

PACIFIC POWER & LIGHT CO.

IBLA 77-477

Decided January 23, 1980

Appeal from decision of the Wyoming State Office, Bureau of Land Management, holding appellant liable for trespass damages. W-57251, Wy-06-4119.

Affirmed.

1. Mineral Lands: Mineral Reservation -- Patents of Public Lands: Reservations -- Statutory Construction: Generally -- Stock-Raising Homesteads

Interpretations of the mineral reservation in patents issued by the United States under the Stock-Raising Homestead Act, 43 U.S.C. § 299 (1970), must be consistent with the established rule that land grants are to be construed favorably to the Government, that nothing passes except what is conveyed in clear language, and that if there are doubts they are resolved for the Government, not against it.

2. Mineral Lands: Mineral Reservation -- Patents of Public Lands: Reservations -- Statutory Construction: Generally -- Stock-Raising Homesteads

In determining whether scoria is included in a mineral reservation in a patent issued under the Stock-Raising Homestead Act, 43 U.S.C. § 299 (1970), the interpretation of the reservation must take into account the intended use for which the land was conveyed and those uses which the Government intended to reserve.

3. Mineral Lands: Mineral Reservation -- Patents of Public Lands:  
Reservations -- Stock-Raising Homesteads

A patent of land under the Stock-Raising Homestead Act, 43 U.S.C. § 291 (1970), was not generally intended to give the grantee the right to use the land for mineral development, but mineral development was to proceed only under the mineral laws.

4. Mineral Lands: Mineral Reservation -- Patents of Public Lands:  
Reservations -- Stock-Raising Homesteads

The mineral reservation in a patent issued under the Stock-Raising Homestead Act, 43 U.S.C. § 291 (1970), includes mineral substances which can be taken from the soil and which have a separate value, including those marketable minerals found at or near the surface, and which have no rare or exceptional character, regardless of whether they are subject to disposition under 30 U.S.C. § 601 (1976) or other existing statutory authority.

5. Mineral Lands: Mineral Reservation -- Patents of Public Lands:  
Reservations -- Public Lands: Administration -- Stock-Raising  
Homesteads -- Trespass: Generally

Sec. 9 of the Stock-Raising Homestead Act, 43 U.S.C. § 299 (1970), contemplates that the Department of the Interior retains continuing jurisdiction and administration of mineral deposits reserved by that Act.

6. Mineral Lands: Mineral Reservation -- Patents of Public Lands:  
Reservations -- Public Lands: Administration -- Stock-Raising  
Homesteads -- Surface Resources Act: Applicability -- Trespass:  
Generally -- Words and Phrases

"Public lands." Under 43 CFR 3602.1 which defines a trespass, the term "public lands" includes mineral deposits reserved under the Stock-Raising Homestead Act, 43 U.S.C. § 299 (1970).

7. Mineral Lands: Mineral Reservation -- Patents of Public Lands: Reservations -- Stock-Raising Homesteads

Under the Stock-Raising Homestead Act, 43 U.S.C. §§ 291-301 (1970); there is no equitable basis for excluding valuable deposits of scoria from the scope of a Federal mineral reservation although the Government has successfully contended in other cases that common or surface minerals are not included in mineral reservations in to the United States, because the rules of construction of private conveyances differ from those which govern Federal grants, and because 30 U.S.C. § 54 (1976) provides compensation for damage to surface owners' crops, improvements and grazing values.

8. Mineral Lands: Mineral Reservation -- Patents of Public Lands: Reservations -- Stock-Raising Homesteads

Scoria which is valuable for surfacing roads is a mineral reserved to the United States in patents issued under the Stock-Raising Homestead Act, 43 U.S.C. § 299 (1970).

9. Appraisals -- Hearings -- Mineral Lands: Generally -- Surface Resources Act: Hearings -- Trespass: Measure of Damages

When the Bureau of Land Management has appraised the damages for a mineral trespass under 43 CFR Part 9230, an appraisal will be sustained in the absence of an offer of specific substantial evidence that

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#### OPINION BY ADMINISTRATIVE JUDGE STUEBING

Pacific Power & Light Company has appealed from the decision of the Wyoming State Office, Bureau of Land Management (BLM), in which the Bureau determined that appellant had committed an unintentional trespass on Federally-owned minerals and held appellant liable for \$8,500 in damages for scoria removed from the deposit. The State Office cited appellant for trespass involving violations of departmental regulation 43 CFR 3602.1 and the Materials Act of July 31, 1947

(61 Stat. 681), as amended, by the Surface Resources Act of July 23, 1955 (69 Stat. 368), 30 U.S.C. § 601 (1970).

The land on which the trespass is alleged was patented in 1923. The patent reserved to the United States "all 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 (39 Stat. 862-865)," the Stock-Raising Homestead Act, 43 U.S.C. §§ 291-301 (1970).  
1/ The principal issue is whether this reservation includes the scoria appellant removed from the land.

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1/ These provisions and limitations are set forth at 43 U.S.C. § 299 (1970):

"All entries made and patents issued under the provisions of sections 291-301 of this title shall be subject to and contain 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. 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. Any person qualified to locate and enter the coal or other mineral deposits, or having the right to mine and remove the same under the laws of the United States, shall have the right at all times to enter upon the lands entered or patented, as provided by said sections, for the purposes of prospecting for coal or other mineral therein, provided he shall not injure, damage, or destroy the permanent improvements of the entryman or patentee, and shall be liable to and shall compensate the entryman or patentee for all damages to the crops on such lands by reason of such prospecting. Any person who has acquired from the United States the coal or other mineral deposits in any such land, or the right to mine and remove the same, may reenter and occupy so much of the surface thereof as may be required for all purposes reasonably incident to the mining or removal of the coal or other minerals, first, upon securing the written consent or waiver of the homestead entryman or patentee; improvements to the owner thereof, where agreement may be had as to the amount thereof; or, third, in lieu of either of the foregoing provisions, upon the execution of a good and sufficient bond or undertaking to the United States for the use and benefit of the entryman or owner of the land, to secure the payment of such damages to the crops or tangible improvements of the entryman or owner, as may be determined and fixed in an action brought upon the bond or undertaking in a court of competent jurisdiction against the principal and sureties thereon, such bond or undertaking to be in form and in accordance with rules and regulations prescribed by the Secretary of the Interior and to be filed with and approved by the officer designated by the Secretary of the Interior of the local land office of the district wherein the land is situate, subject to appeal to the Secretary of the Interior or such officer as he may designate: Provided, That all patents

There appears to be no disagreement as to the proper definition of scoria, which the appraisal report defines as follows:

Scoria as used in this appraisal is heat altered material also referred to as clinker or red dog. The reddish scoria beds are formed by melting, partial fusing and baking of overlying sandstone and shale by heat and gases rising from burning coal beds. The baked rock varies greatly in degree of alteration, some is dense and glassy while some is vesicular and porous.

(Appraisal Report, n.1).

The report offers the following description of appellant's site:

The subject site is located approximately 15 miles north of Glenrock. It is located less than one-half mile west of the Pacific Power & Light David Johnston coal mine.

This is a rather unique location of scoria in that there are no other outcroppings or escarpments within the immediate area. This butte which is only about one-half mile long and one-quarter of a mile wide stands above the general terrain for several miles and the red scoria on top must have contributed to its name of Red Butte.

\* \* \* \* \*

This material is of average quality and readily meets the demand for surfacing roads in the area. It, also, has the potential for other uses, if the demand should arise.

When new roads are developed in the coal mines in this area there is an over abundance of light sand and no ballast type material. \* \* \* For this reason there is a demand for this material.

(Appraisal Report, p. 4).

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fn.1 (continued)

issued for the coal or other mineral deposits herein reserved shall contain appropriate notations declaring them to be subject to the provisions of section 291-301 of this title with reference to the disposition, occupancy, and use of the land as permitted to an entryman under said sections." (Emphasis added.) As to compensation for damage to grazing values, see infra. For the subsequent legislative history of 43 U.S.C. §§ 291-98 (1970), see 43 U.S.C. § 315 (1970) and section 702 of the Federal Land Policy and Management Act of 1976, 90 Stat. 2789. Daniel A. Anderson, 31 IBLA 162 (1977). The Federal Land Policy and Management Act provides that 43 U.S.C. §§ 291-98 (1970) are repealed.

Appellant uses scoria for surfacing roads used in conjunction with its coal mining activities on adjacent land. Although scoria is inferior to gravel for this purpose, gravel is not prevalent in this part of Wyoming while scoria deposits are fairly liberally distributed. However, we do note that the report indicated that there is not much other scoria within the immediate vicinity of appellant's site. The following passage from the appraisal report indicates several characteristics of the market for scoria in this part of Wyoming:

While the population concentration in the various cities creates a demand for scoria, the scatteration of people throughout the county creates an additional demand for county road surfacing. Also, the development of various mines and oil fields creates a demand for surfacing material for roads and well sites. With the lack of sand and gravel that demand is met by local scoria deposits within the neighborhood. The coal mine and oil field development in this area should continue for the next 10 years, with the scoria pits opening near the demand and closing as the demand moves on.

The supply of scoria is fairly extensive throughout the neighborhood. There is no foreseeable shortage.

The demand for scoria is mostly local in nature and as the demand arises it is usually met from a very local source with scoria pits opening and closing as the demand moves from one location to another. The haul distance is, usually, less than 20 miles.

In most instances the consumer purchases scoria material at the most competitive price available. When there is material available from a local pit then that pit owner will meet that demand. When the demand moves down the road 20 or 30 miles, then that demand will usually be met by a different pit owner. The potential market area for any one pit could be described as a circle around that pit with a radius of approximately 20 miles.

(Appraisal Report, p. 3).

[1] The mineral reservation in patents issued under the Stock-Raising Homestead Act has been the subject of recent judicial decisions. In United States v. Union Oil Co. of California, 549 F.2d 1271 (9th Cir.), cert. denied, 434 U.S. 930, rehearing denied, 435 U.S. 911 (1977), geothermal resources were held to be reserved. In Western Nuclear, Inc. v. Andrus, 475 F. Supp. 654 (D. Wyo. 1979) (aff'd on rehearing, appeal pending), the court affirmed this Board's decision in Western Nuclear, Inc., 35 IBLA 146, 85 I.D. 129 (1978), which held that gravel was reserved. The decisions recognized that the Government is entitled to have any ambiguity in the term "mineral"

resolved in its favor under "the established rule" set forth in United States v. Union Pacific R. Co., 353 U.S. 112, 116 (1957). <sup>2/</sup> Therein, the Supreme Court had held "that land grants are to be construed favorably to the Government, that nothing passes except what is conveyed in clear language, and that if there are any doubts, they are resolved for the Government, not against it." This principle was also recently applied in Andrus v. Charlestone Stone Products Co., 436 U.S. 604, 617 (1978).

[2, 3] The above judicial and administrative decisions analyzed the legislative history of the mineral reservation provision and its significance in public land law development. The relevant material from committee reports and floor debates is quoted in those decisions. In Western Nuclear, supra at 157-58, 85 I.D. at 134-35, the Board stated:

The very name of the Act, and the requirement of designation of the land as stock-raising land ("land the surface of which is \* \* \* chiefly valuable for grazing and raising forage crops \* \* \*") prior to entry, underscore the limited purpose of the grant. United States v. Union Oil Co. of California, supra at 1277. The text of the mineral reservation provision makes clear that a patent of land for stock raising purposes was not to give the grantee the right to use the land for mineral development and that mineral development was only to proceed under mineral laws then in effect or those that may later come into effect. This intent is further emphasized in the legislative history of the statute.

The comments of this Department were included in the report of the House Committee on the Public Lands which recommended enactment of the legislation:

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The farmer-stockman is not seeking and does not desire the minerals, his experience and efforts being in the stockline of raising and farming, which operations can be carried on without being materially interfered with by the reservation of minerals and the prospecting for and removal of same from the land. [Emphasis added.]

H. R. Rep. No. 35, 64th Cong., 1st Sess. 5 (1916).

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<sup>2/</sup> United States v. Union Oil Co. of California, supra at 1273, n.5; Western Nuclear, Inc., v. Andrus, supra at 656.

The Stock-Raising Homestead Act is predicated on the concept that land may be subject to multiple uses and that designation for one form of use should not preclude disposal for other possible uses. Thus, interpretation of a conveyance under the Act must take into account the intended use for which the land was conveyed and those uses which the Government intended to reserve. United States v. Union Oil Co., *supra*; see Skeen v. Lynch, 48 F.2d 1044 (10th Cir. 1931). 6/

6/ In Skeen, *supra* at 1046, the Court stated:

\* \* \* The legislative history of the Stockraising Homestead Act when it was reported for passage including the discussion that followed relevant to this subject leave us 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 purpose from the mineral estate, and to grant the former to entrymen and to reserve all of the latter to the United States." [Emphasis added.]

The record of the floor debates also demonstrates the limited purpose of the patent and the broad effect of the mineral reservation. When queried as to whether the reservation included oil, Representative Ferris, chairman of the Committee on the Public Lands and sponsor and manager of the legislation responded as follows:

Mr. FERRIS. It would. We believe it would cover every kind of mineral. All kinds of minerals are reserved; and, more than that, it does not apply to timberlands or to lands susceptible of irrigation or any land that can get water from any known source. It merely gives the settler who is possessed of any pluck an opportunity to go out and take 640 acres and make a home there.

(53 Cong. Rec. 1171 (1916)).

Where there is a dispute as to whether a particular mineral resource is included in the reservation, it is helpful to consider the manner in which the material is extracted and used and to decide whether that particular use fits within the nonmineral interest Congress intended to reserve. See United States v. Union Oil Co., *supra* at 1280-81, n.21 (in which the court distinguishes between geothermal resources and water suitable for agricultural purposes). Under this analysis, there can be no question that appellant's activity constitutes the development of a mineral resource, and we see no basis for excluding the scoria deposit at issue from the scope of the reservation.

[4] Neither the text of the statute nor the legislative history offers any reason for construing the mineral reservation more narrowly than the broad construction given to reservations of minerals in patents issued under other statutes. Western Nuclear, supra at 160, 85 I.D. at 136. The reservation of minerals should be considered to include those mineral substances which can be taken from the soil and have a separate value. See United States v. Isbell Construction Co., 4 IBLA 205, 216, 78 I.D. 385, 390 (1971). See also 1 Rocky Mountain Mineral Law Foundation, American Law of Mining, § 3.26 (1977). Appellant contends that the scoria deposit has no commercial value and cannot be profitably sold to any third party. Appellant contends that it only used the scoria because of its convenient location and because it assumed that the material was freely available to it. However, appellant uses the material for road surfacing in conjunction with coal mining activities on adjacent lands, and this is precisely the type of local demand for which scoria is bought and sold in that area of Wyoming, as the appraisal report indicates. Thus, the appraisal report clearly establishes that the scoria removed from the land has a separate value within this area for use as a road surfacing material and therefore falls within the applicable standard.

In Western Nuclear, Inc. v. Andrus, supra at 663, the court analyzed a number of cases construing the term "mineral" and concluded:

The mineral estate is a flexible entity which expands with the development of the arts and sciences to include more minerals. [3/] This is especially evident in the Union Oil case, supra, where what is essentially heated water has been ruled to be part of the mineral estate reserved in the SRHA of 1916. And, as the 9th Circuit noted, this was at a time when the use of geothermal steam as a fuel source was not widely thought of.

The fact that the mineral lies at or near the surface provides no basis for excluding it from a mineral reservation in a Federal patent. In Western Nuclear, Inc., supra, 35 IBLA at 162-63, 85 I.D. at 137-38, we answered a similar argument as follows:

Appellant through its counsel contends that the surface of the land consists of sand and gravel and that we

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<sup>3/</sup> The court in Western Nuclear v. Andrus, supra at 658, recognized that "[t]he immensity of the problem resulting from separation of estates is apparent in the amount of surface acreage affected. As of 1972, entries under the SRHA [Stock Raising Homestead Act] affected 70,362,406 acres of land. (BLM, U.S. Department of Interior, Public Land Statistics 58 [1972]). In Wyoming, approximately 12 percent of the state is subject to federal reservations of minerals under private lands, most under the SRHA."

should not deem these substances as reserved because their development would destroy the surface and thus nullify the patent. Appellant's argument obscures the Congressional intent to reserve mineral resources for disposal under the mineral laws. If a mineral is not reserved when its development would injure the surface, then even coal in shallow deposits would pass to the homesteader, despite the unambiguous intent of the Act.

We recognize that there is a significant body of law to the effect that mineral reservations do not include the right to destroy the entire surface in developing the mineral. Such rulings arise from the concern that the grantor would have retained dominion over that which he purportedly conveyed and that the grantee would be deprived of the very substance of his bargain without compensation. \* \* \* Holding gravel to be a reserved mineral does not deny the holder of a stock-raising homestead patent the substance of his bargain without compensation, because the Act provides for compensation for damages to crops and improvements. In 1949 Congress provided also for compensation for damage to grazing values. <sup>1</sup>/ 0 In neither the statute's specific reservation of coal nor in its legislative history, is there any indication that surface deposits of coal or other minerals should be deemed excluded from the mineral reservation.

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<sup>10</sup>/ Section 5 of the Act of June 21, 1949, 30 U.S.C. § 54 (1970).

In making the above interpretation, the Board applied its prior holding in United States v. Isbell Construction Co., *supra*, 4 IBLA at 216-22 78 I.D. at 390-93. The compensation provision itself is evidence of Congress' intent to reserve even those minerals which can only be developed by injuring the patented estate.

Appellant points to several non-Federal decisions. Holland v. Dolese Co., 540 P.2d 549 (S.Ct. Okla. 1975), and Weyerhaeuser Co. v. Burlington Northern, Inc., 15 Wash. App. 314, 549 P.2d 54 (1976), involve private grants and do not discuss the history of the Stock-Raising Homestead Act. State ex rel. State Highway Comm'n. v. Trujillo, 83 N.M. 694, 487 P.2d 122 (S. Ct. N.M. 1971), is cited as "a particularly persuasive guide for interpreting the application of the Stock-Raising Homestead Act's mineral reservation in the present case." Statement of Reasons, 15-16. In that decision, the New Mexico Supreme Court held that a rock deposit is not a mineral reserved under the Stock-Raising Homestead Act. The case involved a dispute between the holder of land under a stock-raising homestead patent and a state agency authorized by the BLM to remove reserved mineral material from the land. Although the state court did not exercise jurisdiction over

the interest of the United States in the rock deposit, it purported to apply Federal law. However, there are several reasons for not following the Trujillo decision besides the court's lack of jurisdiction over the United States. First, the Ninth Circuit has questioned, if not rejected, the analysis made in the Trujillo decision because the New Mexico court failed to consider the legislative history of the Stock-Raising Homestead Act. United States v. Union Oil Co. of California, *supra* at 1276, n.11. The Supreme Court declined to review. Second, the New Mexico court applied the wrong standard in determining whether the mineral in question was reserved under a Federal mineral reservation. To fall within a mineral reservation in a Federal patent, the mineral need not have the rare or exceptional character or peculiar property required in Trujillo. As we indicated above, the proper test is merely whether the mineral material can be taken from the soil and have a separate value. Third, we note that the New Mexico Supreme Court has subsequently held sand and gravel to be reserved under a reservation of all minerals in Burris v. State ex rel. State Highway Comm'n., 88 N.M. 146, 538 P.2d 418 (S. Ct. N.M. 1975), although the court did not overrule Trujillo but merely distinguished it. The Board considered Trujillo in Western Nuclear, Inc., *supra*, 35 IBLA at 162, n.9, but determined it could not be applied. In affirming our decision, the district court cited the Trujillo decision, but declined to follow it. Western Nuclear, Inc. v. Andrus, *supra* at 661.

Appellant argues that the mineral reservation does not cover scoria because the reservation only covers minerals subject to disposition under present law. Appellant contends that the Surface Resources Act, 30 U.S.C. § 601 (1970), and 43 CFR 3601.1 do not authorize the disposition of surface minerals on patented lands subject to a mineral reservation because the operation of the Act is limited to land where the Government holds both the mineral and the non-mineral estate. Appellant contends that even if scoria were locatable prior to the enactment of that legislation in 1955, it is no longer reserved because under 30 U.S.C. § 611 (1970), scoria is no longer a valuable mineral deposit within the meaning of the mining law. In Western Nuclear, Inc., *supra* at 165, we discussed a similar argument with respect to gravel:

Under 30 U.S.C. § 611 (1970), the status of gravel was only affected in connection with the mining laws. The mineral remains reserved under the Stock-Raising Homestead Act; The Surface Resources Act was not intended to operate as a conveyance of any reserved minerals to holders of stock-raising homestead patents. Solicitor's Opinion, M-36417 [February 15, 1957]. The effect of the statute was to withdraw gravel deposits including those reserved under the Stock-Raising Homestead Act from appropriation under the mining laws.

Although 43 U.S.C. § 299 (1970) provides that "the coal and other mineral deposits in such land 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 disposal," this language does not support the contention that the Government's ownership of minerals is to be limited to those for which disposal authority exists at a particular time. Although geothermal resources were not subject to disposal under the mineral laws until enactment of the Geothermal Steam Act of 1970, 30 U.S.C. §§ 1001-25 (1970), it is clear that these resources were covered by the reservation before that time. See United States v. Union Oil Co. of California, *supra* at 1273-74.

Appellant, in essence, is contending that the Surface Resources Act operated as a conveyance of common surface minerals to the holders of nonmineral estates, yet the statute contains no words which even remotely indicate that any grant of minerals was intended. Appellant's interpretation of that Act thus violates that fundamental principle of construing Federal land grants which we quoted above, "[T]hat nothing passes except what is conveyed in clear language, and that if there are any doubts, they are resolved in favor of the Government, not against it."

Of course, noncommercial sand, rock, clay and other such mineral materials which comprise the substance of surface belong to the owner of the surface estate, and may be used by him. Not every cluster of rock or patch of sand may be considered to fall within the purview of the reservation. As we stated in United States v. Isbell Construction Co., *supra*, 41 IBLA at 222, 78 I.D. 394, "[I]t is our further opinion that the sand and gravel deposits here in question did not pass to the State of Arizona but were reserved to the United States, conditioned only upon a finding that the said deposits are valuable." (Emphasis added.)

[5] Appellant contends that the trespass notice is invalid because the patenting of the land in this case removed it from the status of public land under 30 U.S.C. §§ 601-03 (1970). Section 9 of the Stock-Raising Homestead Act, 43 U.S.C. § 299 (1970), however, clearly contemplates the Department's continuing jurisdiction and administration of deposits reserved by that Act. By virtue of the reservation alone, such deposits fall within the ambit of the Department's enforcement authority. 43 U.S.C. § 1201 (1970); Western Nuclear, Inc., *supra*. In Western Nuclear, Inc. v. Andrus, *supra* at 656, the court found the argument that the Department has no jurisdiction over these resources to be without merit.

[6] "The extraction, severance, injury, or removal of timber or mineral materials from public lands under the jurisdiction of the Department of the Interior, except when authorized by law and the regulations of the Department, is an act of trespass \* \* \*." 43 CFR 3602.1; 43 CFR 9239.0-7; Western Nuclear, Inc., *supra*. Although these regulations refer to "public lands," that term can only be defined in

context. It is not a term of art having a specific legal effect. Ben J. Boschetto, 21 IBLA 193 (1975). As used in the Federal Land Policy and Management Act of 1976, the term "public lands" includes "any land and interest in land" administered by the Bureau of Land Management. 43 U.S.C. § 1702(e) (1976). The term must be broadly defined when it is used to describe the Department's administrative responsibility to protect mineral resources reserved by the Stock-Raising Homestead Act. Western Nuclear, Inc., *supra*.

Appellant's argument on the applicability of 30 U.S.C. § 601 (1970) confuses the scope of the Department's disposal authority with the scope of its trespass jurisdiction. The latter extends to all interests in land administered by this Department regardless of whether disposal authority for such interests exists. See Ryan Outdoor Advertising, Inc., v. United States, 559 F.2d 554 (9th Cir. 1977); United States v. Ute Coal and Coke Co., 158 F. 20 (8th Cir. 1907). The State Office apparently cited 30 U.S.C. § 601 (1970) because it constitutes an authority under which appellant's appropriation of the reserved scoria could be authorized and because a use inconsistent with that authority would constitute trespass. If it was to be concluded that appellant is correct that the Act does not apply, then there is no authority for any appropriation of the scoria by appellant and any appropriation would constitute a trespass. To sustain the instant trespass action we need not decide whether the Surface Resources Act authorizes disposal of scoria on lands patented under the Stock-Raising Homestead Act; we need only decide, as we do, that appellant's prior appropriation of the scoria was not consistent with the Surface Resources Act or any other statutory authority which is arguably relevant. The question of whether the Department may authorize the exploitation of this scoria is not before us in this proceeding.

[7] Appellant finally argues that considerations of equity support its assertions because the Government has contended in other cases that the mineral estate does not include common surface rock. However, the cases cited by appellant are not analogous. For example, Bell v. United States Forest Service, 385 F. Supp. 1135 (N.D. Cal. 1974), does not support appellant's argument because it involves the rights of a locator of a mining claim, not a holder of land subject to a mineral reservation. Common deposits of surface rock are not locatable because of 30 U.S.C. § 611 (1970), but this statute is not relevant to the construction of a mineral reservation in a Federal land grant as we indicated above.

Appellant also cites Cumberland Mineral Co. v. United States, 513 F.2d 1399 (Ct. Cl. 1975), which held that clay and sandstone were not included in a reservation of minerals by a private party who had conveyed land to the United States. The decision is similar to Bumpus v. United States, 325 F.2d 264 (10th Cir. 1963), which held that sand and gravel were not included in a mineral reservation in a conveyance

to the United States. <sup>4/</sup> In neither Cumberland nor Bumpus was construction of a Federal grant involved. See discussion, supra. As to those cases, also distinguished above, which hold that a mineral reservation does not include minerals the development of which would destroy the surface, the equities involved are not applicable here because Congress has provided for compensation to surface owners for strip or open pit mining damage to crops, improvements and grazing values. 30 U.S.C. § 54 (1976).

[8] It thus is clear that scoria which is commercially valuable for use in road surfacing is a mineral reserved to the United States in patents issued under the Stock-Raising Homestead Act.

[9] The appraisal report made a careful analysis of sales of similar material in the same general area of Wyoming where appellant's site is located. The report concluded that the fair market value of 35,000 cubic yards of material removed was \$8,750, based on a royalty rate of 25 cents per cubic yard. <sup>5/</sup> The State Office lowered its demand to \$8,500 in the trespass notice under appeal. Although appellant has generally alleged that the material has no commercial value, there has been no offer of specific proof tending to show that the appraisal is incorrect. In those circumstances, the appraisal must be sustained. Western Nuclear, Inc., supra, 35 IBLA at 165-67.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Edward W. Stuebing  
Administrative Judge

I concur:

Anne Poindexter Lewis  
Administrative Judge

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<sup>4/</sup> Bumpus was distinguished by the Board in Western Nuclear, Inc., supra, 35 IBLA at 164, n.12, 85 I.D. at 138.

<sup>5/</sup> Departmental regulation 43 CFR 9239.0-8 provides that the measure of damages is determined by the laws of the State in which the trespass is committed. We are aware of no provision of Wyoming law which limits damages to only the royalty value of the material removed, and where State law provides for compensation of damages, the measure of damages may be somewhat higher than the royalty value of the material removed. See Knife River Coal Mining Co., 70 I.D. 16, 18 (1963). Our affirmance of the decision below should not be construed as fixing a limited rule for assessment of damages.

## ADMINISTRATIVE JUDGE FISHMAN DISSENTING:

The main opinion is fully consistent with the Board's decision of May 22, 1978, in Western Nuclear, Inc., 35 IBLA 146, 85 I.D. 129, and its affirmance in Western Nuclear Inc. v. Andrus, 475 F. Supp. 654 (D. Wyo. 1979) (appeal pending). Those decisions held that sand and gravel are minerals reserved to the United States in patents issued under the StockRaising Homestead Act, as amended, 43 U.S.C. §§ 291-300 (1970). The main opinion here holds that scoria is similarly reserved.

Scoria is not a definitive term. In a dictionary of mining, mineral, and related terms, issued in 1968, by the Bureau of Mines of this Department, it is described as follows:

scoria. a. An irregular, rough, clinkerlike, more or less vesicular fragment of lava, thrown out in an explosive eruption or formed by the breaking up of the first cooled crust of a lava flow. Plural, scoriae. Fay. b. Refuse of fused metals; dross; slag. Standard, 1964.

Appellant describes the material at issue as follows:

This dispute concerns title to a material known as "red dog" or "scoria" found on the surface of the land. The scoria may be described as a "baked overburden" of sedimentary rock (generally sandstone, siltstone, claystone or shale) which has been heated and fused as a result of the combustion of underlying coal deposits. Thus, the material in question is essentially baked rock. The oxidized coal which underlies the scoria is known as "clinker."

The scoria at issue here is used by Petitioner to surface its roads in the area of the claim. Such road surfacing constitutes the only known present use of the material, for which purpose it is distinctly inferior in quality to more widely used materials, such as gravel. This "red dog" has no commercial value \* \* \*.

With all due deference to the District Court Judge and to the participants in the IBLA decision in Western Nuclear, I believe that a contrary view is not without a sound predicate. Sand and gravel -- and scoria -- often form a part of the surface of a stock-raising homestead. Under the Stock-Raising Homestead Act, an entryman was able to get as much as 640 acres for foraging by livestock. Destruction of the surface was, and is, inimical to such livestock maintenance. No one would argue rationally that plain and simple dirt on the surface of a stockraising homestead was reserved to the United States as a mineral even though it is a substance neither animal nor vegetable. See State Land Board v. State Department of Fish and Game, 17 Utah 2d 237, 408 P.2d 707 (1965).

The concept that sand and gravel or scoria is reserved in a stock-raising patent runs counter to the doctrine that if a conveyance is made for a surface use, a mineral reservation does not import destruction of the surface. See, Annot. 95 A.L.R.2d 843, 850-851 (1964).

As pointed out at 95 A.L.R.2d 843, 868, the classic case of Waring v. Foden (Eng.) [1932], 1 Ch. 276, 86 A.L.R. 969, held that gravel was not a mineral within the exception of a deed of all "minerals" or "mineral substances" especially where it constituted a large part of the soil of the land conveyed, and to give the word such meaning would be a negation of the substance of the transaction.

That is precisely the situation involved in the issue whether sand or gravel is reserved in stock-raising patents.

Over 40 million acres of public land were patented under the Stock-Raising Homestead Act, including 16 million acres in Wyoming. It would be anomalous to suggest that the grantor retained the right to destroy the surface of all this land, restricting its use for raising livestock, contrary to the purpose of the granting statute.

In State Ex Rel. State Highway Commission v. Trujillo, 82 N.M. 694, 487 P.2d 122 (1971), in considering whether rock was reserved in such a patent, the court stated at 487 P.2d 124-125 in pertinent portion as follows:

The material which we are considering had no rare or exceptional character and possessed no peculiar property giving it special value. It seems useful only for road building purposes, and moreover it was stipulated to have been taken in its exposed state. Although courts have reached differing results in arriving at the judicially ascertained intent of reservation clauses such as the one before us, we are of the opinion that under the circumstances of this case the reservation of coal and other minerals was not intended to include rock.

An annotation entitled "Clay, sand or gravel as 'minerals' within deed, lease, or license" appears at 95 A.L.R.2d 843 (1964) and is of some interest. The annotation states that it is a fair common-sense inference that in most instances, clay, sand or gravel was not specifically in the minds of the parties, but that the paramount rule is to consider the entire instrument and be controlled by the intention so determined. It is said that most cases have held clay, sand and gravel to be included in the word "minerals," but:

"There are, however, important considerations which cause exceptions to this general rule. Among them are that materials which possess no exceptional characteristics or value which distinguish them from the surrounding soil are not likely to be recognized as 'minerals' in the sense of such conveyances; that materials which form part of the surface are also not legally recognizable as minerals, nor are those which cannot be obtained without a destruction of the surface, in the absence of extremely clear indication that they are to be so recognized and that the usual considerations of avoiding damage to the surface estate are to be deliberately disregarded; \* \*."

Each of these exceptions seem applicable here.

\* \* \* \* \*

The Commission places great reliance upon *Skeen v. Lynch*, 48 F.2d 1044 (10th Cir. 1931) construing the same federal statute. In that case, the patentee of lands in Lea County, New Mexico, sought a judicial determination that water, oil and gas were not reserved by language in the patent identical to that with which we are here concerned. This portion of the case was dismissed because the United States was an absent indispensable party.

A second count sought a determination that the patentee was by law the owner of and possessed of a preference right above all others to prospect for and produce oil and gas on the property. The second count was on the assumption that oil and gas were reserved to the United States. The court accepted the assumed fact as irrefutable. In its discussion, apparently by way of emphasis, because the statements do not seem essential to the limb of the case under consideration, the court said:

"The legislative history of the Stockraising Homestead Act when it was reported for passage including the discussion that followed relevant to this subject leave us 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 stockraising and agricultural purposes from the mineral estate, and to grant the former to entrymen and to reserve all of the latter to the United States."

Presumably the trial court was guided by *Skeen*, and the court in *Skeen* apparently gave weight to the legislative history of the Stock-Raising Homestead Act, a feature

which the Commission urges us to consider. A committee report states that the "purpose \* \* \* is to limit the operation of the bill strictly to the surface of the lands \* \* \* .

\* \* \* \* \*

It is clear that the intention of the act was to permit entry upon relatively large tracts suitable only for grazing. For this objective, grass is essential, and grass grows in dirt. A considerable portion of the earth's surface seems to be comprised of dirt. Can it be seriously thought that the patentee under the act in question would not own the dirt in which the grass is situated and finds its sustenance? If he constructs a stock-tank, is it reasonable to suppose that the patentee was moving and using material which he did not own? And what of subsurface water brought to the surface by pumps or windmills and used for stockraising purposes? Certainly, dirt and water as well are minerals in the broadest sense, at least to the extent of not being animal or vegetable.

The main opinion cites United States v. Union Oil Co. of California, 549 F.2d 1271 (9th Cir.) cert. denied, 434 U.S. 930, rehearing denied, 435 U.S. 911 (1977), in support of its conclusion. Union held that geothermal resources were reserved to the United States in stock-raising patents. The language of Union certainly lends itself to my basic thesis that the surface and its resources were conveyed.

Union, 549 F.2d at 1279, states in applicable portion:

This review of the legislative history demonstrates that the purposes of the Act were to provide homesteaders with a portion of the public domain sufficient to enable them to support their families by raising livestock, and to reserve unrelated subsurface resources, particularly energy sources, for separate disposition. This is not to say that patentees under the Act were granted no more than a permit to graze livestock, as under the Taylor Grazing Act, 43 U.S.C. §§ 315 et seq. To the contrary, a patentee under the Stock-Raising Homestead Act receives title to all rights in the land not reserved. It does mean, however, that the mineral reservation is to be read broadly in light of the agricultural purpose of the grant itself, and in light of Congress's equally clear purpose to retain subsurface resources, particularly sources of energy, for separate disposition and development in the public interest. Geothermal resources contribute nothing to the capacity of the surface estate to sustain livestock. They are

depletable subsurface reservoirs of energy, akin to deposits of coal and oil, which it was the particular objective of the reservation clause to retain in public ownership. The purposes of the Act will be served by including geothermal resources in the statute's reservation of "all the coal and other minerals." Since the words employed are broad enough to encompass this result, the Act should be so interpreted. [Emphasis supplied.]

Thus Union recognized a line of demarcation between Federally retained subsurface resources and disposed of surface values.

It makes little sense to argue that surface resources such as sand and gravel (or scoria) are retained minerals, because the surface owner would have a right to compensation for destruction of the surface. But this right to compensation did not arise until June 21, 1949, some 36 years after the enactment of the Stock-Raising Homestead Act of December 29, 1916. See 30 U.S.C. § 54 (1976). 1/

I would find that no trespassing had been committed by the use of scoria off-site by the surface owner of stock-raising homestead patented lands.

Frederick Fishman  
Administrative Judge

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1/ This Act reads as follows:

"Notwithstanding the provisions of any Act of Congress to the contrary, any person who hereafter prospects for, mines, or removes by strip or open pit mining methods, any minerals from any land included in a stock raising or other homestead entry or patent, and who had been liable under such an existing Act only for damages caused thereby to the crops or improvements of the entryman or patentee, shall also be liable for any damage that may be caused to the value of the land for grazing by such prospecting for, mining, or removal of minerals. Nothing in this section shall be considered to impair any vested right in existence on June 21, 1949."

