IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

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

Plaintiff-Appellant,

v. **No. 29,812**

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

Defendant-Appellee,

and

MAINLINE ROCK & BALLAST, INC.,

Additional Defendant.

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

ANSWER BRIEF

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STATEMENT OF COMPLIANCE

Pursuant to Rule 12-213(G) NMRA, undersigned counsel certifies that this Answer Brief complies with the type and volume limitations of Rule 12-213(F) NMRA. This Answer Brief has been prepared in a 14-point Times New Roman proportionally-spaced typeface. The body of the Answer Brief contains 10,918 words according to the word-count feature of the WordPerfect 10 software used to prepare the Answer Brief.

STATEMENT REGARDING CITATIONS TO THE RECORD PROPER AND TRANSCRIPT OF PROCEEDINGS

This statement is included pursuant to Rule 12-213(A) NMRA. References to the Record Proper shall be by page number; *e.g.*, "RP 732." The Transcript of Proceedings was provided on an "FTR" disk containing a file for each of the hearings and one for each day of trial. Following the same format used by Plaintiff-Appellee in the Brief-in-Chief, references to the Transcript shall be by the date of the proceeding and a time stamp; *e.g.*, "3/23/09 Tr. 2:07:40-2:46:20." The playback software used was FTR Gold.

INTRODUCTION

This case concerns ownership of millions of tons of rock that, pursuant to a Lease Agreement between Plaintiff-Appellee and Additional Defendant Mainline Rock & Ballast, Inc. ("Mainline"), and later additionally pursuant to a lease between Defendant-Appellant Commissioner of Public Lands (the "Commissioner") and Mainline, has been blasted and mined from the earth to a depth of 100 feet below grade, crushed and sold commercially, primarily as ballast for railroad beds. Mainline's quarry occupies less than one-eighth of a 640-acre section[1] patented by the State in 1947, with a reservation to the State of:

> *all minerals of whatsoever kind, including oil and gas, in the lands so granted*, and to it, or persons authorized by it, the right to prospect for, mine, produce and remove the same, and perform any and all acts necessary in connection therewith, upon compliance with the conditions and subject to the limitations of the laws of the State of New Mexico . . . .

Plt. Exh. 4 (Patent For State Land No. 1906) (emphasis added); Def. Exhs. MM-1 and MM-2.

Applying the legal standard established in *Bogle Farms, Inc. v. Baca*, 1996-NMSC-051, 122 N.M. 422, 925 P.2d 1184, which requires a case-by-case factual

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[1]The quarry pit itself, as opposed to overburden and waste stockpiles and other surface facilities, occupies less than 1/16 (a quarter-quarter) of the section. Plt. Exh. 16N; Def. Exh. MM-2.

determination of what the parties to the patent intended with respect to this mineral reservation, the District Court, after a two-and-a-half day trial, found that the parties to the 1947 patent intended that the broadly worded mineral reservation would include crushed rock that is sold commercially. RP 749-750 (¶¶ 62-71). Among the circumstances evidencing that intent: (i) the applicant to purchase the land was required to and did state that he was acquiring the land for livestock grazing purposes only; (ii) blasting, crushing and selling rock was not among the purposes for which the land was acquired; and (iii) the State and the patentee understood that the State's intention in reserving "all minerals of whatsoever kind" was to maximize its opportunities to collect royalties from any mineral exploitation that might be made on the land. *Id.* The District Court further found that:

> Even if the parties disagreed as to the meaning of the term "mineral" in the 1930 Shelton contract to purchase or the phrase "minerals of whatsoever kind" in the 1947 patent, or if the parties' intentions could not be determined, it is most reasonable that the term and the phrase include the industrial mineral known as crushed stone, based on all surrounding circumstances.

RP 750 (¶ 72). These facts were supported by abundant evidence, much of which is recounted in the Court's 22-page Findings and Conclusions.

In seeking reversal of the District Court judgment, Plaintiff asks this Court

to (i) ignore the *Bogle Farms* court's case-by-case, fact-specific standard; (ii) adopt a "surface destruction" doctrine that is inapplicable to the circumstances; and (iii) selectively view the evidence in order to make a determination that rock that appears to a limited extent on the surface of the land may not be considered part of the mineral estate unless specifically mentioned in the mineral reservation. Plaintiff's position is contrary to New Mexico law, the nature of the transaction and the evident intent of the parties to the patent.

ARGUMENT

I. THE DISTRICT COURT PROPERLY APPLIED THE *BOGLE FARMS* STANDARD TO DETERMINE WHAT THE PARTIES INTENDED WITH RESPECT TO THE STATE'S RESERVATION OF "ALL MINERALS OF WHATSOEVER KIND."

In its Findings of Fact and Conclusions of Law, RP 732-754, the District Court said the construction of the State's reservation of "all minerals of whatsoever kind" is a factual issue that should be resolved by examining the intent of the parties to the patent. RP 752-753 (¶¶ 11-14). In determining the parties' intent, the Court examined the parties' language and conduct, the objectives they sought to accomplish and the surrounding circumstances. RP 752 (¶ 11). To the extent one party's intent differed from the other's, the Court in its fact-finder role gave the mineral reservation the meaning it found most reasonable, considering all

the circumstances, including the intentions of the parties, the words the parties used, the purposes the parties sought to achieve, custom in the trade, the parties' course of dealing, the parties' course of performance, and whether one party knew or should have known that the other party interpreted the terms differently. RP 753 (¶ 15). The District Court correctly applied both the *Bogle Farms* standard and the Uniform Jury Instructions for determining contractual intent and the meaning of ambiguous contractual terms. *See* Rules 13-804 and 13-825 NMRA.

A. Standard of Review.

When construing a deed or land patent,[2] the general rule is that the grantor's intent should be ascertained from the language employed in the deed or patent, viewed in light of the surrounding circumstances. *Valencia v. Lundgren*, 2000-NMCA-045, ¶ 13, 129 N.M. 57, 1 P.3d 975. Whether a provision in a deed is ambiguous, and susceptible to proof by extrinsic evidence, is a question of law, which is reviewed *de novo*. *Marrujo v. Sanderson*, 2008-NMCA-112, ¶ 5, 144

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[2] A land patent is the usual means by which the state or federal government conveys public lands. *See Black's Law Dictionary* 1234 (9th ed. 2009); 73B C.J.S. *Public Lands* §§ 137-140, 199 (DATE); NMSA 1978, § 19-10-27 (1925) (requiring Commissioner of Public Lands, when selling state lands classified as mineral lands, to issue "*a limited patent only, which shall contain reservation to the state of New Mexico to all the minerals in the said lands*, together with the right to the state or its grantees, to prospect for, mine and remove the same") (emphasis added).

N.M. 730, 191 P.3d 588; *Hasse Contracting Co. v. KBK Fin., Inc.*, 1999-NMSC-023, ¶ 9, 127 N.M. 316, 980 P.2d 641. In making the threshold determination of whether a contractual term is unclear, the trial and appellate court may consider extrinsic evidence. *C.R. Anthony Co. v. Loretto Mall Partners*, 112 N.M. 504, 507-509, 817 P.2d 238, 241-243 (1991).

Once it has been determined that the construction of a contract depends upon extrinsic facts and circumstances, the terms become questions of fact for the trier of fact to decide. *Shaeffer v. Kelton*, 95 N.M. 182, 185-186, 619 P.2d 1226, 1229-1230 (1980) (citation and internal quotation marks omitted). Where a deed is ambiguous, extrinsic evidence is permitted regarding the acts of plaintiff and his predecessors in title. *Sternloff v. Hughes*, 91 N.M. 604, 608, 577 P.2d 1250, 1254 (1978) (citing *Garcia v. Garcia*, 86 N.M. 503, 525 P.2d 863 (1974)). Among other things, an indefinite and uncertain description may be clarified by subsequent acts of the parties. *Garcia*, 86 N.M. at 505, 525 P.2d at 865 (citing cases).

Where a deed or patent contains an exception or reservation, the person asserting title under the deed or patent bears the burden of proving that the exception does not apply. *Allison v. State*, 420 P.2d 289, 293-94 (Ariz. 1966) (citing and discussing cases); *Maxwell Land-Grant Co. v. Dawson*, 151 U.S. 586,

604 (1894) (appeal from New Mexico Territorial Supreme Court); *Buck v. Walker*, 132 N.W. 205, 208 (Minn. 1911).

B. *Bogle Farms* Requires a Factual Determination of Whether the Parties Intended the State's Reservation of "All Minerals of Whatsoever Kind" to Include Crushed Rock Sold Commercially.

In *Bogle Farms*, the Supreme Court held that there must be a case-by-case determination of whether a general reservation of minerals in a state land purchase contract or patent includes minerals such as sand, gravel or caliche, "based on the principle that in contract cases the role of the court is to give effect to the intention of the contracting parties." *Id.*, 1996-NMSC-051, ¶¶ 21-22. There, the plaintiffs were parties or successors to 30-year installment land sale contracts containing a general mineral reservation, and they sought to preclude the Commissioner of Public Lands from specifically reserving sand and gravel in the patents issued when the contracts were paid off. *Id.* at ¶¶ 3-4. In holding that the scope of the contractual reservation should be determined on a case-by-case basis, the court relied on various cases pertaining to State patents. *Id.* at ¶¶ 9-17.

In overruling *Roe v. State ex rel. State Highway Dept.*, 103 N.M. 517, 710 P.2d 84 (1985), *cert. denied sub nom. Baca v. Roe*, 476 U.S. 1141 (1986), which held that that the State's reservation of "minerals" does not include sand and gravel unless they are specifically mentioned, the *Bogle Farms* court said:

> . . . If we were to hold that the definition of "minerals" set out in *Roe* applied to all land sales contracts, we would indeed exalt form over substance. The intent of the contracting parties would be abrogated by rule of law in favor of a strict definition. Our legal history, however, favors substance over form, and thus we will not dispense with the intentions of the contracting parties by holding them to a definition that they did not accept. . . .
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> . . . If there is not a specific reservation, the trial court must look to evidence outside the face of the contract to determine the meaning intended for the term "mineral" when that term has been shown under the circumstances to be ambiguous. . . .

Id., 1996-NMSC-051, ¶¶ 34-35.[3]

Plaintiff's criticism of the intent-of-the-parties standard, particularly when applied to transactions occurring long in the past, is inconsistent with *Bogle Farms*, which involved installment sale contracts executed 30 years before. *Id.*, 1996-NMSC-051, ¶ 3-4. Contrary to Plaintiff's assertion that a parade of horribles will ensue if the District Court judgment is affirmed, the *Bogle Farms* standard and the trial court's fact-specific findings clearly allow other patentees and their successors the opportunity to show either that the reservation in their patents has a different meaning based on the circumstances of the transaction or that the

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[3]The Court went on to discuss situations where a state land purchase was made in reliance on *Roe*, which was decided in 1985, a situation which does not exist here. RP 737 (¶ 15); Plt. Exh. 7.

reservation does not include the particular resource at issue. Conversely, Plaintiff's proposed "surface destruction doctrine" imposes a largely unrebuttable presumption that a general mineral reservation does not include certain minerals when found on the surface or extracted by surface mining, which would preclude a more fact-specific examination of the intent of the parties and have profound implications for other cases arising from disparate circumstances.

Here, the evidence at trial showed that crushed rock was and is routinely classified as a mineral for commercial purposes and that a commercial market for crushed rock, including railroad ballast, existed in New Mexico and nationally when Plaintiff's predecessor executed the purchase contract and when the patent was issued. Plt. Exhs. 26 (New Mexico Geologic Highway Map); Def. Exh. OO-1 (U.S. Geological Survey Bulletin 1549 (1993)); Def. Exhs. K-1, K-2 and L (federal government Minerals Yearbooks for 1932-33 and 1947). As discussed in more detail *infra* at 44-46, this particular rock was and is extensively tested to ensure that it meets detailed specifications for railroad ballast, and the mineral content of the rock plays a role in the fact that it meets those specifications.

The evidence also includes a New Mexico Attorney General Opinion issued in 1945, two years before Patent No. 1906 was issued, stating that the mineral reservation in the State Land Office's form of land purchase contract and patent

should be sufficient to reserve sand, gravel, and building stone that can be taken off of the land on a commercial basis for profit. Def. Exh. M (N.M. Atty Gen. Op. 45-4816). The sale contract and patent language quoted in the Attorney General opinion is the same as in the documents at issue in this case. *See* Plt. Exhs. 3 and 4. The Attorney General opinion quotes a passage from *Northern Pacific Railway Co. v. Soderberg*, 99 F. 507 (D. Wash.), *aff'd*, 104 F. 425 (9th Cir. 1900), *aff'd*, 188 U.S. 526 (1903), which, in finding that land with a granite quarry was mineral land excluded from a federal railroad grant, stated, "In its common and ordinary signification, the word 'mineral' is . . . a comprehensive term including every description of stone and rock deposits, whether containing metallic substances or entirely non-metallic." *Id.*

Similarly, the U.S. Supreme Court has concluded that the 1919 Congress that enacted the Stock-Raising Homestead Act (SRHA)[4] intended the statutorily required reservation of "all coal and other minerals" in SRHA patents to include materials such as sand and gravel that are inorganic, can be removed from the soil, can be used for commercial purposes, and that there is no reason to suppose were intended to be included in the surface estate. *Watt v. Western Nuclear, Inc.*, 462 U.S. 36, 53 (1983). As the *Western Nuclear* court said, that construction reflects

[4]Act of Dec. 29, 1916, ch. 9, 39 Stat. 864, 43 U.S.C. § 299 (as amended).

Congress' understanding that the surface of SRHA lands would be used for ranching and farming and best serves the congressional purpose of encouraging the concurrent development of both surface and subsurface resources, because ranching and farming do not ordinarily entail the extraction of mineral substances that can be taken from the soil and that have separate value. *Id.*, 462 U.S. at 54; *see also Sunrise Valley, LLC v. Kempthorne*, 528 F.3d 1251, 1252 (10th Cir. 2008) (holding that SHRA patent reserved "sand, gravel, and rock"), *cert. denied*, 129 S.Ct. 2377 (2009); *Hughes v. MWCA, Inc.*, 12 Fed.Appx. 875, 877 (10th Cir. 2001) (holding that there is "no question" that common variety scoria (volcanic cinders) "meets the Court's definition of minerals reserved to the United States under the SRHA"); *New West Materials LLC v. Interior Bd. of Land Appeals*, 398 F.Supp.2d 438 (E.D. Va. 2005) (extending *Western Nuclear* and holding that reservation of "oil, gas, and all other mineral deposits" in patent issued pursuant Small Tract Act of 1938 included sand and gravel), *aff'd*, 216 Fed.Appx. 385 (4th Cir. 2007), *cert. denied*, 128 S.Ct. 863 (2008).

In addition, in 1929, the U.S. Department of the Interior concluded that gravel was a locatable "valuable mineral deposit" under the General Mining Act (currently codified at 30 U.S.C. § 22). *Layman v. Ellis*, 52 L.D. 714 (1929). The Department's determination of was "not resolved solely by the test of whether the

substance considered has a definite chemical composition expressible in a chemical formula." *Id.* at 719. Instead, the Department relied on the fact that gravel had been classified as a mineral product in trade or commerce and had economic value for use in trade, manufacture, the sciences, or in the mechanical or ornamental arts. *Id.* at 719-20.[5]

While Plaintiff cites various legal authorities (many post-dating the transaction at issue here) holding that sand, gravel and rock are, as a matter of law, not minerals for purposes of a general mineral reservation, *Bogle Farms* rejected such an approach, and there was sufficient evidence for the District Court to conclude that Patent No. 1906's broadly worded reservation of "all minerals of whatsoever kind" could include crushed rock sold commercially. The District Court then properly considered all of the circumstances to determine whether the parties intended that construction or, alternatively, if the State intended something different than the patentee, that construction was the most reasonable. RP 749-750 (¶¶ 62-72). This is precisely the mode of proceeding that *Bogle Farms* prescribed.

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[5]In 1955, Congress provided by statute that "common varieties of sand, stone, gravel, pumice, pumicite, or cinders" should be disposed of by lease rather than patenting located deposits. 30 U.S.C. §§ 601, 611; *see also New West Materials LLC*, 398 F.Supp.2d at 447 (discussing purpose of Common Varieties Act).

At trial, Plaintiff conceded that extrinsic evidence was necessary and appropriate to show the intention of the parties. In an effort to show that the State's reserved mineral estate does not include the rock at issue here, Plaintiff offered various forms of extrinsic evidence, including (i) her predecessor-in-interest's August 5, 1930 Application to Purchase State Land, Plt. Exh. 1; (ii) the August 5, 1930 Appraisement of Grazing and Agricultural Lands submitted by Plaintiff's predecessor-in-interest with the purchase application, Plt. Exh. 2; (iii) the January 22, 1931 Contract for the Purchase of State Lands between the Commissioner of Public Lands and Plaintiff's predecessor, Plt. Exh. 3; (iv) 2003-2007 testing data regarding the rock, Plt. Exhs. 13, 14, 19, 20 and 22; (v) recent photographs of the subject property and Mainline's quarry operation, Plt. Exhs. 15-17; (vi) a 1978 topographical map of the Pedernal area, Plt. Exh. 25; (vii) a New Mexico Geologic Highway Map, Plt. Exh. 26; (viii) a 1981-1982 national USGS map showing source areas of crushed stone aggregate and predominant bedrock types, Plt. Exh. 27; (ix) a 1983 map showing geothermal resources in New Mexico, Plt. Exh. 28; and (x) a geologic map of the Pedernal area, Plt. Exh. 29. Plaintiff also offered expert testimony regarding the nature of the rock and the extent of that resource in New Mexico and elsewhere. 03/23/09 Tr. 2:07:40-2:46:20.

Plaintiff did not object to the Commissioner's offer of various types of extrinsic evidence, including (i) federal government Minerals Yearbooks for 1932-33 and 1947 providing data regarding commercial production of crushed rock, including ballast, in New Mexico and around the country, Def. Exhs. K-1, K-2 and L; (ii) a 1993 U.S. Geological Survey Bulletin and map regarding natural aggregate sources, Def. Exh. OO-1 and OO-2; (ii) the exploration license and production lease agreements executed by Plaintiff in 1996, 1998, 2003 and 2004, Def. Exhs. R-1 through R-6, S and T-1; (iii) the 2003 Exploration Option and Contingent Lease Assignment between Mainline and Ralph J. Conway, Def. Exh. T; (iv) the 2004 ballast supply contract between Mainline and Burlington Northern and Santa Fe Railway Company (BNSF) and the 2001 BNSF specifications for railroad ballast, Def. Exhs. U and V; (vi) documents regarding the 2004 Torrance County zoning change requested by Mainline and the Mainline mining and reclamation plan approved by Torrance County, Def. Exhs. X, Y and EE; (vii) 2003 testing data regarding the rock, Def. Exhs. Z through DD; (viii) Mainline's 2006 mine registration with the Mining and Minerals Division of the New Mexico Energy, Minerals and Natural Resources Department, Def. Exh. HH; and (ix) the 2006 Settlement Agreement and Rule 5 Mining Lease between the Commissioner and Mainline, Def. Exhs. II and JJ. Plaintiff did not object to testimony of the

Commissioner's expert witness regarding the nature and extent of the rock resource and its commercial classification as an industrial mineral. 03/24/09 Tr. 10:55:26-11:29:46. Nor did Plaintiff object to a court view of the subject property conducted as part of the trial. 03/24/09 Tr. 2:07:38-2:08:40; 03/25/09 Tr. 9:22:40-9:23:35.[6]

Thus, the District Court properly considered extrinsic evidence to determine the intention of the parties and, alternatively, what was reasonable under all of the circumstances.

C. Plaintiff's Proposed "Surface Destruction Doctrine" is Contrary to New Mexico Law.

The Court should not adopt a "surface destruction doctrine" under which, in Plaintiffs formulation, a general mineral reservation is presumed not to include substances found on the surface of the land, the removal of which would involve surface damage, regardless of reclamation or the mineral lessee's obligation to pay for surface damages. (Br. at 12-22). Plaintiff cites several cases holding that sand and gravel are not, as a matter of law, included within a general mineral

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[6]Plaintiff filed a Memorandum on the Inadmissibility of Developments Subsequent to Conveyance, RP 659-662, seeking to exclude statutes and regulations enacted after the issuance of Patent No. 1906, evidence the Commissioner did not offer at trial. Plaintiff did not object to the admissibility of any of the evidence referenced above. 3/23/09 Tr. 9:24:02-9:29:08.

reservation.[7] The *Bogle Farms* court adamantly rejected any such *per se* approach. Because this Court must follow *Bogle Farms*, the Court should reject Plaintiff's argument.

1. A Presumption that the Parties Intended to Exclude Surface Mining is not Appropriate with Respect to State Trust Lands.

In rejecting the *Roe* legal rule that sand and gravel are not reserved unless specifically mentioned in the mineral reservation, the *Bogle Farms* court said, "[T]itle to state trust lands should not be conveyed by implication." *Id.* at ¶ 34 (citation omitted). That principle bars a presumption that the State's mineral reservation does not include rock found to some extent on the surface or surface mining of rock. As the *New West Materials* court said in holding that a Small Tract Act[8] patent's mineral reservation included surface rock and surface mining,

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[7] *See, e.g., Harper v. Talladega County*, 185 So.2d 388, 393 (Ala. 1966); *Bambauer v. Menjoulet*, 29 Cal.Rptr. 874, 875 (Ct. App. 1963); *Whittle v. Wolff*, 437 P.2d 114, 118 (Ore. 1968); *Gifford-Hill & Co., Inc. v. Wise County Appraisal Dist.*, 827 S.W.2d 811, 815 (Tex. 1991) (applying Texas law that limestone is as a matter of law not a mineral, and holding limestone in place is not taxable as a mineral); *Shores v. Shaffer*, 146 S.E.2d 190, 194 (Va. 1966); *State Land Bd. v. State Dept. of Fish and Game*, 408 P.2d 707 (Utah 1965) (construing since-repealed Utah statute reserving state's interest in "coal and other minerals").

[8] Significantly, STA patents were issued pursuant to bargained-for sales, not homestead grants. *See* ch. 317, 52 Stat. 609, amended by ch. 270, 68 Stat. 239 (1954), repealed by Federal Land Policy and Management Act of 1976, Pub.L. No. 94-579, § 702, 90 Stat. 2789. *See* 43 U.S.C. § 682a (1970).

and in explicitly distinguishing cases such as *Farrell v. Sayre*, 270 P.2d 190 (Colo. 1954), the "principle that a reservation of minerals does not include sand and gravel if they comprise a significant part of the soil" applies only "in the context of private transactions involving a specific piece of land with a definite soil composition." *Id.*, at 449; *see also Chugach Natives, Inc. v. Doyon, Ltd.*, 588 F.2d 723, 727 n. 13 (9th Cir. 1978) (distinguishing *Whittle v. Wolff*, 437 P.2d 114 (Ore. 1968), on grounds that mineral reservation in conveyance of public land by a deed from the United States "requires a different analysis than would be the case with private parties").

Here, the subject property was among millions of acres of state public land administered by the commissioner, and the state and federal statutes requiring the mineral reservation, *see infra* at 26-23, were as general and broad as the STA and SRHA in their description of the minerals to be reserved. Therefore, the Court cannot presume that the parties to Patent No. 1906 intended to exclude from the State's mineral reservation rock that appeared to a limited extent on the surface of the land or limited surface mining.

2. The State's Mineral Lessees Must Pay for Surface Damages.

The general rule is that the mineral estate is the dominant estate and can

make use of so much of the surface as is reasonably necessary to explore for and produce minerals, without compensation. *McNeill v. Burlington Resources Oil & Gas Co.*, 2008-NMSC-022, ¶ 32, 143 N.M. 740, 182 P.3d 121. Plaintiff cites cases where surface mining was excluded based in whole or in part on the absence of a deed clause disclaiming mineral owner liability for surface damages caused by mining. *See, e.g., Downstate Stone Co. v. United States*, 712 F.2d 1215, 1218 (7th Cir. 1983); *cf. Holloway Gravel Co. v. McKowen*, 9 So.2d 228, 233 (La. 1942) (noting mineral reservation clause stating that mineral estate owner "shall always exercise and have due regard for the rights of the purchaser, his heirs and assigns, as owner of the land").[9] That line of cases, and the surface destruction doctrine generally, should not apply here, because the State's mineral lessees have a legal obligation to pay for surface damages.

Since 1925, there has been a statute requiring the Commissioner, in issuing

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[9]In abolishing the surface destruction doctrine, the Texas Supreme Court held that the mineral owner should compensate for surface damage when the mining involves a mineral not specifically mentioned in the reservation. *Moser v. U.S. Steel Corp.*, 676 S.W.2d 99, 103 (Tex. 1984); *see also* Richard D. Davis, *Abandonment of the Surface Destruction Test in Determining Ownership of Unnamed Minerals*, 15 Tex. Tech L. Rev. 699 (1984). However, the *Moser* court refused to overrule previous Texas cases holding that certain mineral substances are as a matter of law part of the surface estate, *id.* at 102, which is not the law in New Mexico. Thus, Plaintiff errs in citing Texas cases such as *Farm Credit Bank of Texas v. Colley*, 849 S.W.2d 825 (Tex. App. 1993), which held that lignite within 200 feet of the surface is, as a matter of law, part of the surface estate.

a mineral lease for land where the surface estate had been sold, to obtain from the lessee a bond to secure payment to the surface estate owner for damage to livestock range, water, crops or tangible improvements that may occur as a result of the mineral lessee's activities. Def. Exh. E-3 (N.M. Laws 1925, ch. 137, §§ 5-6) at 295-296; NMSA 1978, § 19-10-26 (as amended through 1979) and § 19-10-27 (1925). Thus, the legislature has ensured that the State's mineral lessee will compensate the patentee and its successors for surface damages occurring as a result of the exploitation of the State's reserved mineral estate. *See Tidewater Associated Oil Co. v. Shipp*, 59 N.M. 37, 41, 278 P.2d 571, 574 (1954) (discussing surface owner protection provisions of 1919 and 1925 statutes and holding that mineral lessee is similarly obligated to surface lessee for damages to grass, livestock or crops); *cf. Dean v. Paladin Exploration Co., Inc.*, 133 N.M. 491, 64 P.3d 518 (Ct. App. 2003) (holding that statutory oil and gas lease surface damage bond provision supercedes general common law rule that mineral lessee is not liable for reasonable damage to surface incident to mineral exploration and production). That requirement is reflected in the Rule 5 Mining Lease issued to Mainline, which states, "Lessee has separately contracted with the owner of the surface estate of the lands described herein, which contractual arrangement . . . includes certain responsibilities relating to operations, reclamation, surface

protection and damages." Def. Exh. JJ at 1; *see also id.* at 3, ¶ 10 (re lessee's agreement with surface owner re surface protection and damages).

Contrary to Plaintiff's contentions regarding heedless destruction of the surface of non-trust surface estate for the sake of the State's mineral estate, Plaintiff herself decided to issue a mineral lease to Mainline, which resulted in construction of the quarry, and there is no record showing widespread surface mining where the State owns only the mineral estate. Because the State's mineral lessee is liable for surface damages caused by the mining operation, the Court should reject Plaintiff's proposed "surface destruction doctrine."

D. Many of the "Surface Destruction" Cases Do Not Apply to the Circumstances Presented in this Case.

Plaintiff has cited "surface destruction" cases referring to the removal of "surface soil." *See Bambauer*, 29 Cal.Rptr. at 875;[10] *W.S. Newell, Inc. v. Randall*, 373 So.2d 1068 (Ala. 1979); *Morrison v. Socolofsky*, 600 P.2d 121, 123 (Colo. App. 1979) (noting that gravel mining techniques necessitated use of topsoil or fine dirt)). Here, topsoil that was stockpiled in constructing the quarry will be used to reclaim the area to its pre-existing grazing use. Def. Exhs. X (describing

[10]In fact, *Bambauer* concerned sand and gravel covering the entirety of a continuous one-third part of a 640-acre section, *id.*, 29 Cal.Rptr. at 875, but referred in passing to "removal of the surface soil would render the land useless for agricultural purposes."

mining and reclamation sequence) and EE (reclamation plan submitted and approved by Torrance County); 03/23/09 Tr. 11:28:16-11:29:20, 11:32:30-52.[11]

Plaintiff does not say how much of the surface must be involved to invoke the "surface destruction doctrine," but various of the cited cases contemplate more surface disturbance than is involved here. For example, in *Farrell*, "the entire surface of the property described in the deed consist[ed] of sand and gravel," *Id.*, 270 P.2d at 191, and its holding has been distinguished in cases where there was limited outcropping of the mineral and the surface mining did not involve "utter destruction" of all of the land conveyed. *See, e.g., Lazy D Grazing Ass'n v. Terry Land and Livestock Co.*, 641 F.2d 844, 846-847 (10th Cir. 1981) (distinguishing *Farrell* and other cases, stating that surface destruction doctrine is "designed to protect against an uncontemplated "utter destruction" of the surface owner's estate"). Plaintiff cites *Morrison* as saying that the doctrine applies where the material underlies "a substantial portion of the parcel" (Br. at 20), but *Morrison* set forth no such standard, and in fact said that "the gravel underlies the topsoil of the entire property [and . . . [d]efendants' construction of the reservation could result in the destruction of the land surface and strip away its agricultural

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[11] In addition to waste, Mainline has removed and stockpiled at least 200,000 cubic yards of overburden as part of its quarry operations. 03/23/09 Tr. 5:18:10-5:20:17; Plt. Exh. 18.

usefulness." *Id.*, 600 P.2d at 122; *see also Holloway Gravel Co.*, 9 So.2d at 233 ("any operation on the land for sand or gravel would result in the utter destruction of its surface"); *Holland v. Dolese Co.*, 540 P.2d 549, 550 (Okla. 1975) (evidence showed "complete destruction of the surface for livestock grazing purposes by the quarry operation"; no reclamation can be planned or performed until a later time, and "long range plan is to leave a portion of the quarried area as a water reservoir"). In *Downstate Stone Co.*, land was conveyed to the United States for watershed protection and forestry purposes, and the court found that uncontrolled quarrying of limestone would preclude any productive use of the surface, would leave a large open quarry, and that it would take generations for the land to return to its natural state. *Id.*, 712 F.2d at 1217.

Here, while Plaintiff states that rock outcropped on 30-40% of Section 16, the District Court made no such finding,[12] and Plaintiff's contention is belied by the evidence. In addition, the evidence shows indisputably that the mining will involve a limited area, which itself will be reclaimed in a reasonable time to its pre-existing grazing use.

The non-aerial photographs in evidence, *e.g.*, Plt. Exhs. 16A-16D, Def. Exh.

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[12] The District Court states in passing that "surface rock was visible." RP 750 (¶ 70).

X, show less than all of Section 16, and they show only limited outcrops of rock. A Mainline witness called by Plaintiff stated that the surface rock on Section 16 was confined to two ridge areas each 700-800 feet wide by 400-500 feet long in the Southwest quarter of the section. 03/23/09 Tr. 10:50:38-10:54:02. Mainline's test drilling was confined to the Southwest quarter of Section 16 (and part of Section 15), where there was surface rock. Plt. Exh. 13; 03/23/09 Tr. 11:01:54-11:03:48. Mainline's site plan for operations and county-approved reclamation plan indicates that the quarry will be confined to this Southwest corner of Section 16. Def. Exh. X; 03/23/09 Tr. 11:27:34-11:28:44. Plaintiff's lease with Mainline limits the amount of area that the quarry operations can occupy at any one time and requires concurrent mining and reclamation. Def. Exhs. T-1 (current lease), X (describing mining and reclamation sequence), EE (reclamation plan submitted and approved by Torrance County); 03/23/09 Tr. 11:28:16-11:29:20, 11:32:30-11:32:52.

II. SUBSTANTIAL EVIDENCE SUPPORTS THE DISTRICT COURT'S FINDING THAT THE PARTIES INTENDED THE STATE'S RESERVATION OF "ALL MINERALS OF WHATSOEVER KIND" SHOULD INCLUDE QUARRY ROCK MINED AND SOLD COMMERCIALLY.

A. Standard of Review.

When sitting as fact finder, the trial court weighs the evidence, determines

the credibility of testimony, and resolves factual conflicts. *Tanuz v. Carlberg*, 122 N.M. 113, 115, 921 P.2d 309, 311 (Ct. App. 1996). The trial court judgment must be affirmed if the findings of fact are supported by substantial evidence, are not clearly erroneous, and are sufficient to support the judgment. *Id.* (citing *Camino Real Mobile Home Park Partnership v. Wolfe*, 119 N.M. 436, 441, 891 P.2d 1190, 1195 (1995)). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Sunwest Bank of Albuquerque, N.A. v. Colucci*, 117 N.M. 373, 375, 872 P.2d 346, 348 (1994); *see also Mascarenas v. Jaramillo*, 111 N.M. 410, 412, 806 P.2d 59, 61 (1991) (reviewing court does not re-weigh the evidence). The reviewing court "liberally construes the findings of fact adopted by the fact finder in support of a judgment, and such findings are proper if a fair consideration of all the findings taken together supports the lower court's judgment." *Clayton v. Farmington City Council*, 120 N.M. 448, 457, 902 P.2d 1051, 1060 (Ct. App. 1995) (citing *Toynbee v. Mimbres Memorial Nursing Home*, 114 N.M. 23, 29, 833 P.2d 1204, 1210 (Ct. App. 1992)). The reviewing court must accept specific findings that are not challenged on appeal. *Gutierrez v. Amity Leather Products Co.*, 107 N.M. 26, 31, 751 P.2d 710, 715 (Ct. App. 1988) (citing *Blumenthal v. Concrete Constructors Co. of Albuquerque, Inc.*, 102 N.M. 125, 692 P.2d 50 (Ct. App. 1984)).

Where the District Court determines intent as a factual matter through examination of extrinsic evidence, the appellate court must not disturb findings, weigh evidence, resolve conflicts or substitute its judgment as to the credibility of witnesses where evidence substantially supports the trial court's findings of fact and conclusions of law. *Sternloff*, 91 N.M. at 608, 577 P.2d at 1254 (citing *Cooper v. Burrows*, 83 N.M. 555, 494 P.2d 968 (1972)).

B. The Court Should Apply Substantial Evidence Review.

The District Court conducted a thorough two-and-a-half day trial. In making its factual findings, it relied on various kinds of extrinsic evidence, including transaction documents; photographs of the subject property and the mining operation; Mainline testing data, lease agreements, site plan, reclamation plan and other documentation regarding the mining operation; publications classifying crushed rock as a mineral; publications showing a commercial market for crushed rock; topographical and mineral maps. *See* discussion supra at 12-14. The District Court also heard testimony from Plaintiff, her son, three Mainline witnesses called by Plaintiff, Plaintiff's expert witness, four State Land Office witnesses and the Commissioner's expert witness. The District Court also conducted a court view of the subject property. 03/24/09 Tr. 2:07:38-2:08:40; 03/25/09 Tr. 9:22:40-9:23:35.

While Plaintiff argues that the Court should conduct *de novo* review of the District Court's factual findings on the grounds that the case involves undisputed facts and documentary evidence, citing *Maestas v. Martinez*, 107 N.M. 91, 93, 752 P.2d 1107, 1109 (Ct. App. 1988), *Maestas* has been distinguished where the documentary evidence required "visual explanation with witness interpretation." *Montoya v. Medina*, 2009-NMCA-029, ¶ 7, 145 N.M. 690, 203 P.3d 905. Here, the determination of the parties' intent with regard to the mineral reservation in Patent No. 1906 involves not only the examination of transaction documents but a variety of evidence (including expert witness testimony) regarding the classification of crushed rock as an industrial mineral and the applicability of that classification under the circumstances presented in the issuance of the patent and in the context of the current mining operation.

Moreover, Plaintiff challenges the District Court's finding that all state trust lands were classified as mineral lands, which is supported not only by a 1919 administrative order, Def. Exh. F, but by State Land Office tract books and the testimony of two State Land Office witnesses. Def. Exhs. D-1 and D-3; 03/24/2009 Tr. 9:19:00-9:21:10 and 10:16:35-10:20:40. There is also a dispute regarding the extent of the rock outcropping, where the evidence includes photographs, witness testimony, and a court visit to the subject property. *See*

discussion *infra* at 21-22 and 03/24/09 Tr. 2:07:38-2:08:40; 03/25/09 Tr. 9:22:40-9:23:35 (record re court view).

This state of the record precludes general *de novo* review of the factual findings challenged by Plaintiff. In any event, even under *de novo* review, the record supports the District Court judgment.

C. The Commissioner was Legally Required to Reserve All Minerals.

Since at least 1919, all state trust lands have been classified as mineral lands, and State Land Office regulations in effect at the time of the transaction at issue in this case required that minerals be reserved in any sale of state trust land. Def. Exhs. F, I (1930 rules stating, "In all sales of State lands, the minerals are reserved to the state.") and J (same language in 1946 rules). This was among the facts supporting the District Court's finding that the State intended to "maximize the State's opportunities for royalties to be derived from any and all minerals that might later be discovered on Section 16."

Not only has Plaintiff cited no authority to support her contention that the Ferguson Act grant of school lands to the Territory of New Mexico precludes the District Court's finding that all state trust lands were classified as mineral lands, her argument misconstrues the Ferguson Act and ignores other legal context

showing that the trust lands were and are properly classified as mineral lands.

1. The Commissioner's Classification of Trust Lands as Mineral Lands is Consistent with the Ferguson Act and Enabling Act.

Under the Ferguson Act of 1898[13] and the Enabling Act of 1910[14], the United States granted to New Mexico sections 16 and 36 in each township for the support of common schools, but the grant excluded "mineral" lands. Ferguson Act § 1 (excluding sections that "are mineral"); Enabling Act § 6 (same).[15] These grants became effective, and the State's title vested, upon completion of the public land survey of each township, *U.S. v. Morrison*, 240 U.S. 192, 210 (1916), but the federal government often challenged the State's title to numbered school sections when minerals were later discovered in such sections. *Roe*, 103 N.M. at 519-520, 710 P.2d at 86-87.

The Ferguson Act and Enabling Act used the term "mineral" as "a term of art for lands known (at the time) to be more valuable for minerals and must contain minerals in sufficient quantity to justify expenditure for their extraction."

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[13] Act of June 21, 1898, ch. 489, 30 Stat. 484 (1898)).

[14] Act of June 20, 1910, Pub. L. 61-219, ch. 310, 36 Stat. 557 (1910).

[15] The Enabling Act confirmed the Ferguson Act grant of section 16 and 36 in each township and added a grant of sections 2 and 32.

RP 733 (¶ 5).[16] *See Watt v. Western Nuclear, Inc.*, 462 U.S. 36, 4 & n. 9 (1983) (discussing general approach to classifying federal land as mineral); *Soderberg*, 188 U.S. at 529 (discussing exclusion of "mineral lands" from railroad grant). Moreover, land was "frequently misclassified as non-mineral." *Western Nuclear*, 462 U.S. at 49 n. 9. In addition, the Ferguson Act and Enabling Act did not, as was common in homestead and other statutes, reserve to the federal government the mineral rights in the school lands granted to the State, so the State was free to exploit any mineral resources that existed on the state trust land.

Here, the public land survey of Township 5 North, Range 12 East was completed in 1915, but the patent from the United States definitively confirming the State's title to Section 16 was not issued until 1960. Def. Exhs. B, B-1 and C. That Section 16 was not excluded from the Ferguson Act and the Enabling Act grant does not mean that Section 16 was considered to have no minerals or that any rock that happened to appear to a limited extent on the surface of that land should not be considered a mineral. For the most part, it simply meant that there was no active mining there or in the immediate vicinity.

2. The School Lands Act (Jones Act) Removed the Exclusion of "Mineral" Land and Required the State to Reserve "All the Coal and Other Minerals."

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[16] Plaintiff does not challenge this finding.

The School Lands Act of 1927[17] removed the exclusion of mineral lands from the Ferguson Act and Enabling Act school land grants, while requiring that all sales "of the lands so granted" be subject to and contain a reservation to the State of "all the coal and other minerals." *Id.* at § 1. A primary purpose of the School Lands Act was to address the Interior Department's policy of challenging a state's title to school lands whenever minerals were later discovered, regardless of how much time had passed. *Roe*, 103 N.M. at 520, 710 P.2d at 87 (citing S.Rep. No. 603, 69th Cong., 1st Sess. (1926); H.R.Rep. No. 1617, 69th Cong., 2d Sess. (1926)). Thus, the School Lands Act requires a mineral reservation as to all numbered school sections, though the Act does not apply to "lieu" lands selected by the State to replace acreage lost by prior federal disposition or reservation of lands surveyed as a Section 2, 16, 32 or 36. *Roe*, 103 N.M. at 519-520, 710 P.2d at 86-87.

3. The Courts Approved Classification of All State Trust Lands as Mineral Lands as Consistent with State Law Requiring the Commissioner to Reserve "All the Minerals" in "Mineral Lands" Sold.

The District Court record includes the 1919 administrative ruling by the

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[17] Also known as the Jones Act, Act of Jan. 25, 1927, ch. 57, 44 Stat. 1026, 43 U.S.C. §§ 870-871(as amended).

commissioner of public lands classifying all state trust lands as mineral lands and state land office mineral estate tract book records for the Section 16 school land section at issue in this case. Def. Exhs. D-1, D-3 and F. State Land Office witnesses testified that mineral estate tract books records have been maintained for essentially all state trust lands. 03/24/2009 Tr. 9:19:00-9:21:10 and 10:16:35-10:20:40. Under the State Land Office rules in effect when the Commissioner executed the contract to sell Section 16 and when the Commissioner issued Patent No. 1906, "all of the lands granted to the State are administered under the same general rules and subject to the same provisions of law," which included the reservation of minerals when state trust lands are sold. Def. Exhs. I and J.

The classification of state trust lands as mineral lands was consistent with state statutes, which also required that the Commissioner reserve the minerals when conveying state trust lands. While the first legislature after statehood prohibited the sale of state trust lands "known to contain valuable minerals, petroleum or natural gas in paying quantities," it also authorized the sale of "mineral lands" as to which a mineral lease had been issued. Def. Exh. E-1 (N.M. Laws 1912, ch. 82, §§ 39 and 40a) (now codified at NMSA 1978 § 19-7-25 and § 19-8-3). In *State ex rel. Otto v. Field*, 31 N.M. 120, 241 P. 1027 (1925), the Supreme Court held that the Commissioner may sell known mineral lands so long

as the mineral estate is reserved to the State. *Id.*, 31 N.M. at 157, 241 P. at 1041-42; *accord*, *Terry v. Midwest Refining Co.*, 64 F.2d 428, 434 (10th Cir. 1933). In so holding, the *Otto* court noted that a mineral reservation had since territorial days been consistently inserted into contracts for the sale of school lands pursuant to regulation and practice. *Id.*, 31 N.M. at 160-164, 241 P. at 1043-1045. Thus, the *Otto* court not only approved of the reservation of minerals in lands granted by the Ferguson Act and Enabling Act, it found that the practice provided persuasive evidence of how seemingly conflicting statutes should be interpreted.

A 1919 statute similarly authorized the Commissioner to sell mineral lands, but required that the Commissioner issue "a limited patent only, which shall contain reservation to the State of New Mexico of *all the minerals in the said lands*, together with the right to the State or its grantees, to prospect for, mine and remove the same." Def. Exh. E-2 (N.M. Laws 1919, ch. 98, § 4) (emphasis added); *see also Otto*, 31 N.M. at 140, 165 & 169-70, 241 P. at 1035, 1045-1047. An equivalent provision was re-enacted in 1925, Def. Exh. E-3 (N.M. Laws 1925, ch. 137, § 6), and is now codified at NMSA 1978 § 19-10-27.

The 1919 administrative ruling by the Commissioner of Public Lands states, in relevant part, as follows:

> . . . [F]or the purpose of orderly administration of

> the lands of the state of New Mexico, and *in order that the state may be afforded maximum protection from the purchase of lands as nonmineral, which may in fact be mineral lands or subject to classification as such*, under the terms of the act aforesaid,
>
> It is hereby ordered that *all of the lands granted by the said state by virtue of the terms of the granting acts of Congress, which have been approved by the Secretary of the Interior, shall be, and the same are hereby, designated, for the purposes of proper, orderly and lawful administration, as mineral lands*, and this designation and classification shall apply to lands selected and unapproved as of the date approval of such unapproved selection may be from time to time made by the Secretary of the Interior;
>
> And it is further ordered that the designation and classification of all of the lands of the state, as herein provided, as mineral lands, shall be and remain in full force and effect until such time as the commissioner of public lands shall modify or amend this ruling, with respect to all or any portion of the lands of the state of New Mexico.

Def. Exh. F (emphasis added).

There is no evidence that the classification of all state trust lands as mineral lands was changed as of the time of the transaction at issue, or has ever been changed. Therefore, the District Court's finding regarding the classification of state trust lands as mineral lands is supported by substantial evidence and is consistent with state and federal statutes.

D. The 1945 Attorney General Opinion Stated that the Mineral Reservation Should Include Sand, Gravel and Building Stone.

As discussed *supra* at 8-9, when the Commissioner issued Patent No. 1906, the Attorney General had issued an opinion stating that the State's mineral reservation should include sand, gravel and building stone that are taken off of the land on a commercial basis for profit. Def. Exh. M at 155. The sale contract and patent language quoted in the Attorney General opinion is the same as in the documents at issue in this case. *See* Plt. Exhs. 3 and 4.

E. The Transaction Documents Reserved the State's Interest in Subsequent Mineral Development in the Broadest Terms.

The District Court reviewed the transaction documents in detail to discern what they indicate regarding the intent of the parties. RP 735-736 (¶¶ 10-13). The Application to Purchase State Lands, Plt. Exh. 1, contains several provisions intended to establish that the applicant was seeking to acquire the land for agricultural purposes only and was not seeking to acquire any kind of mineral rights. The questions and answers included the following:

> 1. Is the land agricultural or grazing in character? *Grazing*
>
> . . .
>
> 10. Is the land or any part of it coal in character? *No*
> 11. Is there any mineral, or oil or gas, known on the land? *No*
> 12. If there is any coal, mineral, oil or gas on the land,

state fully just what, and extent of same, and on what 40-acre tracts? ----------

. . .

28. If your application is passed on favorably and contract is issued you, to what use do you intend to put the land applied for? *Graze sheep or raise cattle*

29. State any additional information you may deem pertinent not fully covered by the above questions: *I need this land in my pasture*

In addition, the applicant confirmed under oath as follows:

> I further state that the land applied for is essentially non-mineral land, and that this application is not made for the purpose of obtaining title to mineral, coal, oil or gas lands fraudulently, but with the sole object of obtaining title to the land applied for for grazing and agricultural purposes.

The application was submitted with an Appraisement of Grazing and Agricultural Lands, Plt. Exh. 2, completed by a resident of Encino who stated that he was familiar with the land and what it was worth.[18] The appraisement form included a Non-Mineral Affidavit, stating:

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[18] *See* N.M. Laws 1912, ch. 82, § 17 (codified at NMSA 1978 § 19-7-1) ("Applications to lease or purchase state lands shall be made under oath, and applicants to lease shall, at their own expense, *procure appraisements thereof to be made under oath by some disinterested and creditable person or persons familiar therewith.* All statements contained in such appraisements, except as to the true value of the land appraised, must be based upon personal knowledge and not upon information and belief. *No such appraisement shall be conclusive upon the commissioner.*") (emphasis added).

> I am well acquainted with the character of said described land and with every 40-acre tract thereof, having frequently passed over the same; that my personal knowledge of said land is such as to enable me to testify understandingly with regard thereto; that there is not, to my knowledge, within the limits thereof, any vein or lode of quartz or other rock in place, 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.[19]

As the *Otto* court said five years earlier, in rejecting the contention that the appraisement and the decision to sell the land constituted a classification of the lands as non-mineral for purposes of state statutes governing the sale of State trust lands:

> [I]t cannot be supposed that the Legislature of New Mexico, after taking the precaution to provide in leases for reservations of minerals, oil, gas, stone, shale, salt,

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[19]The affidavit is nearly word-for-word the same as an affidavit used by the federal government for applications seeking to acquire federal public domain lands open to homestead settlement. *See United States v. Hitchcock*, 1903 WL 18602 *2 (App. D.C.). The phrase "vein or lode of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper" apparently comes from a federal statute regarding the location of "lode" mining claims. 30 U.S.C. § 23; *see also* N.M. Laws 1876, ch. 38, § 1; NMSA 1978, § 69-3-1 (as amended through 1981). The reference to "placer, cement, gravel, salt, or other valuable mineral deposits" appears to refer to placer minerals subject to location under federal mining law. *See* 30 U.S.C. § 35.

> timber, and all other natural products of the land to be dealt with separately by the commissioner,[20] intended that, when he went to sell grazing land or agricultural land, he would be powerless to reserve to the state and its institutions the great wealth which might flow from a future discovery of minerals in the land, merely because the circumstances had not permitted of his having made an adequate exploration in order to enable him to fully determine the exact character of the land.

Id., 31 N.M. 140, 241 P. at 1035-36.

In the Contract for Purchase of Public Lands, Plt. Exh. 3, it was stated, in part, as follows:

> THE PURCHASER AGREES . . . that *this land is being purchased for the purpose of grazing and agriculture only*; that while the land herein contracted for is believed to be essentially non-mineral land, *should mineral be discovered therein it is explicitly understood and agreed that this contract is based upon the express condition that the minerals therein shall be and are reserved to the fund or institution to which the land belongs, together with right of way to the Commissioner, or any one acting under his authority, at any or all times to enter upon said land and mine and remove the minerals therefrom without let or hindrance.*

(Emphasis added.)

Finally, Patent No. 1906, Plt. Exh. 4, reserved to the State "all minerals of whatsoever kind, including oil and gas." Thus, the contract explicitly

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[20] *See* NMSA 1978 § 19-7-28 (1912).

contemplated future discovery of minerals, and the patent reserved ownership of such minerals in the broadest terms. All of the terms of the transaction documents support the District Court's findings as to the general purposes and intents of the parties. Notably, the non-mineral affidavit's reference to "placer, cement [and] gravel" indicates an understanding that the State had an interest in aggregate or industrial minerals found on the surface of the land. The record simply does not support Plaintiff's contention that the rock was excluded from the mineral reservation based on a presumption that the person whom the applicant had complete the appraisement and non-mineral affidavit saw the limited outcropping of rock and concluded that it was not a mineral. In particular, the State's expressed interest in subsequent mineral discovery and development should be seen as applying to rock that might not be considered a mineral when in place but later considered a mineral when mined and sold commercially.

F. A Commercial Market Existed for Crushed Stone, Including Railroad Ballast.

When the purchase contract was executed in 1930 and when Patent No. 1906 was issued in 1947, there was a commercial market in New Mexico for crushed stone, including crushed stone used for railroad ballast. *See* discussion *infra* at 4. Crushed stone was classified commercially as an industrial mineral and

as construction aggregate. *Id.* The 1915 public land survey shows that the railroad line currently operated by BNSF passed through the area within two miles of the quarry site as early as 1915, Def. Exhs. B and B-1, indicating that ballast rock was a well known commodity in the local area.

G. The Prather License and Lease Agreements Characterize the Rock as a Mineral.

In the leasehold estate granted by Plaintiff for Mainline's quarry operation, the rock to be quarried is repeatedly characterized as a mineral, and Plaintiff is paid a royalty as one would expect from a mineral lease. Everything in the exploration license and lease indicates all of the parties' understanding that quarrying the rock implicated the mineral estate.[21] The District Court properly consider this evidence as confirming the intent of the parties to Patent No. 1906 that crushed rock was within the scope of the mineral reservation.

Plaintiff initially rejected overtures seeking a lease to mine rock on the Prather Ranch and later entered into a License Agreement with Ralph J. Conway, which stated, among other things, that Conway was seeking "to explore for Quarry Rock that may be suitable for Railroad Ballast and other construction Aggregates

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[21] Mainline made a conscious decision not to construct the quarry where the federal government owned the minerals, 03/23/09 Tr. 11:33:08-31, but none of the parties was aware that the State owned the mineral estate on Section 16, 03/23/09 Tr. 11:33:32-42, 5:21:23-33.

(hereinafter referred to as the 'Minerals')." Def. Exhs. R-1 and R-4. The License Agreement stated, incorrectly, that Plaintiff owned the "fee simple subsurface mineral estates" on Section 16 and other sections of the Prather Ranch. *Id.* Under the accompanying 25-year Lease Agreement, Plaintiff again represented, incorrectly, that she owned "the subsurface mineral estates" of various sections, including Section 16, and the Lease Agreement again characterized the rock, repeatedly, as "minerals" stating, in part:

> Ralph J. Conway desires to lease from "Prather" and "Prather" desires to lease to Ralph J. Conway the exclusive right and easement to enter upon their Real Property *for the purpose of mining quarry rock, and construction aggregates, gravel and sand (collectively the minerals)* . . . .

Def. Exhs. R-2, R-3 and R-5 (emphasis added). Plaintiff signed no less that three versions of the Lease Agreement.

The Lease Agreement conveyed to Conway rights "*for the purpose of development and mining of the minerals.*" *Id.* (emphasis added). Conway's rights included the right "*to mine, extract, and remove from the premises the minerals in any manner deemed necessary or convenient by Ralph J. Conway, whether by surface or other mining methods*" and the right "to crush, wash, stockpile, store, bag and otherwise prepare for market all minerals." *Id.* (emphasis added). While

Conway's rights included the right to disturb the surface as needed to conduct mining operations, the Lease Agreement limited the amount of acreage to be disturbed at any one time to 200 acres, 160 acres of which "will be disturbed by *concurrent mining and reclamation activities*, while forty acres (40) will be utilized by support facilities and loadout operations." *Id.* (emphasis added). Plaintiff is entitled to receive a royalty of 5% of the F.O.B. quarry selling price excluding delivery charges "of Minerals mined and sold." *Id.* Conway's rights under the Prather lease eventually were assigned to Mainline, which constructed and is operating the quarry. Def. Exhs. T and T-1.

While Plaintiff now objects to the District Court's consideration of the license and lease agreements executed by Plaintiff, the District Court clearly viewed this evidence with an eye toward determining the intent of the parties to Patent No. 1906. Among the things connecting the two is the District Court finding that Plaintiff grew up in the area in the 1930s and later purchased Section 16 for the same purposes as her predecessor-in-interest. RP 737 (¶¶ 14-15). In the absence of evidence indicating why Plaintiff would view the matter differently than her similarly situated predecessors-in-interest, her acceptance of the characterization of the rock as mineral is relevant evidence of what her predecessors-in-interest understood and intended with respect to the patent's

mineral reservation. Also, the license and lease agreements show that rock in place that may not be considered a mineral would be considered a mineral when mined and sold commercially.

Relevant evidence is evidence "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence," and any doubt should be resolved in favor of admissibility. Rules 11-401 and 11-402 NMRA; *Coates v. Wal-Mart Stores, Inc.*, 127 N.M. 47, 55, 976 P.2d 999, 1007 (1999). The District Court's determination that evidence is relevant is reviewed for an abuse of discretion. *Central Security and Alarm Co., Inc. v. Mehler*, 121 N.M. 840, 851, 918 P.2d 1340, 1351 (Ct. App. 1996) (citing *In re Application of Plains Elec. Generation & Transmission Coop., Inc.*, 106 N.M. 775, 778, 750 P.2d 475, 478 (Ct. App. 1988)). While evidence may relate to facts too remote in point of time or matters too far removed from the scene of the transaction to be admissible, *In re Williams' Will*, 71 N.M. 39, 62-63, 376 P.2d 3, 19 (1962), the District Court was well within its discretion here because Plaintiff is so similarly situated to her predecessors-in-interest, and the license and lease agreements she signed are so specifically related to the rock at issue and the perception of it as a mineral when mined and sold commercially.

"A course of performance is the way the parties have conducted themselves in the performance of this contract, reflecting a common understanding of the meaning of the term in dispute." Rule 13-828 NMRA. Course of performance, including course of performance by a successor-in-interest, can be used to demonstrate pre-existing contractual intent. Rule 13-825 NMRA; *Tarlow v. Arntson*, 505 P.2d 338, 341-342 (Ore. 1973) ("How the original parties and their successors conducted themselves in relation to the agreement is instructive in our determination of what must have been intended."); *Lafitte Co. v. United Fuel Gas Co.*, 177 F.Supp. 52, 60 (D. Ky. 1959) (practical construction of contract "by contemporaries or their successors" is highly relevant to interpretation). Here, Plaintiff's conduct with respect to the license and lease agreements is indicative of what her predecessors-in-interest intended with respect to the mineral reservation.

Plaintiff has cited cases that support consideration of course of performance, including course of performance by successors-in-interest. In *Downstate Stone Co.*, the court said its construction of the mineral reservation at issue was supported by "the actions of the grantors and their heirs after the 1935 conveyance." *Id.*, 712 F.2d at 1220. That court also relied heavily on specific aspects of the present-day limestone quarrying operation to show that the mining was inconsistent with the purposes of the 1935 conveyance and mineral

reservation. *Id.*, 712 F.2d at 1217-1218.

Other cases cited by Plaintiff indicate a preference for evidence of conduct contemporaneous with the contract, but do not *per se* exclude course of performance or "backward-looking" evidence. *See, e.g., Eagle Indus. Inc. v. DeVilbiss Health Care, Inc.*, 702 A.2d 1228, 1233 n. 11 (Del. 1997) (backward-looking evidence "usually not helpful"). In *Farrell*, the court said evidence of subsequent transactions by a successor was insufficient to rebut other evidence of the intent of the parties; the court did not say that consideration of the successor's conduct should be precluded. *Id.*, 270 P.2d 192-193.

In *Poverty Flats Land & Cattle Co. v. U.S.*, 788 F.2d 676, 683 (10th Cir. 1986), the court said that "[n]ew BLM views as to the mineral reservations arrived at long after a patent issued, or revealed long after a patent issued, cannot change the title the patentee received under the then prevailing practice and decisions." Similarly, in *Atwood v. Rodman*, 355 S.W.2d 206, 214 (Tex. App. 1962), the court said that one "cannot re-write, supplement or alter a contract made many years before" by offering evidence of newly developed uses of a material. Here, the District Court relied on evidence of Plaintiff's conduct not to show a new view different from a previous prevailing view or practice, but rather conduct of a similarly situated person consistent with other evidence of the original parties'

intent. In addition, Plaintiff elicited testimony from a Mainline witness that similar rock was crushed and used for railroad ballast and other purposes at the time of the conveyance, and indeed the method of extracting and crushing the rock was essentially the same as that employed today. 03/23/09 Tr. 11:10:13-11:11:26.

H. Mainline Conducts Extensive Testing to Ensure Compliance with BNSF's Ballast Standards.

Nothing in the record suggests that the parties to Patent No. 1906 intended that minerals must be "exceptionally rare and valuable" to be included in the mineral reservation. In any event, the evidence shows commercial crushed rock was and is considered an industrial mineral and that this particular rock meets detailed specifications for sale as railroad ballast.

Mainline's ballast supply contract with BNSF incorporates an eight-page set of ballast specifications, which cover "the types, characteristics, property requirements and manufacture of mineral aggregates for processed (prepared) ballast." Def. Exhs. U and V. As a general matter, ballast must be:

> hard, dense, of angular particle structure, providing sharp corners and cubicle fragments and free of deleterious materials. Ballast material shall provide high resistance to temperature changes, chemical attack, have high electrical resistance, low absorption properties and [be] free cementing characteristics. Materials shall have sufficient unit weight (measured in pounds per cubic foot) and have a limited amount of flat and elongated

particles.

Def. Exh. V.

The ballast specifications provide for detailed and regular testing of the ballast rock to measure, among other things, (i) bulk specific gravity and absorption; (ii) percentage of clay lumps and friable particles; (iii) plasticity index; (iv) mill abrasion; (v) "Los Angeles" abrasion; and (vi) sodium sulfate soundness. *Id.* Before taking an assignment of the Prather lease from Conway, Mainline conducted tests, some through an outside professional laboratory geologist, to determine that there was on Section 16 a sufficient quantity of rock of a quality that would meet specifications under its ballast supply contract with the BNSF. Plt. Exhs. 13; Def. Exhs. Z through DD; 03/23/09 Tr. 10:46:25-10:48:12, 10:50:38-10:52:05, 10:54:04-11:08:05, 11:19:08-11:19:48. Mainline has also conducted regular testing to ensure compliance with the BNSF standards, including bulk specific gravity and absorption, mill abrasion, and "Los Angeles" abrasion, and BNSF conducts similar testing. 03/23/09 Tr. 11:19:59-11:20:06; 5:23:25-5:25:46.

As part of its regular operations, Mainline has conducted akali-silica reaction testing of the rock, and lab tests conducted prior to the commencement of this lawsuit contained information regarding the rock's mineral content. Plt. Exhs.

14 and 20. Testimony of a Mainline witness called by Plaintiff and the Commissioner's expert witness support the District Court finding that the mineral content of the rock contributes to its ability to meet BNSF ballast specifications. 03/23/09 Tr. 11:20:15-53; 03/24/09 Tr. 11:19:57-11:20:48.

Plaintiff called Mainline witnesses who testified that ballast rock has commercial value, selling for $5-6/ton. 03/23/09 Tr. 10:48:24-10:49:09. Mainline has tested ballast rock from other quarries that is inferior to the rock obtained from the Torrance County quarry. 03/23/09 Tr. 5:25:48-5:26:46. As indicated by the nearly three million tons of ballast sold through February of 2009, Def. Exh. KK, ballast can be and is economically transported a long distance from its original location once loaded on a train.

Thus, the record fully supports the District Court's findings that the rock has characteristics and commercial value sufficient to bring it within the scope of the State's mineral reservation.

CONCLUSION

For the foregoing reasons, the Court should affirm the District Court's Partial Final Judgment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on this 22nd day of March, 2010, I caused a true and correct copy of the foregoing pleading to be served by causing the same to be deposited in the U.S. mail, first-class, postage pre-paid, addressed to:

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