COPY

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

BRIEF IN CHIEF

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Statement of Compliance

Pursuant to Rule 12-213(G) NMRA, the undersigned counsel certifies that this Brief in Chief 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 10,175 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 shall be 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 shall be by 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.

SUMMARY OF PROCEEDINGS

I. NATURE OF THE CASE.

The issue in this case is whether common country rock visible over a large portion of the surface of a "state section" is within a state patent mineral reservation for "all minerals of whatsoever kin[d], including oil and gas." The trial court found that the rock at issue was "crushed stone" which, according to some technical and geologic publications, qualifies as an "industrial mineral." Findings of Fact No. 20, 4 RP 738. According to the court's findings, an "industrial mineral" is defined as "a valuable, usually nonmetallic rock or related material that is natural or man-made, excluding fuels, metals, and gems." *Id.* No. 21, 4 RP 738. Under this sweeping definition, the court determined the common rock at issue was a reserved "mineral" owned by the State of New Mexico.

Although the court's ruling below affects only a single section of land in Torrance County, its implications are far more significant. In fact, this case could have grave consequences for many rural landowners in the State of New Mexico. Unless reversed, the practical effect of the decision below would be that the Defendant-Appellees Land Commissioner and State Land Office (collectively "SLO") will have the right to destroy and render useless for agricultural and grazing purposes any portion of the millions of acres it has sold to farmers and

non-mineralized rock located at or near the surface of state trust lands. We further request the Court to follow the lead of most other states in adopting the "surface destruction" doctrine, which holds that, in the absence of clear contrary intent, where materials alleged to be "minerals" are plainly visible on the surface, and where the surface would have to be destroyed in order to "mine" them, the parties could not have intended those materials to be "minerals" because, if they were, the mineral reservation would swallow up the grant and render it worthless.

II. COURSE OF PROCEEDINGS.

On October 24, 2006, Prather filed her Complaint for Declaratory Judgment and Other Relief against the Commissioner and SLO in the Seventh Judicial District. Based upon the trial court's ruling that Mainline was an indispensible party, Prather filed a First Amended Complaint joining Mainline on April 17, 2007. The trial court bifurcated the proceedings into Phase I and Phase II. Phase I consisted of liability issues related to Prather's claims seeking to quiet title to the rock on Section 16 in the Trust and for a declaratory judgment that the Trust owned the rock being quarried by Mainline, and SLO's counterclaims seeking the same relief in favor of itself. Phase II is to consist of a determination of all other issues, including determination of damages in favor of the prevailing party. 2 RP 435-37.

A three-day bench trial of Phase I was conducted on March 23 - 25, 2009. The trial court entered its Findings of Fact and Conclusions of Law on April 23, 2009, granting judgment in favor of SLO on its Phase I counterclaims.

III. DISPOSITION IN THE COURT BELOW.

The trial court entered its Findings of Fact and Conclusions of Law on April 23, 2009. The trial court's ruling was based upon a 1919 state regulation classifying ***all*** state lands as "mineral lands" (which the court misapplied), the language of various conveyancing forms drafted and historically used by SLO, and a finding that the common rock on Section 16 was a "mineral," largely because the rock being removed was hard and had value for industrial purposes. The trial court entered a Partial Final Judgment on June 18, 2009. That Judgment certified the case for interlocutory appeal under NMSA 1978, § 39-3-4 and Rule 12-203 NMRA, and also found that there was "no just reason for delay," allowing an appeal under Rule 1-054(B)(1) NMRA. A Notice of Appeal was timely filed on July 7, 2009. On July 30, 2009, this Court denied the interlocutory appeal and ordered the Rule 1-054(B)(1) appeal to proceed.

IV. STATEMENT OF FACTS.

The Prather Trust, as owner of the surface estate, and the SLO, as owner of the mineral estate, make conflicting claims to ownership of the rock on Section 16. This dispute arises out of the meaning of the undefined term "minerals" contained

in a mineral reservation in a 1947 SLO Patent to the Prather Trust's predecessor, Sadie Shelton. Pl. Ex. 4. As discussed below, resolution of the issue turns on whether the parties to the original purchase contract and Patent would have intended this rock to be a reserved mineral.

The history of land ownership on Section 16, together with the transactional documents reflecting its purchase and sale, provide several objective indicators of probable intent of the parties. The Territory of New Mexico originally acquired title to Section 16 under the Ferguson Act, 36 Stat. 484, Ch. 489 (June 21, 1898). 4 RP 733. *Id.* 734. Under that Act, if any of the lands granted were "mineral" in character, title to those mineral lands did not pass to New Mexico. Rather, ownership of the mineral lands remained in the United States. Thus, as of the date of the original grant from the United States, Section 16 was not regarded as "contain[ing] minerals in sufficient quantity to justify expenditure for their extraction." *Id.*

In SLO Administrative Rule No. 1, 1919, dated April 4, 1919, "all" lands granted to the State of New Mexico by Congress were classified as mineral lands, a fact relied on by the trial court in holding that the rocks were minerals. Findings of Fact No. 6, 7, RP 734-35. We challenge those findings in Point V below because of their inconsistency with the Ferguson Act, and because, if credited, the findings

would mean that "all" state lands contain minerals for the purpose of applying SLO's Patent mineral reservation.

In 1930, J.C. Shelton applied to SLO to purchase Section 16. *Id.* at 735. In his application, despite the fact that the rock in question was plainly visible at the time (Pl. Ex. 15A; Finding of Fact No. 14, RP 737), he declared that "the land applied for herein is essentially non-mineral land . . ." Finding of Fact No. 10, RP 735.

By statute, Section 16 had to be "appraised [at] true value" prior to sale. Enabling Act, Sec. 10, 36 Stat. 557, ch. 310 (June 20, 1910) ; Conclusion of Law No. 9, RP 752. The results of the appraisal are reflected in a sworn document dated August 5, 1930, entitled "Appraisement of Grazing and Agricultural Lands." Pl. Ex. 2. The document recites that the appraiser "is well acquainted with said described land" and had personally made a physical inspection. *Id.* Despite the fact that the rock was visible, when asked whether there was any "mineral or coal on said land," the appraiser responded with an unequivocal "No." Further, the appraiser swore in an Affidavit as follows:

> [T]here is not, to my knowledge, within the limits thereof, any vein or lode of quartz or other rock in places bearing gold, silver, cinnabar, lead, tin, or copper, or any deposit of coal; that there is not, within the limits of said land, to my knowledge, any placer, cement, gravel, salt or other valuable mineral deposits; that no portion of said land is worked for mineral during any part of the year by any person or persons; and said land is essentially non-mineral in character."

Pl. Ex. 2; Finding of Fact No. 11, RP 736. Hard common rock of the type visible on Section 16 was not listed in the appraisal as a mineral. *Id.*

Another transactional document was the purchase contract for Section 16, between Shelton and SLO, signed January 22, 1931. Pl. Ex. 3; Finding of Fact No. 12, RP 736. That document recited that "while the land herein contracted for is believed to be essentially non-mineral [land], *should mineral be discovered therein*, it is expressly understood . . . that the minerals . . . are reserved . . . " *Id.* (emphasis in original), quoting Pl. Ex. 3. Given the visibility of the rock, the rock was not regarded as a mineral that had been "discovered" as of 1931.

The rock outcrops covered an extensive portion (30-40%) of the surface of Section 16. Pl. Ex. 15; Def. Ex. NN at 10; 3/23/09 TR 10:53:14-10:53:48. If, hypothetically, the reasonably objective grantee, who, like Shelton, was a rancher intending to use the land for grazing (Pl. Ex. 1; Finding of Fact No. 10, 4 RP at 735), understood that all of this rock was "mineral," and could be removed by SLO or its representatives in a manner which would destroy the entire surface, he would not have purchased the land in the first place. If all of the rock on or just beneath the surface could be removed, that would nullify the grant by destroying the agricultural usefulness of the land. *See* Pl. Ex. 16K-N.

Other unrebutted evidence of the probable intent of the parties at the time of the transaction presented at trial included: (i) if the appraiser, acting under

applicable SLO Regulations (Def. Ex. I at 1), had believed "mineral" to be present, he would have had to reflect that fact in his analysis of the value of Section 16 to account for reduced value in the event the surface was to be destroyed; but, he did not do so (Pl. Ex. 2); (ii) the rock being removed from Section 16 is part of a geological formation that stretches from the Sangre de Cristo Mountains on the North, and into Texas and Old Mexico on the South, the formation being 15-20 miles wide, and outcrops miles in dimension covering its entire length Pl. Ex. 26; 3/23/09 TR 2:33:54-2:39:42); if the rock being removed is "mineral," the entire formation would have to be considered "mineral" since the rock being removed has the same characteristics as the other rock in the formation, *id.*; (iii) although it contained a small portion of materials which could be deemed "minerals" (Finding of Fact No. 39, RP 742-43, Challenged, Point IV), there was no evidence that the rock is being removed for its mineral content; (iv) there is no indication that, at the time of the transaction, the parties placed any particular value on the outcropping rock that would classify it as a mineral.

Although, as noted, the central question here is whether the parties in 1930 and 1947 would have regarded the rock as a "mineral," the trial court's findings are largely based upon information that came into existence after the purchase transaction: (i) statements in the 2004 transactional documents with Mainline, signed by Prather (a 75-year old, who did not know of the "State's mineral

reservation" and did not draft the documents) and others, described the rock leased to Mainline as being part of the "mineral" estate, 3/23/09, TR 3:17:44-3:18:35 (Findings of Fact Nos. 14-16, 4 RP 737-38, Challenged Point IV); (ii) a 1993 U.S. Geological Survey Bulletin describing removal of "crushed stone" as "mining." (Findings of Fact No. 23, 4 RP 739, Challenged Point IV); (iii) specifications for railroad ballast from the 1990's and the present decade (Findings of Fact No. 37 – 39, 4 RP 742 – 43, Challenged Point IV); (iv) Torrance County re-zoning proposal in 2004 (Findings of Fact No. 45, 46, 4 RP 744 – 45, Challenged Point IV); (v) a confidentiality agreement between the Prather Trust and Mainline in 2006 stating that the rock contained "granite and gneiss" (Finding of Fact No. 61, 4 RP 748, Challenged Point IV); (vi) laboratory test results from 2003 (Finding of Fact No. 43, 4 RP 744, Challenged Point IV); (vii) a 2004 reclamation plan for the site (Finding of Fact No. 46, 4 RP 745, Challenged Point IV); and (viii) a 1954 "Geologic Highway Map" describing sand, gravel and crushed stone as industrial minerals (Finding of Fact No. 22, 4 RP 738-39, Challenged Point IV).

The district court also relied on BNSF specifications for railroad ballast. Finding of Fact Nos. 36-38, 4 RP 742, Challenged, Point IV. On their face, however, all those specifications require is that the rock be "hard," durable and angular. *Id.*; Def. Ex. V.

Another stated basis for the trial court's determination that the rock was mineral is that it had economic value and therefore had industrial uses for which there was a market. Findings of Fact Nos. 23 through 34, 4 RP 739-41, Challenged Point IV. However, the court was equally clear that the value for railroad ballast was predicated on its proximity to the railroad line. *Id.* at No. 18, 4 RP 738, Challenged Point IV. These findings are challenged in Point IV below because materials of a particular hardness, durability and angularity near a railroad line could be considered part of the mineral estate, while materials of identical type and quality, located further away from a railroad, would be part of the surface estate.

The final indicia of intent relied upon by the trial court was a technical publication by the U.S. Bureau of Mines which, in the 1930's and 1940's, described crushed stone as "minerals" and reported sales of that material in New Mexico. Finding of Fact Nos. 31-34, 4 RP 741, Challenged Point IV. These findings are challenged because these same documents classified as "minerals" substances not ordinarily commonly understood to be minerals, at least within the scope of a state patent mineral reservation, such as peat, Portland cement, fuel briquettes, carbon black, water and fill dirt. Def. Exs. K-1 at v, 8; K-2 at A3-4 and L at 27-32; 3/24/09 TR 12:11:58-12:12:55, 12:21:47-12:21:54, 12:10:39-12:11:28.

The circumstances leading up to the filing of Prather's complaint began in 2003. In that year, Mainline obtained the right to remove the rock at issue from

most of the Prather Ranch. Finding of Fact No. 44, 4 RP 744. A geologist employed by Mainline determined that the non-mineralized rock plainly visible on Section 16 suited Mainline's ballast needs. *Id.* Nos. 35-43, 4 RP 741-44. This rock, as it existed on the surface prior to removal operations, is depicted in Plaintiff's Exhibit 15A and other portions of Plaintiff's Exhibits 15 and 16.

As a consequence of this initial review, Mainline conducted a drilling program and confirmed that this same rock extended beneath the surface in sufficient quantities to provide a usable supply of railroad ballast to fulfill Mainline's supply contracts with BNSF. *Id.* No. 40, 4 RP 743. After making that determination, Mainline constructed the quarry and began to remove the rock. *Id.* Nos. 49, 50, 4 RP 746-47.

Over a year after commencement of production, an SLO inspector visited the site. *Id.* No. 59, 4 RP 748. Based on that inspection, SLO asserted a claim to ownership of the rock pursuant to its patent mineral reservation, and threatened to shut the operation down. *Id.* With full reservations of rights, all parties (SLO, Mainline and Prather) agreed to interim arrangements that allowed the quarry to remain open. *Id.* Nos. 60, 61, 4 RP 748-49. Under those arrangements, royalties paid to the Trust by Mainline were sharply curtailed. Def. Ex. GG. In her complaint, Prather sought a determination of ownership of the rock and damages in the amount of the lost royalties. 1 RP 1 – 19.

POINT I

NEW MEXICO SHOULD ADOPT THE SURFACE DESTRUCTION DOCTRINE.

A. Standard of Review.

Legal questions in a suit involving ownership of property are reviewed by the appellate court *de novo*. *Adams v. Key*, 2008-NMCA-135, ¶ 12, 145 N.M. 52, 193 P.3d 599. Review is *de novo* in interpreting an instrument involving rights to minerals where the question is whether common materials are "minerals." *Kinney v. Keith*, 128 P.3d 297, 303 (Colo. Ct. App. 2005)(general mineral reservations); *Florman v. MEBCO Ltd. P'ship*, 207 S.W.3d 593, 600 (Ky. Ct. App. 2006).

B. Preservation.

All issues arose by virtue of the parties' pleadings, evidence at trial, requested findings of fact and conclusions of law, presentation of written briefs and memoranda in trial and summary judgment briefing (including supplemental briefs submitted at trial) and by argument to the trial court at trial.

C. Surface Destruction Doctrine as a Basis for Ascertaining Intent.

In New Mexico, the question of what constitutes a mineral has been litigated in the appellate courts since at least 1940. *See Board of County Comm'rs of Roosevelt County v. Good*, 44 N.M. 495, 105 P.2d 470 (1940). Many of the cases involve the same SLO patent reservation at issue here. *See, e.g., Bogle Farms, Inc., v. Baca*, 1996-NMSC-051, 122 N.M. 422, 925 P.2d 1184; *Burris v. State ex*

rel. State Highway Comm'n, 88 N.M. 146, 538 P.2d 418 (1975), 88 N.M. 146, 538 P.2d 418; *Champlin Petroleum Co. v. Lyman*, 103 N.M. 407, 708 P.2d 319 (1985); *Jensen v. State Highway Comm'n*, 97 N.M. 630, 642 P.2d 1089 (1982); *Rickelton v. Universal Constructors, Inc.*, 91 N.M. 479, 576 P.2d 285 (1978); *Roe v. State ex rel. State Highway Dep't*, 103 N.M. 517, 710 P.2d 84 (1985); *State ex rel. State Highway Comm'n v. Trujillo*, 82 N.M. 694, 487 P.2d 122 (1971).

Most recently, the New Mexico Supreme Court articulated the following test for determining what constitutes a mineral under SLO's standard reservation:

> [T]he issue is whether the parties to the *original* contract intended that the state reserve sand and gravel. If the *original* purchaser did not purchase sand and gravel rights from the State, that purchaser could not have conveyed sand and gravel to a subsequent purchaser, regardless of the intent, lack of notice, or good faith of the parties to the later transaction. *See* 7 Powell, *supra*, ¶ 938.21[5], at 84D-31 (stating that assignees may not take more than what assignor possessed).

Bogle Farms, Inc., 1996-NMSC-51, ¶ 35 (emphasis added). Here, the original purchasers from the SLO were the Sheltons and the primary question is what their intent was when the purchase contract was signed in 1931. Pl. Ex. 3.

Courts have commented upon the difficulty of making this inquiry when the transactions occurred in the distant past and all that remains are the documents reflecting the original transaction. As one court observed:

> Courts . . . are often thrust into a complex and hopeless search for the "true intentions" of the original contracting parties. With the passage of decades and series of mesne conveyances, this task can be impossible . . . The most consistent results produced by these cases are title uncertainty and the need to litigate each mineral reservation to determine what substances it encompasses. The courts ultimately determine the meaning of the word 'minerals', and all too often the only reliable rule appears to be that the word minerals means what the courts say it means.

Spurlock v. Santa Fe Pacific Ry. Co., 694 P.2d 299, 307 (Ariz. Ct. App. 1985) (citations and internal quotation marks omitted). The problem is exacerbated when "the original contracting parties" are long dead. *Id.* One commentator echoed this sentiment:

> [I]n the typical case which comes before the court, the parties have given no thought to whether or not the substance in question should be included in or excluded from the . . . reservation of minerals . . . The efforts of the court are thus directed toward determining the nonexistent intention of the parties with respect to the particular substances in question . . .

George E. Reeves, *The Meaning of the Word "Minerals,"* 54 N.D. L. Rev. 419, 423 (1978).

Special criticism has often been directed at those courts that have attempted to divine the subjective intent of the parties decades later. *Miller Land & Mineral Co. v. State Highway Comm'n of Wyoming*, 757 P.2d 1001, 1002 (Wyo. 1988)

(rejecting subjective intent as involving a "long and tortuous path in a complex and hopeless search to discover the particular minerals the parties intended to reserve."); *Hovden v. Lind*, 301 N.W.2d 374, 378 (N.D. 1981) ("[s]ubjective intent, or the lack of it, is not a concern when the parties manifest assent to a term capable of being given a reasonably objective meaning."); *see Thomas v. Markham & Brown, Inc.*, 343 F.Supp. 498, 500 (E.D. Ark. 1973) ("[T]he intent with which the courts concern themselves is objective or presumed; it is not the subjective intent of either the grantor or grantee.")

Applying the preceding rules, the court in *Downstate Stone Co. v. United States*, 712 F.2d 1215 (7th Cir. 1983), observed that in attempting to ascertain the objective intent of parties to conveyances which occurred 45 years before the litigation began, there are only three relevant factors: (i) the surface destruction doctrine; (ii) statutes in effect at the time; and (iii) "[t]he circumstances at the time of the conveyances, [including] the records, documents and acts of the parties . . . ").[1] Unfortunately, as discussed below, since the trial court did not confine itself to these factors, it fell into error.

[1] We discuss the surface destruction doctrine in this Point and Point II. We discuss the documents concerning the Shelton Section 16 transaction in Point III. We discuss the statutes bearing upon the question in Point V.

Although numerous courts have bemoaned the "inconsisten[cy]" of decisions in this area (*e.g., Miller Land,* 757 P.2d at 1002), there is one unifying factor: the surface destruction doctrine provides the best means to ascertain objectively the intent of the parties to a transaction occurring decades ago. In *Bambauer v. Menjoulet*, 29 Cal.Rptr. 874, 875 (Cal. Ct. App. 1963), the court expressed this common sense concept well:

> Certainly removal of the surface soil would render the land useless for agricultural purposes. Cases from other jurisdictions have held that destruction of agricultural land is sufficient reason for holding that the word "mineral" used in a reservation of conveyance does not include gravel.

"[I]t is unreasonable to assume that a party intended to reserve the surface, and at the same time convey to the mineral owner, the limestone on the surface with the right to remove it, thereby destroying all that he had reserved." *Downstate Stone Co.*, 712 F.2d at 1218; *see also Farm Credit Bank of Texas v. Colley*, 849 S.W.2d 825, 827 (Tex. Ct. App. 1993) (presuming an "intent that a surface owner would not consent to a reservation . . . of a substance when the surface must be destroyed to mine it").

In holding, *as a matter of law*, that a mineral reservation would not include common materials on the surface, many American courts[2] have relied on the

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[2] *See W.S. Newell, Inc. v. Randall*, 373 So.2d 1068, 1070 (Ala. 1979); *Harper v. Talledega County*, 185 So.2d 388 (Ala. 1966); *Bambauer*, 29 Cal. Rptr. at 875; *Farrell v. Sayre*, 270 P.2d 190, 192-93 (Colo. 1954); *Holloway Gravel Co. v.*

English decision in *Waring v. Foden*, 1 Ch. 276, 86 A.L.R. 969, 979 (1932), which stated that "the word minerals when found in a reservation out of a grant of land means substances exceptional in use, in value, and in character . . . and does not mean the ordinary soil which, if reserved would practically swallow up the grant."

In *Holland*, citing the respected commentator Eugene Kuntz, 1 *Kuntz Oil and Gas*, § 13.3 at 305, the court stressed that "intent should be the general intention from the standpoint of enjoyment of the respective interest created." 540 P.2d at 550. Only those substances that can be removed "without unreasonably interfering" with the contemplated surface uses are to be deemed minerals. *Id.* at 551. Thus, the surface destruction doctrine has been applied in numerous cases where, as here, the contemplated use of the surface grant was agriculture and grazing. *E.g., Bambauer*, 29 Cal.Rptr. at 875; *Psencik v. Wessels*, 205 S.W.2d 658, 659 (Tex. Civ. App. 1947); *Holland*, 540 P.2d at 550; *Hovden*, 301 N.W.2d at 375; *Morrison v. Socolofsky*, 600 P.2d 121 (Colo. Ct. App. 1979). As the court in *Florman* stated in holding, as a matter of law, that limestone was not a mineral at the time of the original grant (1873) and today, "[i]n this country it is a part of the soil, and *a conveyance that reserves the limestone with the right to remove it would*

McKowen, 9 So.2d 228, 230 (La. 1942); *Holland v. Dolese Co.*, 540 P.2d 549, 551 (Okla. 1975); *Whittle v. Wolff*, 437 P.2d 114, 117 (Ore. 1968); *Gifford-Hill & Co., Inc. v. Wise County Appraisal Dist.*, 827 S.W.2d 811, 814-15 (Tex. 1991) (citing cases); *Shores v. Shaffer*, 146 S.E.2d 190, 194 (Va. 1966); *Puget Mill Co. v. Duecy*, 96 P.2d 571, 573-74 (Wash. 1939).

reserve practically everything and grant nothing." 207 S.W.3d at 601 (citation and internal quotation marks omitted; emphasis in original) The court indicated that this conclusion would hold even in the face of a trial court finding that the limestone had significant value, *i.e.*, it was "excellent Portland cement material." *Id.*; *see also Beury v. Shelton* 144 S.E. 629, 633 (Va. 1928) (applying surface destruction doctrine in country where rock was "a part of the soil").

The surface destruction doctrine has been variously described as a "widely accepted and most prudent rule," *Rysavy v. Novotny*, 401 N.W.2d 540, 542 (S.D. 1987), as the "general rule", *Farrell*, 270 P.2d at 192, and as the rule that courts "overwhelmingly" follow. *Burkey*, 25 Cl. Ct. at 575. It has been employed by the Tenth Circuit in a case arising out of New Mexico involving another common substance of widespread occurrence: caliche. *Poverty Flats Land & Cattle Co. v. United States*, 788 F.2d 676 (10th Cir. 1986). Further, although reversed on other grounds in *Bogle Farms, Inc.*, the Supreme Court in *Trujillo*, 82 N.M. at 697, 487 P.2d at 125, quoted approvingly an A.L.R. annotation (95 A.L.R. 2d 843, 846 (1964)), which stated:

> [Common] materials which form part of the surface are . . . not legally recognizable as minerals, nor are those which cannot be obtained without a destruction of the surface, in the absence of extremely clear indication that they are to be so recognized and that the usual

considerations of avoiding damage to the surface estate are to be deliberately disregarded . . . [3]

POINT II

APPLICATION OF SURFACE DESTRUCTION RULE TO THESE FACTS.

A. Standard of Review.

See Part I(A) above.

B. Preservation.

See Part I(B) above.

C. Application of Facts to Law.

The jurisdictions applying the surface destruction doctrine have evolved several straightforward guidelines for its application.

a. "[T]he *entire* surface area" conveyed need not be covered with the materials in question (here common country rock) before the doctrine applies.

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[3] Other cases applying the doctrine include: *United States v. Hess*, 194 F.3d 1164 (10th Cir. 1999), *appeal after remand*, 348 F.3d 1237 (10th Cir. 2003); *Kinder v. LaSalle County Carbon Coal Co.*, 141 N.E. 537, 540 (Ill. 1923); *Campbell v. Tennessee Coal, Iron & R. Co.*, 265 S.W. 674, 676 (Tenn. 1924); *Witherspoon v. Campbell*, 69 So. 2d 384, 388 (Miss. 1954); *Fisher v. Keweenaw Land Ass'n*, 124 N.W.2d 784, 788 (Mich. 1963); *State Land Bd. v. State Dep't of Fish & Game*, 408 P.2d 707 (Utah 1965); *Shores*, 146 S.E.2d at 193; *Wulf v. Shultz*, 508 P.2d 896, 900 (Kan. 1973); *Vang v. Mount*, 220 N.W.2d 498, 501 n. 2 (Minn. 1974); *West Virginia Dep't of Highways v. Farmer*, 226 S.E.2d 717, 720 (W.Va. 1976); *Reed v. Wylie*, 597 S.W.2d 743 (Tex. 1980); *Doochin v. Rackley*, 610 S.W.2d 715 (Tenn. 1981); *Christensen v. Chromalloy Am. Corp.*, 656 P.2d 844, 846 (1983); *Norken Corp. v. McGahan*, 823 P.2d 622 (Alaska 1991); *Atwood v. Rodman*, 355 S.W.2d 206, 211 (Tex.Civ. App 1962) and *Morrison v. Socolofsky*, 600 P.2d 121 (Colo. App. 1979).

Hess, 348 F.3d at 1245 (emphasis added); *see Morrison*, 600 P.2d at 122 (doctrine applicable if material underlies substantial portion of parcel and extraction would destroy agricultural usefulness); *Kinney*, 128 P.3d at 306 (doctrine not limited to circumstances where material underlies entire surface).

b. The surface destruction doctrine may apply in circumstances where the reservation is included within a patent or other instrument of conveyance issued by a state governmental entity. *State Land Bd.*, 408 P.2d at 708 (state grant); *Hess*, 348 F.3d at 1242 (exchange patent); *Whittle*, 437 P.2d at 115, 117 (BIA deed); *Poverty Flats*, 788 F.2d at 677 (U.S. patent).

c. Photographs showing undisputed evidence of widespread outcropping of the material in question on the parcel trigger application of the doctrine as a matter of law. *See Holland*, 549 P.2d at 550 (photographs show repeated outcropping on surface); *Whittle*, 437 P.2d at 118 (photographs showing widespread destruction caused by removal of gravel from property).

Under the undisputed facts here, the surface destruction doctrine is unquestionably triggered. Numerous photographs were in evidence showing the rock outcroppings that covered a large portion of the property. Pl. Ex. 15; *see* 3/23/09 TR 10:52:24-10:53:48, 10:54:02-10:55:09. These surface rocks were suitable as railroad ballast. 3/23/09 TR 10:55:09-10:55:22, 10:57:11-10:57:26, 11:06:22-11:06:52. They covered 30-40% of Section 16. Def. Ex. NN at 10. The

same rock was found by drill tests and quarrying beneath the surface on Sections 15 and 16. 3/23/09 TR 11:04:03-11:04:33, 11:09-25-11:10:07, 11:49:15-11:49:35. The destruction of the surface, and its consequent unsuitability for grazing, was apparent. Pl. Ex. 16 K, L, M; 3/23/09 TR 11:08:19-11:08:51.

Given these undisputed facts, it is apparent that a reasonable person in Rancher Shelton's position would not have paid valuable consideration for Section 16 during the Great Depression had he known that SLO could destroy the surface. *See* Pl. Ex. 3. This Court is in as good a position as the trial court to apply the doctrine to the facts presented here. As the court in *Kinney*, 128 P.3d at 309, stated in applying the surface destruction doctrine as a matter of law, in a case where the evidence was undisputed that most (but not all) of the surface was underlain by sand and gravel alleged to be "minerals:"

> [A]lthough intent of the parties is generally an issue of fact that should not be resolved on summary judgment . . . here there is no disputed issue of fact that the original contracting parties, who are not parties in the quiet title action, intended the land to be used for ranching and farming purposes and did not intend that the mineral reservations include the right to mine gravel or sand.

Other cases which have determined the intent of the original contracting parties as a matter of law, based solely or primarily on the surface destruction doctrine, include: *W.S. Newell*, 373 So.2d at 1070 (rejecting grantor's self-serving testimony of intent, and relying upon fact that surface was sufficiently destroyed to allow removal of 530,000 cubic yards of soil used as fill material); *Holland*, 540

P.2d at 552 (holding that limestone present throughout surface was a mineral "would destroy the general intent of enjoyment of the surface"); *Farm Credit Bank of Texas*, 849 S.W.2d at 827; *Hess*, 348 F.3d at 1244-45 (citing *Farrell*, 270 P.2d at 192); *Morrison*, 600 P.2d at 122.

POINT III

THE TRANSACTIONAL DOCUMENTS REFLECTING THE SHELTON PURCHASE ARE AT VARIANCE WITH THE TRIAL COURT'S RULING.

A. Standard of Review.

See Part I(A) above. Additionally, where the evidence of the parties' intent is documentary, the appellate court is in as good a position as the trial court to ascertain that intent. *Thomas v. City of Santa Fe*, 112 N.M. 456, 459, 816 P.2d 525, 528 (Ct. App. 1991) (documentary evidence on intent of parties and uncontested facts of surrounding circumstances); *House of Carpets, Inc. v. Mortgage Inv. Co.*, 85 N.M. 560, 564, 514 P.2d 611, 615 (1973); *Cohn v. Town of Randall*, 633 N.W.2d 674, 678 (Wis. Ct. App. 2001) (appellate court in as good a position as trial court to draw inferences from documentary evidence). The circumstances in *Bogle Farms, Inc.*, where live persons who participated in the transactions in question were available to testify concerning their intent (including their alleged reliance on prior decisions of the courts), are markedly different from those presented here. Most appellate courts attempting to determine the scope of a

mineral reservation primarily from the transactional documents, and other information available here, have found that the question is a matter of law. *See* n.3 above. Review of the common and ordinary meaning of a term is *de novo*. *Garcia v. Underwriters at Lloyd's London*, 2007-NMCA-42, 141 N.M. 421, 156 P.3d 712.

B. Preservation.

See Part I(B) above.

C. Analysis.

Since actual testimony concerning the intent of the original contracting parties is unavailable, the next best thing is the transactional documents for the purchase and sale of Section 16. See *Thomas*, 353 F. Supp at 500 ("the scope of a mineral reservation . . . depends ultimately upon the intent of the parties, and legal scriveners . . . "). As discussed below, the documents provide further support for application of the surface destruction doctrine. Moreover, under governing New Mexico law, the fact that there is no evidence the parties considered whether the rock visible on Section 16 was a mineral disclosed a binding intention not to reserve it.

As discussed, the four transactional documents were: the application (Pl. Ex. 1), the appraisal (Pl. Ex. 2), the purchase contract (Pl. Ex. 3) and the Patent (Pl. Ex. 4). Of these, the appraisal is the most significant. Although the rock later used as ballast was plainly visible on the surface at the time (1930) (Findings of Fact

Nos. 14, 70, 4 RP 737, 750), the state-approved appraiser did not classify that rock as a mineral. Pl. Ex. 2. Further, Shelton himself, in the purchase application, recited that there was nothing he regarded as a mineral on the land. Pl. Ex. 1.

Similar historical evidence has been cited in support of decisions not to include sand, gravel, rock or other common substances as being within the scope of a general mineral reservation. In *Hess I*, the fact that the appraisal on patented lands failed to assign any value to the property's mineral rights, when the commercial quality gravel alleged to be a mineral comprised a significant portion of the surface, or near surface, of the ground in the general area, provided a basis for reversal of a trial court decision that the gravel was not reserved in the patent. 194 F.3d at 1168.[4] In the subsequent appeal, the appraisal was again cited in support of the Tenth Circuit's holding, as a matter of law, that the original parties did not intend to include the gravel in the general mineral reservation. *Hess II*, 348 F.3d at 1240. Likewise, in *Weyerhauser Co. v. Burlington Northern, Inc.*, 549 P.2d 54, 55, n.1 (Wash. 1976), a pre-sale railroad examination report noted that there were no "valuable deposits" on the property, although the report did note that the surface rock at issue (basaltic andesite rock) was present on the property under the heading of "Soils." The court held that the report (and a railroad policy manual

[4] There were two reported Tenth Circuit decisions in *Hess*. The first, reported at 194 F.3d 1164, is referred to as "*Hess I*." The second, reported at 348 F.3d 1237, is referred to as "*Hess II*."

requiring valuable deposits to be noted in the examination report) was evidence wrongfully excluded by the trial court because it bore upon the intent of the parties to a general mineral reservation. *Id.* Since SLO's appraisal form here (Pl. Ex. 2) called for the appraiser to list all "minerals," the country rock in question would have been listed had it been regarded as such.

The appraisal report is significant in another respect. The Enabling Act, 36 Stat. 557, 563 § 10, required all sales of state lands to be appraised at "true value." Finding of Fact No. 11, RP 735-36. If the rocks present throughout the surface of Section 16 had been regarded as minerals, a deduction from "true value" would have been made in the appraisal since their removal would have rendered the land useless for the contemplated purpose: grazing. Yet, no such deduction was made. Pl. Ex. 2. Again, this Court is in as good a position as the trial court to evaluate the significance of these historical documents.

The language of the Shelton Patent supports the same conclusion. Where the material alleged to be a mineral can be removed only by destroying the surface, an irreconcilable conflict arises between the mineral reservation and the granting clause of a patent or deed allowing the grantee "TO HAVE AND TO HOLD the said premises . . . FOREVER." *Norken Corp.*, 823 P.2d at 627.[5] In such a case the

[5] The Shelton Patent contains a nearly identical have and hold clause "To Have and to Hold, the same . . . forever." Pl. Ex. 4

reservation cannot stand because it nullifies the grant. *Id.*, citing *Farrell*, 270 P.2d at 192.

The same analysis applies here because the courts have generally reached the conclusion that common country rock at or just beneath the surface is not within a general mineral reservation. *E.g.*, *Burkey*, 25 Cl. Ct. at 574 (cobbles and boulders of hard rock types such as andesite, rhyolite, volcanic tuff and quartzite); *Farrell*, 270 P.2d at 191, 192-93 (railroad "ballast" used on roadbed not a mineral); *Farley v. Booth Bros. Land and Livestock Co.*, 870 P.2d 377 (Mont. 1995)(basaltic scoria used in roadbuilding); *Hovden*, 301 N.W. 2d at 378 (same); *Rysavy*, 401 N.W.2d at 540 ("rock-like substance" called magnesia, "used to absorb moisture and improve the condition of dirt roads"); *Weyerhauser*, 549 P.2d at 56 (basaltic andesite rock used in road building); *see also Watt v. Western Nuclear Inc.*, 462 U.S. 36, 62, n.3 (2004) ("absurd to think" that moss rock used to "decorate fireplaces and homes" is within mineral reservation to government) (in dissent); *Harrison v. County of Stevens*, 61 P.3d 1202, 1206 (Wash. App. 2003)(Once surface owner establishes ownership of rock at or near surface on the basis of the surface destruction doctrine, that ownership extends to "whatever depth it may be found").

A close examination of New Mexico case law discloses that, based upon the transactional documents reviewed above, the common rock on Section 16 must be

deemed non-mineral. We begin with cases holding that, under the specific transactional documents in those cases, a factual issue arose regarding whether sand and gravel was (or might be, depending on the facts) reserved under SLO's form of patent: *Burris* and *Bogle Farms*. In both cases, that result was foreordained because the transactional documents specifically referred to sand and gravel as being "minerals." In *Burris*, 88 N.M. at 147, 538 P.2d at 419, the patentee's application to purchase stated:

> I further state that the land applied for herein is essentially non-mineral land, and that this application is not made for the purpose of obtaining title to *mineral*, *including* but not limited to caliche, *sand and gravel*, coal, oil or gas lands fraudulently but with the sole object of obtaining title to the surface of the land applied for. (internal quotation marks omitted; emphasis added.)

In *Bogle Farms*, also a sand and gravel case, the patentee signed an application with identical language. 1996-NMSC-51, ¶ 3. Thus, in each case, the Court determined that the patentee's intent was clear from the transactional documents: it could not reasonably be denied that the patentee understood sand and gravel could be a mineral.

In *Rickelton*, the Supreme Court was presented with precisely the same issue: whether sand and gravel was a reserved "mineral" within SLO's patent reservation. The Court reached the opposite conclusion because, unlike *Burris*, there was nothing in the transactional documents in the record in that case where the patentee acknowledged that sand and gravel was a mineral. Thus, it

determined, as a matter of law, that the sand and gravel was not reserved. In doing so, it cited, with approval, *Resler v. Rogers*, 139 N.W. 2d 379, 384 (Minn. 1965), which held that "sand and gravel" are not minerals within the *ordinary and natural meaning* of those words in a reservation unless the sand and gravel are exceptional in nature or have a particular value." (emphasis added)[6]

This case is governed by *Rickelton*.[7] In the transactional documents, the Sheltons made no acknowledgement that "crushed stone" or "industrial minerals" or "railroad ballast" or common rock, or anything remotely like any of them, was a mineral. As a consequence, the common meaning governs and, under *Rickelton*, the undefined term "minerals" does not include rock.

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[6] Numerous other courts have used the "ordinary and natural meaning" test in determining the scope of the undefined term "minerals" within a general mineral reservation. *E.g. BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 184 (2004) ("ordinary and popular sense"); *Holland*, 540 P.2d at 551 ("ordinary and generally accepted meanings (citation and internal quotation marks omitted). *Whittle* 437 P.2d at 116 ("ordinary trading transactions"). As noted in New Mexico, determination of the ordinary meaning of a term is reviewed *de novo*. 2007-NMCA-042, ¶ 14.

[7] It is noteworthy that, although the Supreme Court in *Bogle Farms, Inc.* took the opportunity to overrule, or recognize overruling, of several New Mexico decisions, it left *Rickelton* intact despite discussing it extensively. *Id.*, ¶¶ 15-16.

POINT IV

THE TRIAL COURT'S DECISION WAS BASED UPON INSUBSTANTIAL EVIDENCE.

A. Standard of Review.

"[W]hen the facts are not in dispute and a reasonable inference can be drawn, an appellate court may independently draw its own conclusions and overrule contrary conclusions made by the trial court." *Wilson v. Richardson Ford Sales, Inc.*, 97 N.M. 226, 228, 638 P.2d 1071, 1073 (1981). Moreover, when the facts are undisputed, "we review *de novo* the trial court's application of the law to those facts." *Treloar v. County of Chavez,* 2001-NMCA-74, ¶ 11, 130 N.M. 794, 32 P.3d 803. If resolution of an issue depends upon "the interpretation of documentary evidence, an appellate court is in as good a position as the trial court to determine the facts and draw its own conclusions." *Maestas v. Martinez,* 107 N.M. 91, 93, 752 P.2d 1107, 1109 (Ct. App. 1988).

B. Preservation

See Part IB above.

C. Substantial Evidence Review.

The familiar definition of substantial evidence is "relevant evidence that a reasonable mind would accept as adequate to support a conclusion." *Paule v. Santa Fe County Bd. of County Commr's*, 2005-NMSC-021, ¶ 32, 138 N.M. 82, 117 P.3d 240. As noted, in the circumstances presented here, the "conclusion" to

be reached is "whether the parties to the *original* contract intended that the State reserve sand and gravel." *Bogle Farms, Inc.*, ¶ 34 (emphasis added). Since the trial court relied upon information developed long after the original parties entered into the contracts at issue, and since it relied upon other information generally deemed by the courts in similar cases to be immaterial, the judgment must be reversed. The findings discussed in this Point are challenged to the extent that they fail to support the trial court's conclusion on the issue identified above.

The requirement in *Bogle Farms, Inc.* that "original" intentions be analyzed is not novel to New Mexico law. With any contract, the intent of the parties must be determined by evidence of the parties' language, conduct and other circumstances existing at the time the contract was executed. *Shaeffer v. Kelton*, 95 N.M. 182, 185, 619 P.2d 1226, 1229 (1980); *see also Eagle Indus. Inc. v. DeVilbiss Health Care, Inc.*, 702 A.2d 1228, 1233 n.11 (Del. 1997) ("[T]his evidence threatens to transgress one of the primary tenets of the parol evidence rule: relevant extrinsic evidence is that which reveals the parties' intent *at the time they entered into the contract*. In this respect, backward-looking evidence gathered after the time of contracting is usually not helpful.") (emphasis in original).

In other jurisdictions, courts in cases involving the scope of a general mineral reservation have underscored the same point. For example, in *Farrell* the court reversed a finding that sand and gravel were reserved, observing that "[t]he

trial court was led afield and away from the original grant by the side transactions that followed . . . " *Id.* 270 P.2d at 192. The fact that the surface owner in *Farrell*, who, like Prather, was the successor to the grantee in the original transaction, recognized royalty rights in favor of the grantor's successor was deemed insufficient to overcome the appellate court's conclusion (based on the surface destruction doctrine) that the original grantor had no intention of reserving the sand and gravel. *Id.* at 192-93. As the court stated, "the rights of all parties involved are distinctly fixed by the original deed." *Id.* at 193. The reason is obvious: if later developments are allowed to progressively change the title a patentee received in the original instrument, title uncertainty and instability would result. *Poverty Flats*, 788 F.2d at 683; *Atwood*, 355 S.W.2d at 215 ("lead to hopeless confusion").

Despite these clear rules, the trial court took the bait offered by SLO and based his decision upon untimely "side" considerations. Paramount among these was the trial court's reliance upon statements allegedly concurred in by Mrs. Prather, in the 2004 Mainline transactional documents (Def. Ex. T-1), where rock extraction was characterized as "mining." *See* Finding Nos. 47-48, 4 RP 745-46.[8] How those statements, made decades after the transaction was completed, could divest Shelton's successors of rights he obtained remains a mystery. These are

[8] The trial court also cited a 2006 Confidentiality and Non-Opposition Agreement, which referred to the materials being removed as "granite and gneiss materials, also apparently for the proposition that Prather somehow acknowledged that rock being removed is mineral. Finding of Fact No. 61, 4 RP 748-49.

precisely the type of subsequent "side transactions" deemed irrelevant in *Farrell*. They shed no light on what the Sheltons and the Commissioner regarded as a "mineral" in 1930 and 1947.

The trial court also used statements by Mainline in the regulatory arena in 2004 to assist in its determination of what the Sheltons and the Commissioner deemed to be a mineral in 1930 and 1947. Finding No. 46, 4 RP 745 cites a "zone change proposal" stating that "[m]ining and reclamation" would be part of Mainline's quarry operations at Section 16. Then, apparently rejecting our contention below regarding the surface destruction doctrine, the trial court found that the site could be "reclaimed . . . to allow grazing the preexisting grazing use without substantial impairment." Finding No. 57, 4 RP 748. Similarly, the trial court cited a 1954 Highway Geologic Map, published jointly by a private association and a public agency, which referred to "sand, gravel and crushed stone" as "industrial minerals." Finding No. 22, 4 RP 738-39. Lastly, the trial court relied extensively upon U.S. Geological Survey Bulletin No. 1594 (1993) Findings of Fact Nos. 23-27, 4 RP 739-740, and unattributed evidence from 1980 (*id.* no. 28, 4 RP 740), to show how large the market for railroad ballast presently is.

All of this "evidence" is beside the point. As discussed above, Mainline's descriptions of the rock in zoning and reclamation proposals are unhelpful when

there was no foundational showing that those zoning and reclamation requirements were even on the books at material times. What a non-party to the 1930-31 transactions (Mainline) may have said decades later in a different context has no bearing on how reasonable persons in the position of the Sheltons and the Commissioner would have seen the issue. Moreover, since the rights of the parties are fixed by the patent, "whether the land could be reclaimed in [2004 was] irrelevant and immaterial to the intent of the contracting parties at the time of their" 1931 purchase contract and 1947 patent. *Kinney*, 128 P.3d at 309; *see also Reed v. Wylie*, 554 S.W.2d 169, 172 (Tex. 1977) ("If the method of production required the removal of the surface soil, it is immaterial that devices of restoration or reclamation were available.").

Regarding pronouncements by regulatory agencies like those in the 1954 Highway Map, the court in *Poverty Flats* explained that giving credence to such information would make the title a patentee received "dependent on the changes in the views of the officials or changes in personnel." 788 P.2d at 683. Additionally, the Map is plainly a narrow geotechnical publication. Such sources have been discounted in determining what constitutes a mineral. As *Burkey* observed, "most parties to land contracts have little understanding of geology or chemistry." 25 Cl. Ct. at 578. Hence, courts have resisted using the term "minerals" in its "narrow geologic sense." *Id.*; *Kinney*, 128 P.3d at 297; *Atwood*, 355 So.2d at 212 (usage

restrictions). Indeed, if definitions of the term "mineral" in a subsequently enacted statute are not substantial evidence of the meaning of the term "mineral" in a general mineral reservation (*see Bambauer*, 29 Cal.Rptr at 876-77; *Rysavy*, 401 N.W.2d at 542; *Miller Land*, 757 P.2d at 1003), neither is a casual statement subsequently made in the legend of a technical map published by a state agency. As to the trial court's subsequent market analysis, moreover, the plurality opinion in *BedRoc*, 541 U.S. at 184-85, determined that whether a commercial market subsequently developed nearer the site is not helpful in interpreting the meaning of reserved "minerals" at the time of the grant. Since the trial court relied on evidence of the type deemed insubstantial in most other jurisdictions, the judgment must be reversed.

In a similar vein, the trial court also attempted to justify its conclusion by reliance upon technical testimony and specifications concerning the nature of the rock removed. Findings of Fact Nos. 37-43, 53 RP 742 - 744, 747. This information is also insubstantial for the reasons discussed above: since objective persons in the positions of the parties to the Section 16 transactions would not have been aware of this information, it has no bearing. Several courts have so held, as discussed below.

In particular, the trial court found: "39. The mineral content of the rock, which is an aggregate of minerals, has some effect on its meeting the specifications

for ballast." 4 RP 742. To the contrary, "a jumbled mass of fragments of various minerals" are mere rocks, not minerals themselves. *Harper*, 185 So.2d at 391; *Lillington Stone Co. v. Maxwell*, 165 S.E. 351, 352 (N.C. 1932) (citing *United States v. Aitken*, 25 Philippine, 7). Nor are broken fragments of rock minerals. *Harper*, 185 So.2d at 391. Minerals instead have "a definite chemical composition." *Id.* Minerals are also "exceptionally rare and valuable." *Hovden*, 301 N.W.2d at 378. Thus, where a "rock formation consists of a combination of several separate and distinct minerals," a distinction must be made "between the constituent parts of the formation and the formation itself as a whole." *Thomas*, 355 F.Supp. at 500. The "rock itself [is] just a 'rock' and not a 'mineral.' " *Id.*; *see also Downstate Stone Co.*, 712 F.2d at 1219 ("rocks are 'mixtures' and therefore outside the mineral category") (citation omitted).

The trial court relied on several erroneous factors in concluding that merely because the railroad ballast may have had some value generally at the time of the Shelton transactions, it met the "exceptionally rare and valuable" test. *Hovden*, 301 N.W.2d at 378. To summarize the trial court's rationale, contemporaneous technical documents known as annual "Minerals Yearbooks," published by the U.S. Bureau of Mines, classify railroad ballast/crushed stone[9] as an "industrial"

[9] The courts have drawn an explicit distinction between common stone having no distinctive characteristics, which is not regarded as a mineral (*See Thomas*, 353 F.Supp. at 499), and "building stone," which sometimes is. As the court in *Toole*

mineral and indicate there was a market for this material nationally, and in New Mexico at least by 1947, and thereafter. Findings of Fact Nos. 28-34, 4 RP 740-41.

This reasoning has several flaws. In the first place, courts have rejected the use of the Minerals Yearbook's classification in this context. *E.g., United States v. Toole*, 224 F.Supp. 400, 448 and n. 13 (D. Mont. 1963) (peat not a mineral despite classification as such in yearbook). Such turgid governmental publications again give consideration to a particular substance in a technical sense but not from a legal standpoint. *Id.*

More fundamentally, however, where the value comes from the weight or physical bulk of the substance itself (*see* Finding of Fact No. 17, 4 RP 738), not from any rare and exceptional substance removed therefrom, it is generally not deemed to be *a mineral*. *See, e.g., Poverty Flats*, 788 F.2d at 683; *Bambauer*, 29 Cal.Rptr. at 876-77. Some substances, moreover, are so common that they simply are not deemed minerals "regardless of their value," even though the trial court found, based on expert testimony, that the material had "unusual, unique and extraordinary qualities . . . thereby imparting to them special value." *Florman*, 207 S.W.3d at 600, 603 (internal quotation marks omitted). In fact, "commercial

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explained, "some of the most valuable building stone, such . . . as the Caen stone in France, is excavated from mines running far beneath the surface." 224 F.Supp. at 444. Caen stone was used to construct cathedrals in Europe, such as the Canterbury Cathedral.

gravel," like "industrial rock," has often been found to be non-mineral despite the fact that a market exists for it. *Harper*, 185 So.2d at 392 (citing cases). Indeed, the fact that the trial court found that, even presently, this material is worth only $5-6 per ton belies any conclusion that it is "exceptionally rare and valuable." Finding of Fact No. 17, 4 RP 738. The trial court also found that value was imparted by proximity to the Burlington Northern tracks. *Id.*, No. 18, 19 at 738. As already noted, such a standard would lead to hopeless confusion in titles by rendering particular material minerals, or not, by the distance away from transportation or processing facilities. In *Atwood*, the court rejected such a standard, holding that the construction of a cement plant adjacent to the limestone deposit did not convert the limestone into a mineral 35 S.W.2d at 211-13.

If the existence of value/market were the proper criterion, everything, even fill dirt or plain topsoil, would be deemed a mineral. If fact, SLO took this extreme position at trial. 3/24/09 TR 12:20:54-12:21:13. That is a patently unacceptable conclusion. *See Poverty Flats*, 788 F.2d at 682; *W.S. Newell*, 373 So.2d at 1069; *Atwood*, 355 S.W.2d at 213. Such a standard would allow SLO to remove the surface of all reserved property in the State at its whim. For this reason, material so common that it is present in "vast" areas of land is usually not deemed to be within the scope of a general mineral reservation. *E.g., Poverty Flats*, 788 F.2d at 682 (caliche present in vast areas of Southwestern states); *Rysavy*, 401 N.W.2d at

543 (trial court ruling on common rock used for road surfacing "placed into question the ownership of . . . significant portions of western South Dakota"); *State Land Bd.*, 408 P.2d at 708 (sand and gravel deposits "include[] much of the terrain of our Rocky Mountain region."); *Psencik*, 205 S.W.2d at 661-62.[10] To summarize, the widespread nature of the material prevents it from having a rare and exceptional value.

POINT V

STATUTES IN EFFECT AT MATERIAL TIMES BUTTRESS THE CONCLUSION THAT THE ROCKS ON SECTION 16 WERE NOT MINERALS.

A. Standard of Review.

"Appellate courts review questions of law *de novo*." *Boradiansky v. State Farm Mut. Auto. Ins. Co.*, 2007-NMSC-15, ¶ 5, 141 N.M. 387, 156 P.3d 25. Interpretation of statutes presents a legal issue. *Garcia*, 2007-NMCA-42, ¶ 14.

B. Preservation.

See Part I(B) above.

C. Analysis.

The starting point here is the Ferguson Act, 36 Stat. 484, Ch. 489 (1898), under which the Territory of New Mexico acquired Section 16. Finding of Fact

[10] As discussed previously, the evidence here was undisputed that vast areas of New Mexico, and the Rocky Mountain region contained material of the same type as the railroad ballast removed from the Prather Ranch. 3/23/09 TR 2:33:54-2:39:42.

No. 4, 4 RP 733. That statute provided that *only* non-mineral lands were to be conveyed:

> Be it enacted . . . that sections numbered sixteen and thirty-six in every township of the territory of New Mexico, and where such sections, or any parts thereof, are mineral or have been sold . . ., other non-mineral lands equivalent thereto . . and as contiguous as may be to the section in lieu of which the same is taken, are hereby granted to said territory for the support of common schools.

The only possible conclusion that could be drawn from the above-quoted restriction is that Ferguson Act lands were not deemed to contain minerals—a critical conclusion since the materials now claimed to be minerals were plainly visible. Thus, unless something has changed since the Ferguson Act, the statutory analysis also undercuts the trial court's conclusion.

SLO and the trial court struggled mightily to find something that changed. In the briefing below, SLO relied heavily on *Watt*, where in a 5-4 decision, under the unique circumstances presented by the Stock Raising and Homesteading Act of 1916 (43 U.S.C. § 299) ("SRHA"), sand and gravel was deemed to be a part of the mineral estate.

Watt is an exceedingly weak reed for the SLO. After reciting the facts, the majority opinion paid lip service to the surface destruction doctrine by stating: "[i]f all lands were considered minerals under the SRHA, the owner of the surface estate would be left with nothing." (*Id.* at 43.) The majority nonetheless concluded that gravel was a reserved mineral because of the grazing purpose of the

SRHA (*id.* at 53-54), a specific recognition that particularly valuable gravel deposits were locatable minerals under the mining laws—at least sometimes (*id.* at 54, 56-59), and the "rule that land grants are construed favorably to the Government." (*Id.* at 59.)[11]

There is a vigorous dissent in *Watt* subscribed to by four justices, criticizing the majority opinion's definition of minerals because:

> This definition compounds, rather than clarifies, the ambiguity inherent in the term "minerals." It raises more questions than it answers. Under the Court's definition, it is arguable that all gravel falls within the mineral reservation. *Ante*, at 2228-2229, and n. 14, 2231-2232. This goes beyond the Government's position that gravel *deposits* become reserved only when susceptible to commercial exploitation. See TR of Oral Arg. 18-20. And what about sand, clay, and peat? As I read the Court's opinion it could leave Western homesteaders with the dubious assurance that only the dirt itself could not be claimed by the Government. It is not easy to believe that Congress intended this result. *Id.* at 61-62.

In 2004, the Supreme Court ruled 6-2 that sand and gravel were not "valuable minerals" under the Pittman Underground Water Act of 1919. *BedRoc*, 541 U.S. at 176. The four-justice plurality opinion expressed doubt about the correctness of *Watt* (*id.* at 182-183), but distinguished that case from *BedRoc* on

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[11] The rule of construction that favors the sovereign applies only to land grants, i.e., gifts or free entry on public lands. The principle has no application where, as in this case with Section 16, the conveyance is for valuable consideration. *Hess II*, 348 F.3d 1237, 1242 (10th Cir. 2003) (rule of construction favoring government only applicable to land grants, i.e., " 'a donation of public land to an individual, a corporation, or a subordinate government.' "); *see also, Hydraulic Race Co. v. Greene*, 245 N.Y.S. 444 (App. Div. 1930).

the ground that the SRHA reserved "minerals" (*id.* at 184-186), while the Pittman Act reserved "valuable minerals."[12] The plurality expressly declined to extend *Watt* "beyond the SRHA." *Id.* at 186.

Justice Thomas, joined by Justice Breyer, filed a concurring opinion in *BedRoc*. The concurrence is notable for demonstrating that the term "valuable minerals" in the Pittman Act cannot be "meaningfully distinguished from the analogous provision in the . . . SRHA (*id.* at 187) because the terms ["minerals" and "valuable minerals"] are " 'synonymous.' " (*Id.*) Justices Thomas and Breyer believed *Watt* was incorrectly decided, but accepted its continuing validity as a rule of property under the SRHA. (*Id.* at 189.) If this view, to which we subscribe, is correct, SLO cannot prevail because, as noted, it has made no attempt to establish that common country rock is a *valuable* mineral.

Justice Stevens, joined by Justices Ginsberg and Souter, dissented in *BedRoc*, using the same analysis as Justices Thomas and Breyer, but reaching the opposite result. The Stevens dissent agrees that the term "minerals" under the SRHA and the term "valuable minerals" in the Pittman Act have the same meaning

[12] "Valuable minerals" is a term of art. It excludes common materials such as salt, even though salt mining indisputably takes place. *See Gladys City Co. v. Amoco Production Co.*, 528 F.Supp. 624, 627 (S.D. Tex. 1984). SLO made no attempt at trial to establish that the rock on Section 16 is a "valuable mineral."

and thus argued that the result in *BedRoc* should have been the same as in *Watt*. *Id.* at 189-192.

After *BedRoc*, it can be said that a clear majority of the Supreme Court believed that the terms "minerals" and "valuable minerals" mean the same thing when construing mineral reservations in federal patents under federal land grant acts. Justices Thomas, Breyer, Stevens and Ginsberg said so expressly in *BedRoc*. Chief Justice Rehnquist and Justice O'Connor did the same in their *Watt* dissent.

Watt has also received a chilly reception in the lower courts. *Miller Land*, 757 P.2d at 1003, blamed *Watt* as the "culprit" for the confusion in this area. The Tenth Circuit has joined the *BedRoc* plurality in limiting *Watt* to SHRA cases. *See Hess II*, 348 F.3d at 1241; *Hess I*, 194 F.3d at 1191-92; *Poverty Flats*, 788 F.2d at 680-81; *see also Burkey*, 25 Cl. Ct. at 576-77; *Kinney*, 128 P.3d at 307; *Rysavy*, 401 N.W. 2d 542-43. We stress that *Watt* interprets federal law and is in no way binding upon this Court.

Additionally, state statutes do not aid the inquiry. As the court in *Rickelton* commented: "What the legislature meant [by the term mineral] is not well defined in New Mexico." 91 N.M. 480, 57 P.2d at 286.

The trial court gave special significance to an SLO regulation, Administrative Regulation No. 1. 1919, classifying "all state lands" as "mineral lands." Finding of Fact No. 7, 4 RP 734-35. However, that Regulation says

nothing about what constitutes a mineral. Any implication that, by virtue of the Regulation, the original contracting parties must have known the rock on Section 16 was a mineral is unsustainable.

The history of Administrative Ruling No. 1 is recounted in *State ex rel. Otto v. Field*, 31 N.M. 120, 123-25, 241 P.1027, 1030-32 (1935). There, the court explained that geologists had concluded that a large part of state lands which totaled more than 10,000,000 acres, were thought to contain oil and gas deposits. This led to unprecedented leasing activity. The legislature appropriated funds to complete a formal classification but, at the time, it was not possible to conduct the classification with accuracy. *See also*, finding of Fact No. 6, 4 RP 734. Until the work could be completed, "for the purpose of orderly administration of the lands of the state . . . , and in order that the state may be afforded *maximum protection* for the purchase of lands as non-mineral," all state lands were classified as mineral lands. *Id.* at No. 7, 4 RP 734-35 (emphasis added). How this interim administrative measure tends to prove or disprove anything about the intent of the parties here in 1930 or 1947 is unexplained.

CONCLUSION

For the foregoing reasons, the Prather Trust requests that the Partial Final Judgment be reversed and the case be remanded to the district court with instructions to enter judgment quieting title to the rocks on and beneath Section 16

in the Prather Trust, and declaring that it is the owner (and entitled to royalties) on those rocks, and for a Phase II determination of damages and all other issues.

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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of January 2010, I caused a true and correct copy of the foregoing Brief in Chief to be mailed first class, postage prepaid, to:

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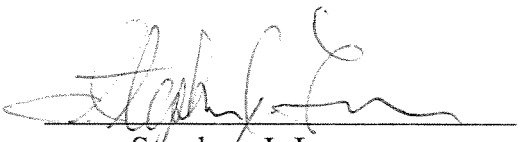

Stephen J. Lauer

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