATIONS RELIED ON BY SLO HAVE NO BEARING ON THE INTENT OF THE ORIGINAL CONTRACTING PARTIES.

SLO continues to rely on statutes and regulations classifying "all" state lands as mineral lands. Answ. Br. at 30. We challenged SLO to explain how this overbroad classification would have any bearing upon the intent of the original parties to the contract. Br. Ch. at 42-43. Although the Answer Brief (at 29-32) analyzes these statutes at length, it nowhere supplies the answer to the question we posed.

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[6] SLO criticizes us for citing Texas authority because, it says, Texas has "abolish[ed]" the surface destruction doctrine. Answer Br. at 17, n. 9. The case SLO cites for that proposition, *Moser v. United States Steel Corp.*, 676 S.W.2d 99 (Tex. 1984), merely held, as a matter of law, that uranium is within the common and ordinary meaning of the term "mineral." In a decision rendered subsequent to *Moser*, the Texas court made it clear that, in a proper case, Texas still recognizes the doctrine. *Gifford-Hill & Co., Inc. v. Wise County Appraisal Dist.*, 827 S.W.2d 811, 815 (Tex. 1991) notes that *Moser* left intact *Heinatz v. Allen*, 217 S.W.2d 994, 998 (Tex. 1949) (holding that common building stone at shallow depths and outcropping at the surface was not within the scope of a general mineral reservation), *Atwood v. Rodman*, 355 S.W.2d 206 (Tex. Civ. App. 1962) (surface shale not a mineral) and *Psencik v. Wessels*, 205 S.W.2d 658 (Tex. Civ. App. 1947) (sand and gravel).

SLO also briefly resurrects the Jones Act, 43 U.S.C. §§ 870-71 (1927), which was the subject of its summary judgment motion denied below. 2 RP 410-14.[7] The Jones Act requires the state to reserve "minerals" from conveyance of trust land such as those of the type of Section 16. The short answer is that the Jones Act sheds no light upon the question here: what *constitutes* a mineral?

POINT IV

SLO'S FEDERAL CASE LAW DOES NOT CONTROL THE STATE LAW QUESTIONS POSED HERE.

Several state courts have explicitly rejected *federal* decisions such as *Watt v. Western Nuclear, Inc.*, 462 U.S. 36 (1983) and its progeny in interpreting *state* law on the question of what constitutes a "mineral" under a general mineral reservation. Based on the *Watt* line of cases, SLO nonetheless asserts that sand and gravel of widespread occurrence should invariably be considered a mineral under a mineral reservation when the government has left that term undefined. That rule would be inconsistent with the mandate of *Bogle Farms* to determine the original parties' intent.

Watt, understandably, eschewed the surface destruction doctrine to determine the original parties' intent because it was focusing on a different question, namely the interpretation of the Stock Raising Homestead Act of 1916

[7] The trial court did not refer to the Jones Act in its Findings and Conclusions. 4 RP 732-54.

("SRHA"), 43 U.S.C. § 299. *See Rysavy*, 401 N.W.2d at 542 (*Watt* is of "little help in deciding the present case" in which the SRHA does not apply.). Similarly, the federal cases deciding whether sand and gravel is a mineral under federal mining claim location statutes (Answ. Br. at 9–11) are dependent on federal statutes, not the intent of long dead parties to instruments executed decades ago.

SLO never addresses the storm of criticism *Watt* has generated. A United States Supreme Court plurality shared the concerns of the dissenters in *Watt* and therefore limited it to its facts. *BedRoc*, 541 U.S. at 183. Although *Bogle Farms* did discuss *Watt* (1996-NMSC-051, ¶ 12), our appellate courts have not had an opportunity to consider it in light of the Supreme Court's later decision in *BedRoc*.

Nearly all the cases considering *Watt* outside the context of the SRHA follow *BedRoc* and reject *Watt*.[8] The Tenth Circuit, referencing the surface destruction doctrine, has refused to apply *Watt* on at least three occasions. *Hess II,* 348 F.3d at 1241 (requiring consideration of consequence of "disturbing the land's surface to extract the gravel"); *United States v. Hess*, 194 F.3d 1164, 1171-72 ("*Hess I*") (distinguishing *Watt* on the basis that SRHA involved free grants to homesteaders, while the Taylor Grazing Act required the grantee of an exchange patent to pay valuable consideration); *Poverty Flats Land & Cattle Co. v. United*

[8] *Sunrise Valley, LLC v. Kempthorne*, 528 F.3d 1251 (10th Cir. 2008), *cert. denied*, 129 S.Ct. 2377 (2009) and *Hughes v. MWCA, Inc.*, 12 Fed. Appx. 875, 877 (10th Cir. 2001) are inapposite because they were decided under the SRHA and therefore regarded *Watt* as binding.

States, 788 F.2d 676 (10th Cir. 1986). The state court cases that have considered *Watt* in non-SRHA cases have rejected it. *E.g., Miller Land & Mineral Co. v. State Highway Comm'n of Wyoming*, 757 P.2d 1001, 1003 (Wyo. 1988) ("If there is any confusion, we suspect that the *Watt* case is the culprit as the vast majority of courts have held for various reasons that gravel is not a mineral estate . . .) (citation omitted); *Kinney v. Keith*, 128 P.3d 297, 307 (Colo. App. 2005) (recognizing that *Watt* is limited to SRHA).

The applicability of *Watt* in New Mexico outside the SRHA context is an open question. In *Champlin Petroleum Co. v. Lyman*, 103 N.M. 407, 708 P.2d 319 (1985) our Supreme Court considered whether caliche was within the general mineral reservation of a U.S. patent issued under the SRHA. Because *Watt* was the controlling interpretation of the SRHA, the Court was obligated to follow it. However, the Court indicated that, outside the SRHA context, it "may share the reservations of the dissenters [in *Watt*] that the majority's definition of a reserved mineral may be overly broad." *Id.* 103 N.M. at 409, 708 P.2d at 321.

Watt's defects are also recognized by the commentators. In Clark, *BedRoc Ltd., LLC v. United States*: *Sand and Gravel, Changing Value in Changing Times*, 9 Great Plains Nat. Res. J. 78 (2005), the author observed that *Watt* only survived after *BedRoc* because of a "pedantic" distinction between the phrases "other minerals" (SRHA) and "other *valuable* minerals" (Taylor Grazing Act) (emphasis

added) in the respective federal statutes. According to the author, *Watt* should have been overruled. *Id.* The primary reason for not overruling *Watt*, in the author's view, was that "courts rarely overrule 'bad' decisions involving statutory interpretation." *Id.* at 87. Accordingly, *Watt* "can be viewed as a desperate attempt by Chief Justice Rehnquist to preserve the doctrine of stare decisis." *Id.* at 88.

Against this backdrop, SLO seeks to "extend[]" *Watt* to non-SRHA cases. Answ. Br. at 10. It has unearthed one case so concluding. In *New West Materials LLC v. Interior Bd. of Land Appeals*, 398 F.Supp.2d 438 (E.D. Va. 2005), *aff'd*, 216 Fed. Appx. 385 (4th Cir. 2007), the court applied *Watt* in a case arising under the Small Tract Act, 52 Stat. 609, Ch. 317 (1938). But it did so in different circumstances than those presented here. Applicable precedents required the court to give deference to any Interior Board of Land Decision interpretation that had a "reasonable" basis. *Id.* at 443-44. Additionally, the court noted that "[t]he risk of surface destruction caused by sand and gravel mining was presumably captured by a reduction in the land's price." *Id.* at 450. That is not true here. As we noted in our Brief-in-Chief (at 6-7), the 1932 Appraisal of Section 16 (Pl. Ex. 2) made no deduction in value for the existence of any minerals on the property, even though the rocks now alleged to be minerals were plainly visible on the surface.

CONCLUSION

For the foregoing reasons, the Partial Final Judgment should be reversed and the case remanded to the trial court.

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CERTIFICATE OF SERVICE

I hereby certify that on May 7, 2010, I caused a true and correct copy of the foregoing *Reply Brief* to be mailed first class, postage prepaid, to:

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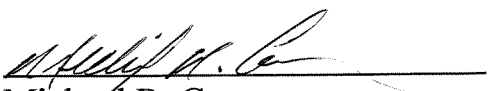

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