IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

No. 29,812

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

Plaintiff-Appellant,

v.

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

Defendant-Appellee,

and

MAINLINE ROCK & BALLAST, INC.,

Additional Defendant.

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF BY THE NEW MEXICO FARM AND LIVESTOCK BUREAU

**APPEAL FROM THE SEVENTH JUDICIAL DISTRICT
COUNTY OF TORRANCE, STATE OF NEW MEXICO
DISTRICT COURT NO. D-0722-CV-2006-228
HONORABLE MATTHEW REYNOLDS, DISTRICT JUDGE, DIVISION II**

SUBMITTED BY:

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MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF BY THE NEW MEXICO FARM AND LIVESTOCK BUREAU

COMES NOW, the New Mexico Farm and Livestock Bureau ("NMFLB"), by and through its counsel, Brennan & Sullivan, P.A. (Michael W. Brennan), and does hereby respectfully move this Court pursuant to Rule 12-215 of the New Mexico Rules of Appellate Procedure for Leave to file the attached *amicus curiae* brief in the above-captioned matter. As grounds for this Motion, NMFLB states as follows:

1. The NMFLB is a free, independent, nongovernmental and voluntary organization of farm and ranch families united for the purpose of analyzing agricultural problems and formulating action to achieve educational awareness and social advancement.

2. This appeal raises an issue of significant importance to NMFLB members. Specifically, this appeal seeks to determine whether common country rock located on or near the surface of a state minerals section, which contains little to no mineralization, is considered to be a "mineral" for purposes of New Mexico's commonly used mineral estate reservation. The implications of this determination are estimated to affect hundreds of NMFLB members who own split-estate lands similar to the Plaintiff-Appellant in this case, as the consequence of the District Court's decision would be that the Defendant-Appellees Land Commissioner and State Land Office (collectively the "SLO") would have the right to destroy the

surface estate of any portion of the millions of acres of mineral estate land it manages, thus putting thousands of acres of lands at risk of being rendered useless for farming and grazing purposes at the whim of the SLO. At the very least, the District Court's decision will unsettle and burden the ownership of vast acreages of surface lands owned by NMFLB members subject to similar state minerals reservations.

3. An *amicus curiae* brief from the NMFLB is desirable in that *amicus curiae* briefing will assist this Court in its evaluation of the important law, principles, and practical implications at direct issue in this case.

4. The NMFLB's *amicus curiae* brief will provide additional legal and factual authority for this Court's consideration.

5. The NMFLB's *amicus curiae* brief would be in support of Plaintiff-Appellant. Although *amicus curiae* briefing is normally restricted to the time frame allowed for the party whom *amicus* supports, the NMFLB requests that the Court grant it leave to file its *amicus curiae* brief at this time due to the unavoidable delay incurred for receiving NMFLB Board approval to file. Notably, Rule 12-215 contemplates that the Court may grant a delayed leave to file an *amicus curiae* brief "for cause shown." *See* Rule 12-215 ("If the court, for cause shown, grants leave for amicus to file a brief after the time allowed for the party whose position amicus supports....") NMFLB did not learn about the implications

of this appeal until well into the appeals process. NMFLB took measures to attain Board approval for the *amicus curiae* brief as soon as possible, but experienced delay as the NMFLB Board meets only periodically. The *amicus curiae* brief's delay will cause no prejudice to Defendant-Appellee. In fact, Defendant-Appellee previously submitted an unopposed motion to extend the deadline for its own Answer Brief.

6. Plaintiff-Appellant Delma E. Prather does not oppose this Motion.

7. Additional Defendant Mainline Rock & Ballast does not oppose this Motion.

8. Counsel for Defendant-Appellee was contacted and does not approve of this motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the Motion for Leave to File Amicus Curiae Brief by the NMFLB was mailed on May 19th, 2010 to the following:

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NEW MEXICO FARM AND LIVESTOCK BUREAU'S CONDITIONAL BRIEF OF *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF-APPELLANT

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I. INTEREST OF *AMICUS CURIAE*

The New Mexico Farm and Livestock Bureau ("NMFLB") is a free, independent, nongovernmental and voluntary organization of farm and ranch families united for the purpose of analyzing agricultural problems and formulating action to achieve educational awareness and social advancement. The NMFLB submits this *amicus curiae* brief to: 1) present to the Court the far-reaching effects the underlying decision could have on the New Mexico farming and ranching community; and 2) urge the Court to adopt the "surface destruction" doctrine as adopted by a multitude of other jurisdictions in order to preserve a party's intent to protect the usefulness of his or her surface estate. Accordingly, NMFLB supports Plaintiff-Appellant's request to overturn the District Court's decision below.

This appeal raises an issue of significant importance to NMFLB members. Specifically, this appeal seeks to determine whether common rock located on or near the surface of a state section, which contains little to no mineralization, is considered to be a "mineral" for purposes of New Mexico's mineral estate reservation. The implications of this determination are estimated to affect hundreds of NMFLB members who own split-estate lands similar to the Plaintiff-Appellant in this case, as the consequence of the District Court's decision would be that the Defendant-Appellees Land Commissioner and State Land Office (collectively the "SLO") would have the right to destroy the surface estate above

virtually any portion of the millions of acres of mineral estate land it manages that are overlain by private surface lands; thus, potentially rendering thousands of acres of lands useless for farming and grazing purposes. At the very least, the District Court's decision will unsettle the ownership of the vast acreages owned by NMFLB members that are subject to similar reservations.

II. INTRODUCTION

On June 21, 1898, the federal government transferred vast areas of lands to the New Mexico Territory through the Ferguson Act, 30 Stat. 484 (1898). *See Bogle Farms v. Baca*, 122 N.M. 422, ¶ 9, 122 N.M. 422, 925 P.2d 1184. Included in this transfer was the land at issue in this appeal. The federal government later passed the Enabling Act, 36 Stat. 557 (1910), which granted further lands to New Mexico and confirmed its pervious grants. *See Asplund v. Hannett*, 31 N.M. 641, 643 (1926). The Enabling Act created a trust for these lands to be managed by the New Mexico State Land Office. Thereafter, New Mexico's Constitution established that it is the Commissioner of Public Lands' duty to "select, locate, classify and have the direction, control, care and disposition" of such lands. N.M. Const. art. VIII, § 2. As such, the SLO currently manages millions of acres of land, including: "nine million acres of surface estate and 13 million [acres of] oil, gas and mineral estate." State Land Office, *The ABC's of the New Mexico State Land Office*, http://www.nmstatelands.org/default.aspx?pageId=44 (last visited

January 14, 2010). "State trust lands are located in every New Mexico county, except Los Alamos." *Id.*

III. ARGUMENT

A. The District Court's Decision Should Be Overturned Because It Could Result In The Destruction Of Millions Of Acres Of Surface Estate And "Unsettle The Ownership Of This And Other Land Bearing Similar Title Reservations."

The determination that common rock is a "mineral" for purposes of New Mexico's mineral estate reservation stands to affect the millions of acres of split estate lands that overlay New Mexico's mineral estates. A great amount of these lands belong to farmers and ranchers who depend upon the usefulness of their surface estates to earn their living by growing New Mexico's crops and raising New Mexico's livestock. The underlying decision below would give the SLO the power to destroy these surface estates and leave them useless. Indeed, the underlying decision is premised upon the determination that it was the intent of such surface estate owners to give the SLO this power by agreeing that the common rock which essentially makes up their surface estate was subject to being mined as a "mineral."

This Court should share the fears of the South Dakota Supreme Court in *Rysavy v. Novotny*, as "the trial court's ruling if allowed to stand could result in the destruction of the surface and unsettle the ownership of this and other land bearing similar title reservations." *Rysavy v. Novotny*, 401 N.W.2d 540, 543 (S.D. 1987)

(citing *Atwood v. Rodman*, 355 S.W.2d 206 (Tex. 1962)). Accordingly, this Court should overturn the decision below in recognition of the far-reaching detrimental impacts it could have on the farmers and ranchers of New Mexico, and indeed to the entire state. The Court should instead follow the lead of the *Rysavy* court, and many others like it, in adopting and applying the "surface destruction" doctrine to find that such common rock is not a "mineral." As described below, such a holding would recognize the common sense finding that it could not have been the intent of surface estate owners to agree that the common rock which holds their very estate together was subject to mining and destruction.

B. The "Surface Destruction" Doctrine Is The Most Reasonable Indicator Of A Party's Intent In Agreeing To A Mineral Reservation Affecting The Surface Estate.

The NMFLB supports the Plaintiff-Appellant's request that this Court adopt the "surface destruction" doctrine in determining the intent of the original parties regarding what comprises a "mineral" for purposes of New Mexico's mineral estate reservation. The "surface destruction" doctrine essentially provides that when determining whether a certain material falls under reservation in a split estate situation, "any [material that could not be removed without destroying the surface

estate] is not a reserved 'mineral,' absent a specific language to the contrary, or other showing that the parties intended otherwise." *Rysavy*, 401 N.W.2d at 542.[1]

Common reason demands use of the "surface destruction" doctrine, as it assumes the obvious truth that a surface estate owner would not agree to purchase a surface estate which could be destroyed and made useless at the whim of the mineral estate owner. The obviousness of this conclusion is understood by the Tenth Circuit in *United States v. Hess*, as they explain that the "effectiveness" of such a conveyance would be "negated" if "all or nearly all the surface were held to be included in the mineral reservation." *United States v. Hess*, 348 F.3d 1237, 1249 (10th Cir. 2003). As the *Rysavy* court explains, the rationale of the "surface destruction" doctrine is that the reservation of a material comprising or supporting the majority of the surface estate "would in reality effectuate a grant of very little

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[1] *Rysavy* cites to a multitude of Courts which have established this doctrine: "*Downstate Stone Co. v. United States*, 712 F.2d 1215 (7th Cir. 1983) (interpreting Illinois law) (citing *Kinder v. LaSalle County Coal Co.*, 310 Ill. 126, 141 N.E. 537 (1923)); *Harper v. Talladega County*, 279 Ala. 365, 185 So.2d 388 (1966); *Bambauer v. Menjoulet*, 29 Cal.Rptr. 874, 214 Cal.App.2d 871, 95 A.L.R.2d 839 (1963); *Morrison v. Socolofsky*, 43 Colo.App. 212, 600 P.2d 121 (1979); *Wulf v. Shultz*, 211 Kan. 724, 508 P.2d 896 (1973); *Little v. Carter*, 408 S.W.2d 207 (Ky. 1966); *Holloway Gravel Co. v. McKowen*, 200 La. 917, 9 So.2d 228 (1942); *Fisher v. Keweenaw Land Association*, 371 Mich. 575, 124 N.W.2d 784 (1963); *Vang v. Mount*, 300 Minn. 393, 220 N.W.2d 498 (1974); *Witherspoon v. Campbell*, 219 Miss. 640, 69 So.2d 384 (1954); [*Christensen v. Chromalloy American Corp.*, 99 Nev. 34, 656 P.2d 844 (1983).] *Hovden v. Lind*, 301 N.W.2d 374 (N.D. 1981); *Holland v. Dolese Company*, 540 P.2d 549 (Okla. 1975); *Whittle v. Wolff*, 249 Or. 217, 437 P.2d 114 (1968); *Doochin v. Rackley*, 610 S.W.2d 715 (Tenn. 1981); *Reed v. Wylie*, 597 S.W.2d 743 (Tex. 1980); *State Land Board v. State Department of Fish & Game*, 17 Utah 2d 237, 408 P.2d 707 (1965); *Shores v. Shaffer*, 206 Va. 775, 146 S.E.2d 190 (1966); *West Virginia Dept. of Highways v. Farmer*, 159 W.Va. 823, 226 S.E.2d 717 (1976); *Waring v. Foden*, 1 Ch. 276, 86 A.L.R. 969 (Eng. 1932); Annot., 95 A.L.R.2d 843, 846 (1964); 54 Am.Jur.2d *Mines and Minerals* § 6 (1971)."

or nothing to the surface owner...." *Rysavy*, 401 N.W.2d at 542. The *Rysavy* court believed that "the parties would not intend to negate the substance of their transaction." *Id.* at 542-43.

The analysis required in this appeal cries out for the sound logic of the "surface destruction" doctrine. So too do the great number of those in New Mexico's ranching and farming community that operate on surface estates with such mineral reservations. A surface estate owner would not rationally agree to a reservation for the mining of common rock when it is obvious that his or her surface estate would be destroyed if the mineral estate owner were to act upon such reservation. This Court should overturn the District Court's decision and apply the "surface destruction" doctrine to find that common rock is not a "mineral" in this case because the excavation of such rock by the State would destroy the surface estate, contrary to the plain and obvious intent of parties acquiring the surface estate.

IV. CONCLUSION

For the foregoing reasons, NMFLB supports the Plaintiff-Appellant and requests that this Court overturn the underlying decision of the District Court.

Respectfully submitted,

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