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Public Lands - The Inclusion of Gravel in a Mineral Reservation to the United States under the Stock-Raising Homestead Act - Western Nuclear, Inc. v. Andrus, Watt v. Western Nuclear, Inc.

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CASE NOTE

PUBLIC LANDS—The Inclusion of Gravel in a Mineral Reservation to the United States under the Stock-Raising Homestead Act. Western Nuclear, Inc. v. Andrus, 475 F. Supp. 654 (1979); 664 F.2d 234 (1981), cert. granted sub nom., Watt v. Western Nuclear, Inc., 50 U.S.L.W. 3934 (U.S. May 24, 1982) (No. 81-1686).

In 1975 Western Nuclear, Inc. acquired ranch land on which was located on old gravel pit. The land was subject to a 1929 patent, issued pursuant to the Stock-Raising Homestead Act of 1916 (SRHA).[1] In accordance with the provisions of that Act, the patent contained the following reservation:

> Excepting and reserving, however, to the United States *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 pursuant to the provisions and limitations of the Act of December 29, 1916.[2]

Western Nuclear began to remove the gravel and to use it for road surfacing, concrete aggregate and the like. Soon thereafter, the Wyoming Office of the Bureau of Land Management (BLM) cited Western Nuclear for trespass on the mineral interests retained by the United States. After a hearing, the BLM assessed damages against Western Nuclear of $13,000, which was the value of the gravel removed.[3] This decision was upheld by the Interior Board of Land Appeals (IBLA).[4]

The United States Court for the District of Wyoming affirmed the IBLA decision holding that gravel is a mineral reserved to the United States by the 1929 patent.[5] On appeal to the Tenth Circuit, Western Nuclear argued that the gra-

1. 43 U.S.C. §§ 291-301 (1976), *suspended by* The Taylor Grazing Act of June 28, 1934, ch. 865, 48 Stat. 1269, codified at 43 U.S.C. §§ 310-316(o) (1976), *repealed by* the Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, § 702, 90 Stat. 2787, codified at 43 U.S.C. §§ 1701-1782 (Supp. II 1978). Valid existing patents such as the one in this case were unaffected by the repeal.
2. Western Nuclear, Inc. v. Andrus, 664 F.2d 234, 235 (10th Cir. 1981) (emphasis added).
3. *Id.* at 235-36.
4. 85 Interior Dec. 129 (1978).
5. Western Nuclear, Inc. v. Andrus, 475 F. Supp. 654 (D. Wyo. 1979).

vel was not reserved to the United States. Alternatively, if the court found that the gravel was reserved, Western Nuclear alleged that the BLM lacked jurisdiction over the subject land. The court held that the BLM did have authority to cite Western Nuclear for the alleged trespass on mineral interests retained by the United States.[6] The Tenth Circuit, however, reversed the lower court and held that gravel was not a mineral within the meaning of the mineral reservation of the SRHA.[7] The government then appealed to the United States Supreme Court, which recently granted certiorari.[8]

HISTORY

In construing a federal statute, the court may consider the intent of Congress at the time of the statute's enactment and the circumstances then present.[9] This legislative intent can be found in the stated purpose of the statute, the history of the legislation as recorded in the legislative records, and through examination of the condition of the country at the time the statute was enacted.[10] Therefore, a history of the SRHA will be beneficial.

In following its own policy of encouraging the settlement and development of the western lands, Congress enacted the Homestead Act of 1862 which allowed any person twenty-one years of age or older to enter and farm 160 acres of land.[11] Mineral lands were reserved from sale by the General Mining Law of 1872.[12] Land was mineral in character if it was more valuable for its minerals than for any other purpose.[13] To classify a land as mineral, the Interior Depart-

6. 664 F.2d at 238.
7. *Id.* at 242.
8. Western Nuclear, Inc. v Watt, 664 F.2d 234 (10th Cir. 1981), *cert. granted,* 50 U.S.L.W. 3934 (May 24, 1982) (No. 81-1686).
9. Moore v. County of Alameda, 411 U.S. 693, 709 (1972); United States v. Stewart, 311 U.S. 60, 69 (1940).
10. Winona & St. Peter R.R. Co. v. Barney, 113 US. 618, 625 (1885); United States v. Union Pacific R.R., 230 F.2d 690, 692 (10th Cir. 1956), *rev. on other grounds,* 353 U.S. 112 (1957).
11. 43 U.S.C. § 161-263 (1970), *repealed by* the Public Land Policy and Management Act of 1976, § 702, Pub. L. No. 94-579, 90 Stat. 2787 codified at 43 U.S.C. §§ 1701-1782 (Supp. II 1978).
12. 30 U.S.C. § 21-54 (1976).
13. Northern Pac. R. Co. v. Soderberg, 188 U.S. 526 (1902); H. P. Bennett, Jr. 3 Pub. Lands Dec. 116 (1884); W. H. Hooper 1 Pub. Lands Dec. 560 (1881).

ment relied on earlier administration determinations, affidavits of the entrymen themselves and information from the field offices. This method of classification along with the problems of distance and communication, allowed much abuse and fraud within the system. Consequently, vast tracts of public lands rich in minerals passed into private ownership.[14]

President Theodore Roosevelt was concerned with this problem and in the early 1900's he began to withdraw large areas of public land, which were presumably valuable for coal, from all forms of entry.[15] In 1906 and again in 1907, President Roosevelt encouraged Congress to conserve supplies of mineral fuels and suggested that some public lands could be beneficially used for production of subsurface fuels, as well as for agriculture.[16] He recommended "enactment of such legislation as would provide title to and development of the surface land as *separate and distinct* from the right to the underlying mineral fuels in regions where these may occur."[17] In 1909 the Secretary of the Interior emphasized the same theme, arguing that such a scheme could prevent monopoly, extortion and fraud in the disposition of coal, oil and gas.[18]

Thereafter, Congress passed several acts which allowed for the sale of land with the express reservation to the United States of certain specified minerals. Patents issued under the Coal Land Acts of 1909 and 1910 contained reservations of coal to the United States.[19] Patents issued under the Agriculture Entry Act of 1914 reserved specifically phosphate, nitrate, potash, oil, gas and asphaltic materials to the United States, but all rights to any other minerals subsequently passed to the patentee.[20] This Act also increased the amount of land to be homesteaded to 320 acres.[21] There were still,

14. Reeves, Geraud & Moran, *Development of Federally Reserved Minerals in Fee Lands*, in 1 AMERICAN LAW OF MINING § 3.1 (R.M.M.L.F. ed. 1960).
15. Swenson, *Legal Aspects of Mineral Resources Exploitation*, in GATES, HISTORY OF PUBLIC LAND LAW DEVELOPMENT 726-27 (1968).
16. 41 CONG. REC. 2806 (1907).
17. *Id.* (emphasis added).
18. 1909 DEP'T INT. ANN. REP. pt. I, at 7.
19. 30 U.S.C. § 81-90 (1976).
20. 30 U.S.C. § 121-123 (1970).
21. GATES, HISTORY OF PUBLIC LAND LAW DEVELOPMENT 503 (1968).

however, many problems. Three-hundred and twenty acres of land in the semi-arid West were not enough for a homesteader to make a successful living, and many valuable minerals were still passing into private ownership.[22]

The Stock-Raising Homestead Act of 1916[23] appeared to be an answer. Rather than classifying lands entered as agricultural or mineral, the Act simply provided for a patent which reserved to the United States *all* minerals in the homesteaded land:

> [A]ll entries made and patents issued under the provisions of this subchapter shall be subject to and contain a reservation to the United States of *all the coal and other minerals* in the lands .... [and such] deposits . . . shall be subject to disposal by the United States in accordance with the provisions of the coal and mineral land laws. . . .[24]

Congress increased the amount of land to be homesteaded to 640 acres, showing its intent to restore the grazing capacity and the meat producing capacity of the lands in the West and thus to promote permanent settlement.[25] At the same time, Congress intended to reserve to the government the ownership and right to dispose of all underlying minerals.[26]

MEANING OF "MINERAL" IN THE MINERAL RESERVATION OF THE SRHA

> "[M]ineral" 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 is used in the particular instrument or statute.[27]

The general mineral reservation was not readily accepted by all Congressmen. Although Congressman Mondell

22. *Id.* at 516-17.
23. 43 U.S.C. § 291-301 (1976).
24. 43 U.S.C. § 299 (1976) (emphasis added).
25. H.R.REP. No. 626, 63d Cong., 2d Sess. 10-11 (1914).
26. H.R.REP. No. 35, 64th Cong., 1st Sess. 5, 18 (1916).
27. Bumpus v. United States, 325 F.2d 264, 266 (10th Cir. 1963).

from Wyoming voted for the Act, he stated for the record his opposition to such a broad reservation: "When one takes into consideration the wide range of substances classed as mineral, the actual ownership under a complete mineral reservation becomes a doubtful question."[28] Committee reports and floor debates indicate only that Congress intended to reserve *all* minerals.[29] The only discussion concerning the scope of the mineral reservation occurred when Congressman Ferris of Oklahoma, manager of the bill, was asked whether the reservation would include oil. He responded affirmatively, saying that the reservation would cover "every kind of mineral."[30]

Lindley on Mines, a contemporary authority on mining law and minerals, developed certain rules for determining whether a substance is a mineral.[31] A mineral is a substance that (a) is recognized as a mineral according to its chemical composition by standard authorities on the subject, or (b) is classified as a mineral product in trade or commerce, or (c) possesses economic value for use in trade.[32] Lindley emphasized, however, that the real test in determining whether a substance is a mineral is market based. If the substance is valuable in itself and near enough to a market to have value, it is a mineral.[33]

Ricketts on Mines, another standard authority, defined "mineral" as a naturally occurring inorganic substance which has a definite chemical formula and certain distinguishing properties and which is capable of "being got from the earth for the purpose of profit."[34] This definition of mineral closely resembles that of a modern day geologist.[35]

In general, the courts have not developed any firm definition of "mineral." Their decisions are often unreconcilable

28. 54 CONG. REC. 687 (1916).
29. H.R.REP. NO. 35, 64th Cong., 1st Sess. 5 (1916); 53 CONG. REC. 1171 (1916).
30. 53 CONG. REC. 1171 (1916).
31. LINDLEY ON MINES § 98 (rev. ed. 1914).
32. *Id.*
33. LINDLEY, *supra* note 31, at § 90.
34. RICKETTS ON MINES § 99 (1911).
35. "A naturally formed chemical element or compound having a definite chemical composition and, usually, a characteristic crystal form. A mineral is generally considered to be inorganic. . . ." AMERICAN GEOLOGICAL INSTITUTE, GLOSSARY OF GEOLOGY 455 (1972).

because of differences not only in the basic facts of the cases but also in the principles applied.[36] The Supreme Court in 1903 considered the meaning of "mineral" in *Northern Pacific Railway v. Soderberg*.[37] In this case, the Court held that lands chiefly valuable for granite quarries were mineral lands.[38] The Court noted that since the word "mineral" is used in so many different ways, ordinary definitions are not much of a guide in any given case. Instead, the Court looked to Land Department rulings which supported the theory that mineral lands are those lands which are mainly valuable for something other than agriculture purposes.[39] Noting that "nothing passes by implication," the Court emphasized that grants from the sovereign will receive a strict construction in favor of the government.[40]

Only two federal court of appeals cases have construed the meaning of the mineral reservation clause of the SRHA. In 1931, the Tenth Circuit decided *Skeen v. Lynch*.[41] That case involved a patent issued under the SRHA. The court held that the intent of Congress was to separate the surface estate from the mineral estate, reserving "all of the latter to the United States."[42] More specifically, the court held that oil and gas were within the scope of the mineral reservation.[43]

The second case, *United States v. Union Oil Co.*[44] was a much more recent case decided by the Ninth Circuit Court of Appeals. The issue in *Union Oil* was whether geothermal steam was included within the mineral reservation required by the SRHA. The court admitted that Congress in 1916 had no intention of reserving or passing title to geothermal resources, but held that the mineral reservation clause could

36. *See* Reeves, *The Meaning of the Word "Mineral,"* 54 N.D.L.REV. 419 (1978). This article discusses the various factors upon which courts have relied in determining whether a particular substance is a mineral within the meaning of an instrument or statute.
37. 188 U.S. 526 (1903).
38. *Id.* at 536.
39. *Id.* at 534.
40. *Id.*
41. 48 F.2d 1044 (10th Cir. 1931), *cert. denied*, 284 U.S. 633 (1931).
42. *Id.* at 1046.
43. *Id.* at 1047.
44. 549 F.2d 1271 (9th Cir. 1977).

still be construed to include geothermal steam.[45] After a discussion of the legislative history, the court concluded that the purposes of the Act were to provide homesteaders with enough land to support their famiiles by raising livestock and "to reserve unrelated subsurface resources, particularly energy sources, for separate disposition."[46] The court found that in order to serve the latter purpose, a broad construction of the mineral reservation was necessary. Since geothermal resources contribute nothing to the agricultural development of the surface estate and since they are depletable subsurface energy resources, much like coal and oil, the court held that geothermal steam would be included within the scope of the mineral reservation.[47]

GRAVEL

Black's Law Dictionary defines gravel as "small stones or fragments of stone often intermixed with particles of sand."[48] The American Geological Institute considers gravel to be a certain size (between 1/12 to 3 inches in diameter) of unconsolidated rock fragments.[49] By Lindley's marketability test, gravel could easily be considered a mineral. By Rickett's scientific definition, gravel is not a mineral, because it does not have a definite chemical composition.

When construing private grants or reservations of minerals, state courts have generally held that gravel is not a mineral unless there was a specific intent to reserve the gravel.[50] This is not necessarily the rule applied to mineral reservations by the federal government when public land is conveyed. Since the reservations are in accordance with the provisions of a federal statute, special statutory construction rules must be applied and the court must ascertain the intent of Congress.[51]

45. *Id.* at 1273-74.
46. *Id.* at 1279.
47. *Id.*
48. BLACK'S LAW DICTIONARY 830 (rev. 4th ed. 1968).
49. AMERICAN GEOLOGICAL INSTITUTE, *supra* note 35, at 310.
50. *See* 95 A.L.R.2d 865 (1964).
51. *See supra* notes 9 and 10.

One state court case, *State ex rel. State Highway Commission v. Trujillo*[52] decided the issue of whether gravel was included in the mineral reservation clause of a patent issued under the SRHA. The New Mexico Supreme Court interpreted *Skeen* as holding that Congress intended to separate the land into two estates, a surface estate and a subsurface or mineral estate.[53] The court stated in *Trujillo* that Congress did not intend the entryman to have use of only the surface.[54] If this were so, he would possess nothing more than grass. Instead, the intent was only to reserve the minerals in the land to the United States.[55] The court then held that since ordinary gravel is just rock with no rare or exceptional character, it was not reserved to the government under the SRHA.[56]

The Tenth Circuit in *Bumpus v. United States*[57] had the opportunity to decide whether gravel was included in a mineral reservation which evolved from a condemnation of some land. In order to bulid a reservoir, the government took the surface estate, but reserved to the owner all "oil, gas and other minerals in and under said land."[58] Applying the rule of construction ejusdem generis, "of the same kind or species,"[59] the court held that the terms "oil" and "gas" limited the scope of the word "minerals" to those minerals of the same kind or species as oil or gas.[60] Thus, gravel was not included within the mineral reservation.[61]

In construing a statute, the courts may also look to a contemporaneous interpretation of the statute by an officer or agency charged with its administration.[62] Several Department of the Interior decisions have addressed the issue

52. 82 N.M. 694, 487 P.2d 122 (1971).
53. 487 P.2d at 125.
54. *Id.*
55. *Id.*
56. *Id.* at 124.
57. 325 F.2d 264 (10th Cir. 1963).
58. *Id.* at 265.
59. "Where an enumeration of specific things is followed by a more general word or phrase, such general word or phrase is held to refer to things of the same kind, or things that fall within the classification of specific terms." *Id.* at 267.
60. *Id.*
61. *Id.*
62. Udall v. Tallman, 380 U.S. 1 (1965), *reh'g. denied*, 380 U.S. 989 (1965).

under consideration. *Zimmerman v. Brunson*,[63] decided in 1910, was the Interior Department decision in force when the SRHA was enacted. The Department held that land containing deposits of sand and gravel, suitable for mixing with cement for concrete construction, was not mineral land within the meaning of the mining laws.[64] The Secretary stated in *Zimmerman* that sand and gravel were not recognized by standard authorities as minerals when their sole use was for "general building purposes" and their chief value stemmed from their "proximity to a town or city."[65]

Nineteen years after *Zimmerman*, and thirteen years after the enactment of SRHA, the Land Department overruled itself and held in *Layman v. Ellis*[66] that land containing valuable deposits of gravel was mineral in nature. More recently, the Department, through a decision by the Interior Board of Land Appeals (IBLA), upheld the *Layman* decision in *United States v. Isbell Construction Co.*[67] One issue in *Isbell* was whether common sand and gravel were minerals reserved to the United States in a patent granted under the Taylor Grazing Act.[68] The Board noted that, until 1955, valuable deposits of sand and gravel had been considered mineral under the mining laws. In 1955, Congress amended the Materials Act of 1947[69] by the Common Varieties Act,[70] which stated in part that common varieties of sand and gravel were not to be deemed valuable mineral deposits within the meaning of the mining laws.[71] The Board quoted from a Solicitor's Opinion which stated that the change in the mining law did not affect the scope of the mineral reserva-

63. 39 Pub. Lands Dec. 310 (1910).
64. *Id.* at 313.
65. *Id.*
66. 52 Pub. Lands Dec. 714 (1929).
67. 78 Interior Dec. 385 (1971).
68. 43 U.S.C. § 315 (1970). The Taylor Grazing Act of 1934 ended homesteading on the public domain, but authorized exchanges of land between the government and the landowner in order to consolidate federal lands. The landowner received a patent reserving all minerals to the United States. 43 U.S.C. § 315(g)(c) (1970).
69. Act of July 31, 1947, 61 Stat. 681. The Materials Act gave the Secretary of the Interior the authority to dispose of mineral materials, including, but not limited to, common varieties of sand, stone, gravel, pumice, pumicite, cinders and clay on public lands.
70. 30 U.S.C. §§ 601-615 (1976).
71. 30 U.S.C. § 611 (1976).

tion in the SRHA.[72] The Board then held that valuable deposits of sand and gravel were minerals reserved to the United States.[73]

THE PRINCIPAL CASE: *Western Nuclear v. Andrus*

In *Western Nuclear*, the Tenth Circuit Court of Appeals reversed the Wyoming district court, which had found that gravel was a mineral reserved to the United States under the provisions of the SRHA.[74] Relying on the legislative history of the Act, Lindley's marketability test,[75] and two Court of Appeals cases, *Skeen v. Lynch* and *United States v. Union Oil*, the trial court concluded that once a substance is found to be valuable, it will be included in the general mineral reservation to the government: "This is despite the fact that at the time of enactment of the Act the term 'mineral' may not have included these particular substances. . . . [T]he mineral reservation in the SRHA of 1916 is broad enough to include gravel. . . ."[76]

The Tenth Circuit overturned the district court's decision.[77] In doing so, the court relied on *Zimmerman v. Brunson*, the Interior Department decision in force when the SRHA was enacted, which held that gravel was not a mineral for the purposes of mining laws or homestead acts.[78] Just a few years after *Zimmerman*, the Department of the Interior had begun drafting the legislation which became the SRHA. The court felt that it was "highly improbable" that the Department was unaware of its own ruling in *Zimmerman*.[79] The court presumed that Congress was also aware of that decision.[80] Even though *Layman v. Ellis* overruled *Zimmerman*, the court stated that this was insignificant.[81] The im-

72. 78 Interior Dec. at 389-90 (quoting SOLIC. OP., M-36417 of Feb. 15, 1957).
73. 78 Interior Dec. at 390.
74. 475 F. Supp. at 663 (D. Wyo. 1979), *rev'd*, 664 F.2d at 242 (10th Cir. 1981).
75. LINDLEY, *supra* note 31, at § 93.
76. 475 F. Supp. at 662-63.
77. 664 F.2d at 242.
78. 39 Interior Dec. at 313.
79. 664 F.2d at 240.
80. *Id.*
81. *Id.*

portant thing to the court was that in 1916 the Department of the Interior had ruled that gravel was not a "mineral."[82]

The court then noted three previous cases in which other courts had construed the reservation of "coal and other minerals" in the SRHA. The Tenth Circuit in *Skeen v. Lynch* held that oil and gas were included within the reservation clause. In *United States v. Union Oil,* the Ninth Circuit held that since geothermal steam was an "unrelated subsurface energy resource," it fell within the reservation clause. The *Western Nuclear* court agreed with the analysis in *Skeen* and *Union Oil,* but it refused to apply that type of analysis to gravel since gravel was not a subsurface energy resource.[83]

In the third case, *State ex rel., State Highway Commission v. Trujillo,* the New Mexico Supreme Court held that gravel was not included in the mineral reservation clause of the SRHA.[84] The Tenth Circuit noted that the *Trujillo* court disagreed with the statement in *Skeen* that the congressional intent of the SRHA was to grant a surface estate and reserve to the United States the subsurface mineral estate.[85] The *Western Nuclear* court felt that this disagreement was not essential to the final result reached in *Trujillo.*[86]

The court in *Western Nuclear* also discussed two cases that did not involve patents issued under the SRHA but did address the issue of whether gravel was included in reservations of "other minerals." The court noted its earlier holding in *Bumpus v. United States*[87] that gravel was not con-

82. *Id.*
83. 664 F.2d at 241.
84. 82 N.M. 694, 487 P.2d 122 (1971).
85. 664 F.2d at 241.
86. *Id.* The *Trujillo* court misinterpreted *Skeen* to hold that by enacting the SRHA Congress intended to grant to the entryman only the surface estate. *Skeen,* however, held that the Congress intended to separate the surface estate from the mineral estate reserving all of the latter to the United States. 48 F.2d at 1046. In other words, the entryman was to own everything except the minerals. Therefore, the *Trujillo* court's disagreement with *Skeen* was not important to the issue of whether gravel was a reserved mineral.
87. This case was cited mainly because the court finds it interesting that the government in *Bumpus* took a position contrary to its position in the present case. The government had claimed that gravel was not included within the reservation phrase "oil, gas and other minerals."

tained in the reservation clause "oil, gas and other minerals." The second case the *Western Nuclear* court discussed was *State Land Board v. State Department of Fish and Game*,[88] a Utah Supreme Court case that held gravel was included in a reservation to the state of "all coal and other minerals." Both the *Bumpus* court and the Utah court applied the construction rule of ejusdem generis (of the same kind).[89]

The court in *Western Nuclear* then employed the analysis used by the Utah Supreme Court in *State Land Board*.[90] According to the Utah court, "coal and other minerals" should be construed to mean "something of the same general character as coal or minerals which are usually . . . more valuable than the land in which they are contained. . . ."[91] The Tenth Circuit in *Western Nuclear* concluded that since gravel is closely related to the surface estate, it is a "part and parcel" of that estate.[92] Gravel, the court noted, is just "fragmented rock" and ordinary rocks and stones are not minerals reserved to the United States in the SRHA of 1916.[93] The court stated that if such common substances were considered to be reserved minerals, patentees would own only dirt and little or nothing more.[94] Therefore, the court held that gravel was not a reserved mineral.[95]

ANALYSIS OF THE COURT'S OPINION

As of 1972, over seventy million acres of land have been entered under the Stock-Raising Homestead Act of 1916.[96] Approximately twelve percent of the land in Wyoming is subject to federal reservation of minerals, most under the SRHA.[97] Therefore, the decision in *Western Nuclear* directly

88. 17 Utah 2d 237, 408 P.2d 707 (1965).
89. Bumpus v. United States, 325 F.2d at 267 (10th Cir. 1963); State Land Bd. v. State Dep't of Fish and Game, 408 P.2d at 708 (1965).
90. 17 Utah 2d 237, 408 P.2d at 707.
91. Western Nuclear, Inc. v. Andrus, 664 F.2d at 242 (quoting State Land Bd. v. State Dep't of Fish and Game, 408 P.2d at 708).
92. 664 F.2d at 242.
93. *Id.*
94. *Id.*
95. *Id.*
96. Western Nuclear, Inc. v. Andrus, 475 F. Supp. at 658 (D. Wyo. 1979) (citing BUREAU OF LAND MANAGEMENT, U.S. DEP'T. OF INTERIOR, PUBLIC LAND STATISTICS 58 (1972)).
97. Western Nuclear, Inc. v. Andrus, 574 F.Supp. at 658.

affects a substantial amount of privately owned land in our state.

In *Western Nuclear* the district court and the Tenth Circuit both acknowledged that rules of statutory construction must be followed. Both courts noted that federal statutes are construed according to the congressional intent, found in the legislative history, and the statute's historical context.[98] In *Skeen v. Lynch*, the Tenth Circuit had already held the intent of Congress in the SRHA was to separate the surface estate and the mineral estate reserving all of the latter to the United States.[99] Since this was of no help in resolving the specific issue, both courts examined the historical setting and paid particular attention to *Zimmerman v. Brunson*, the Interior Department ruling that gravel was not a mineral.

Although *Zimmerman* was important because it was the decision in force at the time the SRHA was enacted, the Tenth Circuit failed to acknowledge other important factors which framed the "historical setting." Lindley, a leading authority on mining law in the early 1900's, stated the test followed by most courts in determining whether a substance was a mineral was the profit marketability test.[100] Lindley criticized the Land Department's decision in *Zimmerman* as not following this general rule.[101] When the Land Department in *Layman v. Ellis* overruled *Zimmerman*, it stated that the earlier case had, on "unsubstantial grounds," disregarded precedent set by the Department and there was no logical reason why a discrimination should exist between gravel and other stones which could be "extracted, removed and marketed at a profit."[102] The district court relied on *Layman* to support its position, while the Tenth Circuit totally disregarded the decision since *Layman* was not in force at the time the SRHA was enacted. Yet, *Layman* was an official admission of the mistake made in *Zimmerman*. How-

98. 664 F.2d at 239; 475 F. Supp. at 656.
99. 48 F.2d at 1046.
100. LINDLEY, *supra* note 31, at § 93.
101. *Id.* at § 98.
102. 52 Pub. Lands Dec. at 721.

ever, the Tenth Circuit should not be criticized too severely for ignoring *Layman*. It is well-established that unless Congress expressly states otherwise, a court may presume the legislature intended the statutory terms to retain those meanings previously established by the courts.[103] The judicially established meaning of the word "mineral" did not include gravel at the time the SRHA was enacted[104] or at the time the patent in *Western Nuclear* was issued.

To construe the reservation clause of the SRHA, the district court had also applied the rules of statutory construction that public legislation is to be construed broadly in favor of the government and that no rights pass by implication.[105] The Tenth Circuit had previously noted in *Bumpus v. United States* that if the word "mineral" is construed broadly, gravel would be considered a mineral.[106] In *Western Nuclear*, the Tenth Circuit needlessly ignored these rules of construction and their application in *Bumpus*. Recognizing an exception to these rules, the Supreme Court in *Leo Sheep Co. v. United States* said that public grants are not to be construed so strictly as to "defeat the intent of the legislature, or to withhold what is given either expressly or by necessary or fair implication."[107] By strictly construing the grant to the entryman in *Western Nuclear* as not including gravel, the court would not only have defeated the legislative intent, but it would have withheld what was given by necessary implication. Congress intended to give the entryman everything except the minerals which were reserved to the United States.[108] Since much of the soil in the West consists of gravel, a necessary implication is that gravel is part of the surface estate.[109] Otherwise, as the Tenth Circuit noted, the entryman would own nothing but dirt.[110]

103. Coder v. Arts, 213 U.S. 223, 243 (1909).
104. Zimmerman v. Brunson, 39 Pub. Lands Dec. 310 (1910).
105. 475 F. Supp. at 662.
106. 325 F.2d at 266.
107. 440 U.S. 668, 682-83 (1979).
108. Skeen v. Lynch, 48 F.2d 1044 (10th Cir. 1931), *cert .denied*, 284 U.S. 633 (1931).
109. Western Nuclear, Inc. v. Andrus, 664 F.2d at 242 (10th Cir. 1981).
110. *Id.*

In *Skeen* the Tenth Circuit refused to apply the rule of ejusdem generis (of the same kind of species), when it held that oil and gas were included in a reservation of "coal and other minerals" to the United States under the SRHA.[111] However, in *Western Nuclear* the same court appeared to use the rule by comparing gravel to those minerals which were previously held to be included within the reservation: oil and gas[112] and geothermal steam.[113] The court also applied the Utah Supreme Court's analysis in *State Land Board v. State Department of Fish and Game* in which the rule of ejusdm generis was used to find that gravel was not a mineral.[114] The rule is of no use in construing the meaning of "other minerals." Gravel is "like" coal, gas, oil and geothermal steam in that all of these substances have value. The district court in *Western Nuclear* noted this when it held that gravel was a mineral.[115] However, gravel is not "like" coal, gas, oil and geothermal steam in that it is not an energy resource. The Tenth Circuit used the latter analysis to hold that gravel was *not* a mineral.[116] If courts applied the rule of ejusdem generis to construe the mineral reservation clause of the SRHA, their results could easily be inconsistent depending on the type of comparison each court would make.

In *Western Nuclear*, both the district court and the Tenth Circuit court discussed the Ninth Circuit's decision in *United States v. Union Oil Co.* The court in that case reasoned that even though geothermal steam was not considered valuable in 1916, it had become a valuable resource and, therefore, fell within the mineral reservation of the SRHA.[117] The district court applied that same analysis to gravel.[118] In 1916, gravel deposits in the West were not considered valuable resources. Although gravel had been used for building and construction purposes for hundreds

111. 48 F.2d at 1046-47.
112. 664 F.2d at 240.
113. *Id.* at 241.
114. 17 Utah 2d 237, 408 P.2d 707.
115. 475 F.Supp. at 662.
116. 664 F.2d at 242.
117. 549 F.2d at 1273-79.
118. Western Nuclear, Inc. v. Andrus, 475 F.Supp. at 662-63 (D. Wyo. 1979).

of years, its value depended on its location. As population increased, some of those areas containing gravel became more valuable; under a profit marketability test, the land could conceivably be considered mineral in character. The district court concluded gravel was a mineral included in the reservation since it had become valuable.[119] This is too broad a reading of *Union Oil.* If soil were found to be "valuable," it would be included in the reservation and the landowner would find that his patent entitled him to nothing more than the prairie grass. Landowners have sold "moss rock," common rock on which moss has grown, to contractors to decorate fireplaces and homes. The rock has become "valuable," but it is absurd to think that this common rock should now be included in a mineral reservation to the government.

On the other hand, the Tenth Circuit in *Western Nuclear* engaged in too narrow a reading of *Union Oil.* The *Western Nuclear* court thought the Ninth Circuit had held that a substance is reserved under the mineral reservation only if it is a "subsurface energy resource."[120] Since gravel is not necessarily a subsurface resource or an energy resource, the court distinguished the two cases. The court's narrow interpretation of *Union Oil* makes no sense. According to the court's rationale, precious substances like gold and silver, which are not energy resources, would not be included in the mineral reservation. That is certainly not what Congress intended.

Union Oil dealt with new substances, or new uses for substances, and should be read with that in mind. The case broadened the scope of the mineral reservation in the SRHA to include new substances which are found to be valuable. Since new energy resources are, of course, valuable, they must be considered reserved minerals. Clearly, gravel does not fit into that category. It is not a new substance nor has there been any new use assigned to it.

119. *Id.*
120. 664 F.2d at 241.

In its final analysis, the court in *Western Nuclear* seemed to base its decision on a geologist's viewpoint of gravel rather than a judicial viewpoint. The court's logic was as follows. Ordinary rocks and stones are not minerals under the reservation in the SRHA. Gravel is just fragmented rock. Therefore, gravel is not a mineral reserved to the United States.[121] The court suggested that if ordinary materials such as rock and stone were included within the mineral reservation, many of the patentees under the SRHA would own only dirt and little or nothing more.[122] This last point is important and deserves more discussion than a sentence at the end of the court's analysis. The Tenth Circuit realized that there was much more to consider than the legislative history.[123] Much of the terrain in the Rocky Mountain region is composed of rocks, sand and gravel.[124] If sand and gravel were reserved to the government in a patent, the entryman would not be left with much—just dirt and grass. Records of the House debates before enactment of the SRHA show that Congress intended to convey "fee titles" to the patentees. These "fee titles" were to give the owner "much more than the surface; they [were to] give him all except the body of the reserved mineral."[125] The purpose of the Act was to give each settler a home with sufficient acreage to support his family.[126] Congress could not have intended to reserve those substances that comprise the soil. Clearly, entrymen would not have settled that land if they knew that the government could claim most of it.

The Supreme Court has consistently been concerned with protecting the rights of landowners. As noted earlier, the Court in *Leo Sheep* indicated that it would not construe a public grant so strictly against the grantees as to defeat the intent of the legislature or withhold what is given by neces-

121. *Id.* at 242.
122. *Id.*
123. *Id.* at 239. Construing a statute by looking to the legislative history is not usually very helpful. The *Western Nuclear* dispute is one instance in which courts have looked at the same history and setting for the SRHA and still different results were reached.
124. 664 F.2d at 242.
125. 53 CONG. REC. 1233-34 (1916).
126. 43 U.S.C. § 292 (1976).

sary or fair implication.[127] Much of the land patented under the SRHA consists of gravel. The necessary implication is that gravel must belong to the surface estate.

From 1916 to 1975 the government made no claim to ownership of the gravel on SRHA land.[128] Since the SRHA was first enacted, entrymen and their successors have treated the gravel as part of their surface estates. The Supreme Court in *Leo Sheep* stated that there is a special need for certainty and predictability where land titles are concerned: "[G]enerations of land patents have issued without any express reservation of right now claimed by the Government. Nor has a similar right been asserted before."[129] The Supreme Court should, in light of *Leo Sheep*, affirm the Tenth Circuit Court's holding that gravel is not a mineral reserved to the United States under the SRHA.

CONCLUSION

The meaning and scope of "mineral" in the mineral reservation under the SRHA cannot be stated in precise terms. Some substances are obviously included: coal, gold and silver. Other substances have been judicially included: oil, gas and geothermal steam. Some substances obviously should not be included: common rocks and stones, and dirt.

In construing the phrase "coal and other minerals," the court considered several factors. The court viewed the legislative intent, the historical context of the statute and other judicial interpretations of the statute, before it correctly held that gravel was not included in the reservation of "other minerals."

However, the court's analysis is weak. The court in *Western Nuclear* restricts the meaning of the word "min-

127. 440 U.S. at 682-83.
128. Reply Brief for Appellant at 4, Western Nuclear, Inc. v. Andrus, 664 F.2d 234 (10th Cir. 1981).
129. 440 U.S. at 687. The issue in *Leo Sheep* was whether Congress intended to reserve an easement across public lands granted to the Union Pacific Railroad in the Union Pacific Act of 1862. The Tenth Circuit held that an easement was implicitly reserved. The Supreme Court reversed the decision. 440 U.S. at 679.

eral" in the reservation clause of the SRHA. By applying the rule of ejusdem generis and a too narrow reading of *Union Oil*, the court implied that a substance is a mineral only if it is an energy resource. This definition of "mineral" would exclude many valuable substances like gold and silver, which Congress certainly intended to reserve.

The *Western Nuclear* court should have relied more on the Congressional intent of the SRHA and the expectations of the landowner and the federal government. By enacting the SRHA, Congress intended to give the entryman much more than soil and grass. His estate included everything except the mineral estate, which was reserved to the United States. Since the soil consisted mostly of gravel, gravel must necessarily be part of the surface estate.

Finally, the government did not claim ownership of the gravel under SRHA mineral reservations until 1975, almost sixty years after enactment of the SRHA. In view of this and its own prior decision in *Leo Sheep*, the Supreme Court should affirm the Tenth Circuit ruling.

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