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## The Meaning of Minerals in the Stock-Raising Homestead Act Mineral Reservation

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## COMMENTS

### THE MEANING OF MINERALS IN THE STOCK-RAISING HOMESTEAD ACT MINERAL RESERVATION

The word "minerals" has been the subject of a confusing array of cases and law review articles. The result is that the meaning of "minerals" depends on how and where it is used, what the parties meant it to mean and what a particular court or agency says it means.<sup>1</sup> In the last four years, courts have had occasion to determine the meaning of "minerals" within the mineral reservation in patents issued under the Stock Raising Homestead Act of 1916.<sup>2</sup> In January of 1977, the Ninth Circuit in *United States v. Union Oil Co. of California* held that geothermal steam was a mineral reserved to the United States.<sup>3</sup> And in August of 1979, the United States District Court of Wyoming held that gravel was also a mineral within the SRHA mineral reservation.<sup>4</sup> The purpose of this comment is to discuss and evaluate the methods of determining the meaning of "minerals" within the mineral reservation of the SRHA.

#### FEDERAL VERSUS PRIVATE GRANTS

Before examining the meaning of "minerals" in the SRHA reservation, it is important to point out the differences in determining the meaning of the term in private deeds and the meaning of the term in statutes and the grants or

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1. " 'Mineral' is a word of general language, and not *per se* a term of art. It does not have a definite meaning. It is used in many senses. It is not capable of a definition of universal application, but is susceptible to limitation or expansion according to the intention with which it was used in the particular instrument or statute. Regard must be had to the language of the instrument in which it occurs, the relative position of the parties interested and the substance of the transaction which the instrument embodies. The word, if broadly construed would include gravel." *Bumpus v. U.S.*, 325 F.2d 264, 266 (10th Cir. 1963). See generally Reeves, *The Meaning of the Word "Minerals"*, 54 N. DAKOTA L. REV. 423 (1978) [hereinafter cited as Reeves.], Patterson, *Ownership of "Other Minerals"*, 25 ROCKY MTN. MIN. L. INST. 21.1 (1979) [hereinafter cited as Patterson.]
2. 43 U.S.C. § 291 *et seq.* (repealed 1976).
3. *United States v. Union Oil Co. of California*, 549 F.2d 1271 (9th Cir. 1977), *cert. den.* 434 U.S. 930 (1977) [hereinafter cited in text as *Union Oil*.]
4. *Western Nuclear, Inc. v. Andrus*, 475 F. Supp. 654 (D. Wyo. 1979) [hereinafter cited in text as *Western Nuclear*.]

patents issued under those statutes. In construing private deeds, the intention of the parties to the instrument controls.<sup>5</sup> These grants are often construed most strongly against the grantor.<sup>6</sup> Each state may have its own particular rules of construction, and in interpreting a particular instrument a party must turn to the law of the state which governs that instrument.<sup>7</sup>

In interpreting statutes, general rules of statutory construction are followed. The language and purpose of the statute and the intent of the legislature are primary considerations.<sup>8</sup> Federal grants are construed favorably to the government, and "nothing passes except what is conveyed in clear language."<sup>9</sup> There are a number of sources available to determine congressional intent which are not available in the area of private deeds. These are: stated legislative purpose, legislative history, related sections of the same statute, other statutes on the same matter and federal agency decisions.

Because "minerals" is not a term of art, authority which defines the term one way is not always applicable to determination of the meaning of the term in a different context. This has led to conflicting results in cases concerning private deeds<sup>10</sup> and is a stumbling block to courts in interpreting federal statutes. This inquiry, then, into the meaning of "minerals" shall be in the context of the SRHA. Authority concerning private deeds will be referred to only as it may add to the analysis of this particular act.

### THE STOCK-RAISING HOMESTEAD ACT

The SRHA was enacted on December 29, 1916.<sup>11</sup> It provided for entry under homestead laws of not more than 640 acres of unappropriated, unreserved public stock-raising

5. Kuntz, *The Law Relating to Oil and Gas in Wyoming*, 3 Wyo. L. J. 107 (1949) [hereinafter cited as Kuntz.]

6. Reeves, *supra* note 1, at 441.

7. Patterson, *supra* note 1, at 21-57.

8. Reeves, *supra* note 1, at 440 and 441.

9. *United States v. Union Pacific R. Co.*, 353 U.S. 112, 116 (1957).

10. Kuntz, *supra* note 5, at 112.

11. Pub. L. No. 290, 39 Stat. 862 (1916).

lands.<sup>12</sup> Stock-raising land was defined as land, the surface of which was chiefly valuable for grazing and raising forage crops, which did not contain merchantable timber, was not susceptible of irrigation from any known source of water supply, and was of such a character that 640 acres was reasonably required to support a family.<sup>13</sup>

Entries made and patents issued under this act were subject to a reservation to the United States of "all the coal and other minerals in the lands so entered and patented, together with the right to prospect for, mine, and remove the same."<sup>14</sup> The minerals were then subject to disposal by the United States in accordance with the coal and mineral land laws in force at the time of disposal. The Act allowed persons acquiring the minerals from the United States to mine and remove minerals upon securing written consent or waiver of the homesteader, upon payment of damages to crops and tangible improvements, or upon executing a bond sufficient to secure the payment of such damages.<sup>15</sup> Later, Congress extended the amount of damages recoverable when minerals were removed by strip or open pit mining to damage caused to the value of the land for grazing.<sup>16</sup>

### STATUTORY CONSTRUCTION IN GENERAL

When statutory language is not clear, courts may turn to other sources to determine the meaning of the statute. The statute should receive the construction which will carry out the intent of Congress.<sup>17</sup> It is a well settled rule that legislative history composed of congressional debates, amendments, committee reports, etc., attending the enactment of the statute, may be resorted to as an aid in determining the construction of a statute.<sup>18</sup> A court may also turn to the

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12. 43 U.S.C. § 291 (1976).

13. 43 U.S.C. § 292 (1976).

14. 43 U.S.C. § 299 (1976).

15. *Id.*

16. 30 U.S.C. § 54 (1976) (originally enacted as Act of June 21, 1949, ch. 232, § 5, 63 Stat. 215).

17. *Winona & St. Peter R.R. Co. v. Barney*, 113 U.S. 618, 625 (1885). For analysis of the inherent pitfalls in searching for intent see: Dickerson, *Statutory Interpretation: A Peek into the Mind and Will of a Legislature*, 50 *IND. L. J.* 206 (1975).

18. *Annot.*, 70 *A.L.R.2d* 5, 7 (1931).

history and conditions of the times when the act was passed.<sup>19</sup> It must construe the statute in light of the impressions under which Congress did in fact act, and whether Congress was mistaken in its view is not for a court to consider when it is interpreting a statute.<sup>20</sup>

Legislatures are presumed to have used statutory terms in their judicially established meaning.<sup>21</sup> Thus, a court may refer to judicial interpretations of a word in cases which were decided before an act was passed. Deference is also given the contemporaneous interpretations of a statute by the officer or agency charged with its administration.<sup>22</sup> The weight accorded administrative interpretations is not dependent on strict contemporaneity,<sup>23</sup> yet a lack of contemporaneity may still limit the influence of such interpretations.<sup>24</sup>

### HISTORY

In both *Union Oil* and *Western Nuclear*, the courts looked to historical events preceding the enactment of the SRHA.<sup>25</sup> Before 1909, public lands were disposed of as either wholly mineral or wholly non-mineral. But because of inadequate methods of classification, the system was abused and much valuable mineral land passed to individuals for minimum amounts in return. It was President Theodore Roosevelt who acted to prevent this abuse. He withdrew large areas of land thought to be valuable for coal from entry. He pointed out to Congress "the importance of conserving the supplies of mineral fuels still belonging to the government."<sup>26</sup> The Secretary of Interior recommended separating the right to mine from title to the soil.<sup>27</sup> Congress

19. *Great Northern R. Co. v. United States*, 315 U.S. 262, 273 (1942).

20. *Moor v. Country of Alameda*, 411 U.S. 693, 709 (1973).

21. *Coder v. Arts*, 213 U.S. 223, 242 (1909).

22. *Udall v. Tallman*, 380 U.S. 1 (1965) reh. den. 380 U.S. 989 (1965).

23. *Great Northern R. Co. v. U.S.*, *supra* note 19, at 275 (agency interpretations made thirteen years after enactment accepted).

24. *United States v. Union Oil Co. of Calif.*, *supra* note 3, at 1279. The court refused to give weight to Department of Interior communications which stated that geothermal resources were not minerals within the meaning of the SRHA mineral reservation. The court noted that these letters were written a half century after the act was passed, were inconsistent with one another and were "weakly reasoned." *Id.* at 1280 (footnote 19).

25. *United States v. Union Oil Co. of Calif.*, *supra* note 3 at 1274-1276; *Western Nuclear, Inc. v. Andrus*, *supra* note 4 at 657.

26. *Id.* 41 CONG. REC. 2806 (1907).

27. *Id.*

apparently heeded these suggestions and passed the Coal Lands Acts of 1909 and 1910, which allowed agricultural entries but reserved the coal to the United States.<sup>28</sup> In 1914, the Agricultural Entry Act of 1914 was passed, which allowed agricultural entry on lands withdrawn as valuable for phosphate, nitrate, potash, oil, gas or asphaltic minerals and provided for patents reserving the particular mineral for which the land had been withdrawn.<sup>29</sup>

In *Union Oil*, this history was used to support the court's determination that it was the purpose of Congress in enacting the SRHA to retain subsurface fuel resources in public ownership for conservation and subsequent orderly disposition in the public interest.<sup>30</sup> This purpose is too narrow in and of itself, of course, for it would not include the reservation of minerals such as gold and silver which are not fuel resources.

#### STARE DECISIS

*Stare decisis* is not much help in determining whether geothermal steam is a mineral because courts have not had much occasion to examine its nature. The history of gravel, however, is filled with judicial interpretations. In *Western Nuclear*, the court did a rather comprehensive examination of cases which had determined whether gravel or similar types of material was a mineral. The court looked at Land Department decisions, state court decisions construing private mineral reservations, state court decisions construing federal mineral reservations, federal district court decisions, federal circuit court decisions and one United States Supreme Court decision. But the court failed to point out the weight these decisions should have had in interpreting the SRHA.

First, as mentioned above, "mineral" is not a term of art. One court's definition of the term in 1979 is not necessarily the same as Congress' definition of the term in 1916.

28. 30 U.S.C. § 81 (1976) (originally enacted as Act of March 3, 1909) ch. 270, 35 Stat. 844; 30 U.S.C. §§ 83 *et seq.* (1976) (originally enacted as Act of June 22, 1910, ch. 318 § 1, 36 Stat. 583).

29. 30 U.S.C. §§ 121-123 (1976) (originally enacted as Act of July 17, 1914, ch. 142, § 1, 38 Stat. 509).

30. *United States v. Union Oil Co. of Calif.* *supra* note 3, at 1274-1276.

All authority must be examined in regard to its applicability to interpretation of the SRHA. Private mineral reservations are not applicable.<sup>31</sup> Under federal law, the determination of whether gravel is a mineral may come in the context of the Mineral Location Law of 1872,<sup>32</sup> or of a federal grant of land which was not, under the particular statute, to be "mineral land." It also occurs in the context of condemnation in which the minerals are reserved to the individual whose land was condemned.

Case authority dealing with the SRHA is, of course, the most important. In *Skeen v. Lynch*,<sup>33</sup> the plaintiff had entered and received a patent on 640 acres of land under the SRHA. The plaintiff brought suit against the defendant who had received a permit to prospect and drill for oil and gas on the same 640 acres. The first count alleged that, assuming the United States had reserved the water, oil and gas, the plaintiff owned a preferential right to prospect and produce oil and gas from the land. The court affirmed the grant of the motion to dismiss the first count because the United States was an indispensable party and had not been joined. In deciding the second count, the court accepted the assumption that oil and gas were reserved to the United States as irrefutable and held that the plaintiff had no preferential right to prospect and drill for oil and gas.

Although the court's comments on the SRHA reservation should be just dicta because the United States was an indispensable party, this part of the decision has been cited in later cases.<sup>34</sup> The court said that the legislative history left "no room to doubt that it was the purpose of Congress in the use of the phrase 'all coal and other minerals' to segregate the two estates, the surface for stock raising and agricultural purposes from the mineral estate. . . ."<sup>35</sup> The

31. See text *supra* at note 5. Note that the court in *Western Nuclear* stated that generally these private mineral reservations do not include gravel. *Western Nuclear, Inc. v. Andrus*, *supra* note 4, at 661.

32. 30 U.S.C. § 21 *et seq.* (1976).

33. *Skeen v. Lynch*, 48 F.2d 1044 (10th Cir. 1931) [hereinafter cited in text as *Skeen*.]

34. *State ex rel. State Highway Commission v. Trujillo*, 82 N.M. 694, 487 P.2d 122 (1971); *United States v. Union Oil Co. of Calif.*, *supra* note 3, at 1276; *Western Nuclear, Inc. v. Andrus*, *supra* note 4 at 662.

35. *Skeen v. Lynch*, *supra* note 33, at 1046.

court refused to apply the rule of *ejusdem generis* because the sentence after the reservation language in the statute said that the coal and other minerals would be subject to disposal in accord with the coal and mineral land laws in force and such language did not comport with a reading that the reservation included only coal.<sup>36</sup>

There is no doubt that legislative history supported the conclusion in *Skeen*. In the House of Representatives floor debate on the conference bill, when asked whether the reservation included oil, Congressman Ferris replied that it would. When it was pointed out that oil was not a mineral, Congressman Ferris said that if there was any doubt about it they would include oil in the reservation.<sup>37</sup>

Another case dealing with the mineral reservation in the SRHA was *State ex rel. State Highway Commission v. Trujillo*.<sup>38</sup> Trujillo's land was condemned by the State of New Mexico. The State district court determined that the State need not compensate Trujillo for the road building material taken from the land because it was reserved to the United States under the SRHA patent granted to Trujillo's predecessor in interest. The New Mexico Supreme Court reversed and directed the trial court to enter judgment for Trujillo.<sup>39</sup> The court refused to follow the *Skeen* theory that it was the intention of Congress to create two estates.<sup>40</sup> Apparently the court was confused by the district court's misinterpretation of *Skeen* that the land was divided into surface and subsurface estates.<sup>41</sup> It instead looked at an A.L.R.2d Annotation dealing with the term "minerals" with regard to sand, clay and gravel in deeds, leases and licenses between private parties.<sup>42</sup> The court found that because the

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36. *Id.* at 1046-1047.

37. 53 CONG. REC. 1171 (1916).

38. *State ex rel. State Highway Commission v. Trujillo*, 82 N.M. 694, 487 P.2d 122 (1971).

39. *Id.* at 126.

40. *Id.* at 125.

41. *Skeen* did not suggest the segregation of the land into a surface estate and a subsurface estate but rather the segregation of land into a surface estate and a mineral estate. The term, surface, has a well recognized meaning which encompasses not only the superficies but also the land in the mineral grant or reservation. 1 AMERICAN LAW OF MINING § 3.49, 580.2 (1980).

42. *State ex rel. State Highway Commission v. Trujillo*, *supra* note 34, at 124. See also: Annot., 95 A.L.R.2d 843 (1964).



road building material had no exceptional characteristics which distinguished it from the surrounding soil, and because it formed a part of the surface and could not be obtained without destruction of the surface, the material was not a mineral.

The primary problem with this analysis is that it relies on authority which examined the intent of the parties to private deeds. This is of limited value in determining the intent or purpose of Congress. The next problem is with placing emphasis on the destruction of the surface. Private deeds and leases often do not expressly provide for damages to the surface upon removal of the minerals. The SRHA and the later amendment<sup>43</sup> do provide for payment of damages which might remove the SRHA reservation from the court's line of reasoning.

The court in *Western Nuclear* also had the opportunity to rely on *Union Oil*. In *Union Oil*, the court properly inquired into the purpose of Congress in passing the SRHA and found the purpose to be to retain subsurface resources, particularly sources of energy, for separate disposition and development in the public interest. This purpose was not of much help to the court in *Western Nuclear* since gravel has not yet been found to be an energy resource.

The *Western Nuclear* court's reliance on cases defining minerals in contexts other than the SRHA and at a time later than 1916 is misplaced. First, the congressional intent and purpose of other statutes is not the same as it was for the SRHA. And second, in determining the meaning of a term in a statute, courts presume the term was used in its judicially settled or well known meaning. The legislature could not have been aware of a judicially settled meaning which was settled after the act was passed.

One result of this misplaced reliance is the court's definition of a mineral as a substance which is found to be valuable at any point in time.<sup>44</sup> Value is an important factor

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43. 43 U.S.C. § 299 (1976). See text *supra* at note 15.

44. *Western Nuclear, Inc. v. Andrus*, *supra* note 4, at 662.

in the determination of whether a mineral is locatable under the Mining Law of 1872.<sup>45</sup> In this area, a mineral is a substance which is either recognized by standard authorities, or classified as a mineral in trade or commerce, or possesses economic value for use in trade, manufacture, the sciences or in the mechanical or ornamental arts.<sup>46</sup> "Substance" is a very broad term and is reminiscent of the old "scientific division of all matter into the animal, vegetable (plant) or mineral kingdom."<sup>47</sup> Under the locatable mineral definition, one limit to the term is either classification of the substance by standard authorities, classification by trade or commerce or the value limit. All these limits change with time, and "value" is particularly subject to change in these inflationary times of energy shortages. Such changeable limits are not of serious concern in the area of mineral locations because the determination of value is made at the time the locator makes the entry. The mineral is not owned and the determination of value is not made until the location is made. But in the case of a grant or patent of land, title is passed at the time the patent is issued.<sup>48</sup> Thus, if a "substance" were not valuable at the time the patent was granted, the "substance" should belong to the patentee.<sup>49</sup> Yet under the *Western Nuclear* definition of mineral, if a substance later becomes valuable it no longer belongs to the patentee.<sup>50</sup>

Although the court in *Western Nuclear* purported to look at the intent of Congress, it spent an inordinate amount

45. 1 AMERICAN LAW OF MINING §§ 2.7A & 2.7G at 182.1 + 182.13 (1980). For an exhaustive explanation of the definitions of "locatable mineral" and "valuable mineral deposit" under the Mining Law of 1872 see: AMERICAN LAW OF MINING, Ch. IIA, § 2.7A *et seq.* and Ch. V, § 4.44 *et seq.*
46. *Id.* at § 2.7A.
47. Northern Pacific R. Co. v. Soderberg, 188 U.S. 526, 530 (1902).
48. United States v. Reimann, 504 F.2d 135, 138 (10th Cir. 1974); Dunbar Lime Co. v. Utah Idaho Sugar Co., 17 F.2d 351, 357 (8th Cir. 1926).
49. In *Western Nuclear*, the patent to Western Nuclear, Inc.'s, predecessor in interest was granted in 1926. Before that time, certain deposits of gypsum and granite were found to be subject to the Mining Law of 1872 because the lands were more valuable on account of these minerals than for agriculture. W. H. Hooper, 1 L.D. 560 (1881); H. P. Bennet, Jr., 3 L. D. 116 (1884); Northern Pacific R. Co. v. Soderberg, *supra* note 47. But it was not until 1929 that Layman v. Ellis, 52 L.D. 714 (1929) overruled Zimmerman v. Brunson, 39 L.D. 310 and stated that gravel was a mineral locatable under many laws. And it was not until 1979, that *Western Nuclear* applied this definition of minerals to the SRHA.
50. Unless the patentee knew at the time the land was patented to him that his ownership of the land was subject to the government's right to all "substances" not plant or animal in character that might be valuable in the future, this would constitute an unconstitutional taking.

of time examining the use of the word in unrelated areas of law. Its conclusion that the mineral estate is a flexible entity which expands with the development of the arts and sciences is not well founded. The court should have spent more time examining the intent and purpose of Congress in enacting the SRHA and examined more closely the cases which already dealt with the SRHA.

### RELATED ACTS

Having eliminated the consideration of a number of extraneous cases, the next source for interpretation of the SRHA is later federal acts. In determining whether geothermal resources are a mineral, the Geothermal Steam Act of 1970<sup>51</sup> may have some bearing. And in the area of gravel, the Surface Resources Act of 1947<sup>52</sup> and the Common Varieties Act of 1955<sup>53</sup> may be of some importance.

Statutes must apply only prospectively.<sup>54</sup> Thus it would be improper to use a later act to give a meaning to an act if the two statutes are not *in pari materia*<sup>55</sup> because that would make the later act apply retrospectively. The United States Supreme Court has noted the hazards of using the views of a subsequent Congress as a basis for inferring the intent of an earlier one.<sup>56</sup> Yet the Court also notes that they "should not be rejected out of hand as a source that a court may consider in the search for legislative intent."<sup>57</sup>

51. 30 U.S.C. § 1001 *et seq.* (1976). Section 1024 states that as to any land subject to geothermal leasing, all laws which provide for disposal of land subject to reservation of any mineral shall thereafter be deemed to embrace geothermal steam and associated geothermal resources as a substance which must be reserved.

52. 30 U.S.C. § 601 *et seq.* (1976). Section 601 states that the Secretary may dispose of mineral materials (including common varieties of gravel) on public land if disposal is not expressly authorized by law (including the United States mining laws).

53. 30 U.S.C. § 611 (1976). Section 611 provides that no deposit of common varieties of gravel and certain other materials shall be deemed a valuable mineral deposit within the meaning of the mining laws of the United States.

54. *Southwestern Coal and Improvement Co. v. McBride*, 185 U.S. 499, 503 (1902).

55. *Erlenbaugh v. United States*, 409 U.S. 239, 243 (1972) (a later act may be regarded as a legislative interpretation of an earlier act if the two are *in pari materia*): This rule makes more sense when the statutes were enacted by the same legislature at the same time, which was not the case here.

56. *Andrus v. Shell Oil Co.*, \_\_\_\_\_ U.S. \_\_\_\_\_, 100 S.Ct. 1932, 1938 N. 8 (1980).

57. *Id.*

In *Union Oil*, the court used the Geothermal Steam Act of 1970 as an example that the term "mineral" could encompass geothermal resources.<sup>58</sup> Section 1020 of the Act directs the Attorney General to initiate appropriate proceedings to quiet the title of the United States to geothermal resources in lands the surface of which had passed from federal ownership with a reservation of minerals.<sup>59</sup> The Committee on Interior and Insular Affairs "took no position" on the question of whether the mineral reservation in SRHA patents included geothermal resources.<sup>60</sup>

The court's reliance on the 1970 Act was improper. Congress' use of the term "minerals" as including geothermal steam should have no bearing on the use and meaning of the term by a 1916 legislature. In view of the expansive definition of minerals under the mining law due to increased value of all sorts of material and to increasing energy needs and shortages, "mineral" today has a far different general meaning than it had in 1916.

In *Western Nuclear*, the court brushes over the Common Varieties Act of 1955 by saying that reserved minerals are not necessarily the same as locatable minerals,<sup>61</sup> although the court did not make that distinction in examining case authorities. The court is correct, however, in stating that the classification of gravel in the Common Varieties Act of 1955 should not affect the meaning of the term "minerals" in the SRHA. The two Acts are not sufficiently *in pari materia*, and the latter Act should not apply retrospectively to determine the application of the former Act.

Putting the retrospective aspect aside, however, the SRHA, itself, has an interesting futuristic aspect. The Act states that the "coal and other mineral deposits in such lands shall be subject to disposal by the United States in accordance with the provisions of the coal and mineral land laws in force at the time of such disposal."<sup>62</sup> Mineral lands

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58. *United States v. Union Oil Co. of Calif.*, *supra* note 3, at 1274.

59. 30 U.S.C. § 1020 (1976).

60. H.R. REP. NO. 91-1544, 91st Cong., 2nd Session, reprinted at 3 U.S. CODE CONG. & AD. NEWS 5113, 5119 (1970).

61. *Western Nuclear Inc. v. Andrus*, *supra* note 4 at 660-661.

62. 43 U.S.C. § 299 (1976).

were considered to be those lands more valuable for purposes of the minerals than for agriculture.<sup>63</sup> Or, if "mineral land laws" means the mining laws, locatable minerals are defined within the tests of marketability and the prudent man test.<sup>64</sup> This suggests that in determining whether a substance has been reserved to the United States and can be disposed of by the United States, these tests should be applied. Also, if the Common Varieties Act of 1955 takes certain common varieties of gravel out from the coverage of the mining laws, these substances may no longer be capable of disposal under the present mineral land laws as required by the SRHA. However, the techniques of determining congressional intent and purpose are the subject of much manipulation, and it should be easy to assume that Congress expected the definition of "mineral land laws" to expand to include all laws governing disposal of substances owned by the United States.

In summary then, other acts defining or at least implying a definition of the term, mineral, will not be of much help in interpreting the SRHA.

#### LEGISLATIVE INTENT AND THE THEORIES OF ANALYSIS

An analysis of *Union Oil* and *Western Nuclear* shows four different theories which could be the basis for analysis of the mineral reservation question. The first is the major analysis in *Union Oil*, that is that it was the purpose of Congress to reserve the fuel or energy resources to the United States upon the grant of SRHA lands. The second was the major theory in *Western Nuclear*. This theory encompasses the idea that any substance is a mineral, if it has value in and of itself, and if the substance is valuable today, was within the definition of mineral in 1916 when the SRHA was passed.

A third theory underlied both *Union Oil* and *Western Nuclear*: the analysis that Congress intended to split the subject land into a surface estate to be granted to the home-

63. Northern Pacific R. Co. v. Soderberg, 188 U.S. 526 (1902); H. P. Bennet, Jr., 3 L.D. 116 (1884); W. H. Hooper, 1 L.D. 560 (1881).

64. Andrus v. Shell Oil Co., *supra* note 56, at 1935, note 4.

steadier for raising livestock and settling on semi-arid land, and into a subsurface estate which is retained by the federal government.

The fourth theory was mentioned by the *Union Oil* court<sup>65</sup> and involves Kuntz's manner of enjoyment test.<sup>66</sup> This theory is based on the general intent of the parties to an instrument by considering the purpose of the grant in terms of the manner of enjoyment intended in the ensuing interests. Kuntz states that the "surface is burdened with the right of access and the mineral estate is burdened with the right of the surface owner to insist that the surface be left intact and that it not be rendered valueless for the purposes for which it is adapted. . . ."<sup>67</sup> The owner of the mineral estate would compensate the surface owner for the destruction of the surface owner's enjoyment.<sup>68</sup>

The courts, the Interior Board of Land Appeals,<sup>69</sup> the district court in *Union Oil*, and commentators<sup>70</sup> have all referred to the legislative history of the SRHA. They each find in that history, support for their own particular view. The result sought, the theory used, and the particular words underlined dictate the intent and purpose of Congress found in that history,

*Congressional Purpose: Reservation of Fuel Resources*

The primary reason for the result in *Union Oil* is the court's recognition of the potential value of geothermal resources as an energy source.<sup>71</sup> Congress recognized this value in the Geothermal Steam Act of 1970. The court admits that in 1916, Congress was not aware of geothermal energy,<sup>72</sup> and perhaps the court would also admit that in 1916, Congress did not contemplate the energy crisis six decades in the future. The court finds the purpose to reserve

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65. United States v. Union Oil Co. of Calif., *supra* note 3, at 1274-footnote 7.  
 66. Kuntz, *supra* note 5, at 112.  
 67. *Id.* at 113.  
 68. *Id.* at 115.  
 69. Western Nuclear, Inc., 35 IBLA 146.  
 70. Bjorge, *The Development of Geothermal Resources and the 1970 Geothermal Steam Act Law in Search of Definition*, 46 COLO. L. REV. 1 (1974).  
 71. United States v. Union Oil Co. of Calif., *supra* note 3, at 1272-1273.  
 72. *Id.* at 1273.

future fuel sources in statements and actions by Theodore Roosevelt in 1907, and in an annual report by the Department of Interior.<sup>73</sup> It is likely that neither the President nor the Department knew of geothermal resources and the future energy crisis either.

What the court in *Union Oil* is actually doing is imposing its own economic values and present knowledge of geothermal resources upon a 1916 Congress. This is judicial legislation.<sup>74</sup> The purpose which the court in *Union Oil* found in the history of the SRHA was invented to meet the fact situation before it. Gold and silver are still minerals even though they are not energy resources, and the fact that gravel is not a fuel resource does not necessarily mean that it is not a mineral.

What the court has said is that under the SRHA, energy is a mineral.<sup>75</sup> As Bjorge points out, geothermal resources are not limited to superheated steam.<sup>76</sup> A geothermal resource is the natural heat of the earth existing below the surface in such a condition that it is economically feasible to be developed for commercial purposes.<sup>77</sup> To say that heat is a mineral is to say that sunlight is a mineral because it too is capable of being reduced to usable energy. And if energy sources are minerals then water falls are minerals.

Congress, in 1970, made the policy decision that geothermal resources are of sufficient importance that the government should encourage their development on public land. Perhaps Congress would also make the decision that the federal government is more capable of seeing that the resource is developed than are private landowners. But this decision should be made by legislatures and not by courts.

73. *Id.* at 1274-1275. The court also finds support for its theory in the legislative reports and floor debates. This history goes more toward the theory of segregation of surface and subsurface estates and will be considered below. See text *infra* at note 79.

74. *United States v. Bass*, 404 U.S. 342, 343 (1971) (rules of statutory construction are not substitutes for congressional law making); See also: *Hamilton v. Smith*, 285 Ala. 199, 86 So. 2d 283, 285 (1956); *Dickerson*, *supra* note 17, at 230.

75. *United States v. Union Oil Co. of Calif.* *supra* note 3, at 1279.

76. Bjorge, *supra* note 70, at 21.

77. *Id.*

*Valuable Substances: The Hindsight Test*

The difficulties inherent in defining minerals as substances which have presently obtained economic value have already been discussed. A more feasible definition would include the three criteria used in the mining law, but the determination of value would be made at the time the patent was granted.

*Subsurface Estate versus Mineral Estate*

The most important underlying theme in both *Union Oil* and *Western Nuclear* is the theory that the surface estate is segregated from the subsurface estate. And it is in this area that legislative history has been referred to most. A few of the statements which the courts, the Interior Board of Land and Appeals, and commentators have relied on are set forth below.<sup>78</sup>

In *Skeen v. Lynch*, the court found that the legislative history showed that it was the purpose of Congress to segregate the surface estate from the mineral estate.<sup>79</sup> But the courts in *Union Oil* and *Western Nuclear* have misinterpreted this to mean segregation of the surface estate from the subsurface estate.

The difference is significant. If the subsurface estate were reserved to the United States, everything, mineral, plant, animal or energy, below a certain point would belong to the United States. If the mineral estate were reserved to the United States, all mineral substances, be they on the

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78. "It appeared to your committee that many hundreds of thousands of acres of the lands of the character designated under this bill contain coal and other minerals, the surface of which is valuable for stock-raising purposes. The purpose of section 11 (the reservation) is to limit the operation of this bill strictly to the surface of the lands described and to reserve to the United States the ownership and right to dispose of all minerals underlying the surface thereof. . . ." H.R. REP. No. 35, 64th Cong., 1st Sess. 18 (1916). "The farmer-stockman is not seeking and does not desire the minerals, his experience and efforts being in the line of stock raising and farming, which operation can be carried on without being materially interfered with by the reservation of minerals and the prospect in for and removal of same from the land." *Id.* at 5.

"Mr. Ferris: It would. We believe it would cover every kind of mineral. All kinds of minerals are reserved;" 53 CONG. REC. 1171 (1916).

79. *Skeen v. Lynch*, *supra* note 33, at 1046.



surface or below, would belong to the United States. To say that the subsurface estate is reserved certainly helps determine the issue of whether geothermal resources were reserved because, by their very nature, they are subsurface resources. Coal, however may be at the surface of the land. Granite cliffs and the accompanying fallen blocks are at the surface. Gravel may be interspersed with the sand and soil which compose the surface.

The quoted legislative history supports the theory that only the mineral estate was reserved just as well as it supports the theory that the subsurface estate was reserved. But to find the former theory in this history does not help a court in its interpretation. To say that the mineral estate was reserved does not define mineral, it only gives rise to the very question that was asked. It is understandable, but not forgivable, that a court wishing to hold that a particular substance belonged to the government would grasp at whatever straw was available to support their decision.

It is at this point that the rule of interpretation of federal grants should be mentioned. It is a well known rule of construction that federal grants are construed favorably to the government and that "nothing passes except what is conveyed in clear language."<sup>80</sup> The courts in *Union Oil* and *Western Nuclear* follow this rule almost to the point of absurdity. Surely the rule should not be used to define terms. The courts should not say that the word in all federal patents simply meant what the federal government in each particular adversarial position says it means.

The United States Supreme Court has not applied this rule in its "full vigor" to grants under the railroad acts.<sup>81</sup>

It is undoubtedly . . . the well-settled rule of this court that public grants are construed strictly against the grantees, but they are not to be so construed as to defeat the intent of the legislature, or to withhold what is given either expressly or by necessary or fair implication.<sup>82</sup>

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80. *United States v. Union Pacific R. Co.*, *supra* note 9.

81. *Leo Sheep Co. v. United States*, 99 S. Ct. 1403, 1411 (1979).

82. *Id.* The Court was citing *U.S. v. Denver and Rio Grande R. R. Co.*, 150 U.S. 1, 14 (1893).

This language would seem to apply in the case of defining the SRHA reservation. In construing a statute, the meaning must first be sought in the language in which the act is framed.<sup>83</sup> The pertinent language is:

Any qualified person may make entry under the homestead laws of lands so designated by the Secretary . . . and secure title thereto by complicity with the terms of the homestead laws. . . .<sup>84</sup> All entries made and patents issued under the provisions . . . of this title shall be subject to and contain a reservation . . . of coal and other minerals . . . together with the right to prospect for, mine and remove the same.<sup>85</sup>

This language is clear. Even the court in *Union Oil* admits that the patentee receives title to all rights in the land not reserved.<sup>86</sup> The language is clear that what was retained was minerals, not a subsurface estate, and everything else—be it plant, animal, energy or some unknown quantity heretofore undiscoverable—was conveyed to qualified patentees.

### *The Manner of Enjoyment Test*

The “manner of enjoyment” test arose in the context of private grants, and the issue was whether oil and gas had been granted or reserved when the term “minerals” was used in the instrument’s granting or reservation clause.<sup>87</sup> Kuntz pointed out the inconsistent results when courts tried to determine the intent of the parties. These inconsistencies arose because the courts were looking for a specific intent when the parties probably had nothing specific in mind on the matter at all.<sup>88</sup> Kuntz proposed that the general intent

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83. *Caminetti v. United States*, 242 U.S. 470, 485 (1916).

84. 43 U.S.C. § 291 (1976).

85. 43 U.S.C. § 299 (1976).

86. *United States v. Union Oil Co. of Calif.*, *supra* note 3, at 1279.

87. Kuntz, *supra* note 5.

88. *Id.* at 112. There is still a question whether theories dealing with private deeds can be applied to federal grants. There would be no inconsistent holdings in the area of federal grants because there is only one party’s intent to discover and that is the intent of Congress. Yet, it is also likely that Congress did not specifically have geothermal steam or gravel in mind when it enacted the SRHA.

of the parties be sought by considering the manner of enjoyment intended by the ensuing interests. The manner of enjoyment of the mineral estate would be through extraction of valuable substances whether presently valuable or valuable at some point in the future due to development of the arts and sciences. The manner of enjoyment of the surface would be through retention of such substances as are necessary for the use of the surface. The two estates would be mutually servient and dominant. The surface estate would be burdened with the right of access and the mineral estate burdened with the right of the surface owner to insist that the surface be left intact and not be rendered valueless for the purposes for which it was adapted.<sup>89</sup> If extraction of a "mineral" destroyed the use of the surface, the owner of the surface would have the right to be compensated for the value of the land.<sup>90</sup>

*Union Oil* uses this theory in partial support of its conclusion.<sup>91</sup> It is indeed an attractive theory for it would answer the issues here under consideration. Both geothermal steam and gravel would be minerals but any damage to the enjoyment of the surface estate by reason of their extraction would have to be paid by the mineral estate owner.

But under this theory, the definition of minerals has no limit. Kuntz's phrase, substances presently valuable or valuable at some point in the future, might include water, trees, soil and wildlife. It would only seem natural to seek a meaning within the limits of the term "mineral". Trees could then be excluded because they are plants, and wildlife could be excluded because they are animals. Water and soil would not, however, be excluded, and geothermal energy and sunlight remain in question.<sup>92</sup>

The best answer is to turn back to the original rule of construction and seek the intent of Congress first in the

89. *Id.* at 113.

90. *Id.* at 115-116.

91. *United States v. Union Oil Co. of Calif.*, *supra* note 3, at 1274 footnote 7. See also 1 AMERICAN LAW OF MINING § 3.26 (1980).

92. One might question whether energy comes within the meaning of "substances."

language of the statute. When Congress reserved the coal and other minerals, it provided for a right of access to prospect, mine and remove those minerals. It also limited this right in that the mineral locator was not to injure, damage or destroy permanent improvements and was to compensate the patentee for all damages to crops.<sup>93</sup> Under a "manner of enjoyment" test, this implies that Congress did not expect the extraction of minerals to interfere with the enjoyment of the surface estate except when removal might entail destruction of such things as fences, buildings, or crops. This implies that Congress had not anticipated strip or pit mining, removal of support or removal of the soil, which might include gravel and sand.

It was not until 1949 that Congress recognized that extraction of minerals might totally remove the surface. It then provided for payment for damages to the value of the land for grazing.<sup>94</sup> Even this is not a complete adoption of the manner of enjoyment test, for part of the enjoyment of the surface would be to realize its value for its highest and best use. If a nearby city expanded to the point that the land became valuable for subdivision, the manner of enjoyment would include the ability to subdivide and sell the surface. If it was the intent of the Congress to limit the use of stock-raising homestead lands to such stock-raising even after the patent had been granted, it would have intended to limit the development and settlement of the West. No court has yet limited a patentee under the SRHA to use of his or her land solely for grazing. The patentee gets more than a permit to graze stock upon the land.<sup>95</sup> The statute itself did not and does not now comport with a "manner of enjoyment" test.

### CONCLUSION

Four underlying theories of the courts' decisions in *Union Oil* and *Western Nuclear* have been discussed. Each theory has been found to be inapplicable or incorrect. The

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93. 43 U.S.C. § 299 (1976).

94. 30 U.S.C. § 54 (1976).

95. *United States v. Union Oil Co. of Calif.*, *supra* note 3, at 1279.

courts, in an attempt to impose their own economic values, have strayed from their proper judicial role. It was Congress' intent under the SRHA to patent land to stock-raising land entrymen reserving to itself only the minerals. The definition of minerals should be determined at the time the patent was granted by applying the general rules of the definition of minerals under the mining laws. The definition of minerals should not include forms of energy such as geothermal energy unless at the time of the patent that energy was considered to be a mineral by the standard authorities, in trade or commerce, or known to be of value in the mechanical or scientific arts.

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