

Editor's Note: appeal filed, Civ. No. 1:05CV403 (E.D. VA April 20, 2005); aff'd by sum. judg. (Oct. 28, 2005), 398 F.Supp.2d 438) appeal filed No. 05-2362 (4th Cir.); aff'd (Feb. 8, 2007) - unpublished 216 Fed. Appx. 385), petition for cert files, S. Ct. No. 07-44 (July 11, 2007), cert denied (Jan. 7, 2008)

NEW WEST MATERIALS

IBLA 2002-183

Decided December 2, 2004

Appeal from a Notice of Trespass issued by the Phoenix Field Office, Bureau of Land Management. AZA-31890.

Affirmed.

1. Mineral Lands: Mineral Reservation– Patents of Public Lands: Reservations– Small Tract Act: Generally– Small Tract Act: Sales–Statutory Construction: Generally– Trespass: Generally

Sand and gravel are covered by the reservation of “oil, gas, and all other mineral deposits” in patents granted under the Small Tract Act, 43 U.S.C. § 682a (1970). Removal of sand and gravel from land patented under that Act for commercial purposes constitutes a trespass.

APPEARANCES: Dalva L. Moellenberg, Esq., and Bradley J. Glass, Esq., Phoenix, Arizona, for New West Materials; Jerry L. Haggard, Esq., Phoenix, Arizona, for Intervenor JWR, Inc.; Richard R. Greenfield, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Phoenix, Arizona, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE IRWIN

In 1959, the Phoenix, Arizona, office of the Bureau of Land Management (BLM) issued patents to individuals that granted several contiguous 5-acre lots in sec. 7, T. 4 E., R. 1 N., Gila and Salt River Meridian, in accordance with the authority provided in the Small Tract Act, 43 U.S.C. § 682a (1970).^{1/} The patents reserved to

^{1/} Section 1, Ch. 270, 68 Stat. 239, 43 U.S.C. § 682a (1970), repealed by Pub. L. 94-579, Title VII, § 702, 90 Stat. 2789 (1976).

The lots involved are 13-24 and 26-28. The Act authorized sale or lease of tracts “not exceeding five acres”; eight of the fifteen patents granted approximately
(continued...)

the United States “all oil, gas and other mineral deposits, in the lands so patented, together with the right to prospect for, mine, and remove the same according to the provisions of said Act of June 1, 1938.”^{2/}

The lots remained vacant until most of them were acquired in August 2000 by JWR, Inc., of Imperial, California.^{3/} JWR leased them to New West Materials (New West) to mine sand and gravel. In November 2001 BLM notified New West’s operations manager that it was of the opinion “that mineral material has been removed and sold from the * * * Federal Mineral estate, without a contract, in violation of” Revised Statute 2478 and 43 U.S.C. § 1201^{4/} and 43 CFR 3603.1 and 9239.^{5/} New West responded it did not believe the sand and gravel were covered by the reservation.

On January 3, 2002, BLM issued a Notice of Trespass to New West and JWR for “an act of non willful trespass by removing and selling mineral material (sand and

^{1/} (...continued)

5.9 acres. The Act provided that “no person shall be permitted to purchase more than one tract;” on June 23, 1959, Patent Numbers 1196670-1196675 were issued to Wilbur, Charles, Lucretia, Alan, Genevieve, and Edythe Bayham for lots 13-18.

^{2/} The Small Tract Act was originally enacted on June 1, 1938. Ch. 317, 52 Stat. 609.

^{3/} Maricopa County Assessor’s Office Secured Master list for Tax Year 2001, pages 131,201 and 131,206-131,210.

^{4/} 43 U.S.C. §1201 (2000) authorizes the Secretary to implement provisions of Title 43 of the United States Code by appropriate regulations.

^{5/} 43 CFR 3603.1 (2001) provided: “**Unauthorized use.** Except when authorized by sale or permit under law and the regulations of the Department of the Interior, the extraction, severance or removal of mineral materials from public lands under the jurisdiction of the Department of the Interior is unauthorized use. Unauthorized users shall be liable for damages to the United States, and shall be subject to prosecution for such unlawful acts (see subpart 9239 of this title).”

43 CFR 9239.0-7 provides: “**Penalty for unauthorized removal of material.** The extraction, severance, injury, or removal of timber or other vegetative resources 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. Trespassers will be liable in damages to the United States, and will be subject to prosecution for such unlawful acts.”

gravel) without a valid contract, from the above-referenced lands.”^{6/} Both New West and JWR appealed.^{7/}

The Small Tract Act was originally enacted in 1938 to “provide for the purchase of public lands for home and other sites,” *i.e.*, for “a home, cabin, camp, health, convalescent, recreational, or business site.”^{8/} The House Committee on the Public Lands report on the bill incorporated a letter from Charles West, Acting Secretary of the Interior, with the following explanation:

In the public domain there are millions of acres of public lands that are not suitable for agricultural use or for grazing. Much of this land is suitable for use as home, health, business, or recreational sites.

Enactment of the proposed bill would permit those in need of the benefits of a desert climate to obtain home sites in such places, permit the acquisition of lands along highways for use as overnight cabin, gas station, or store sites, permit the purchase of lands suitable for such purposes for muskrat raising, and permit the purchase of mountain as well as desert land for use as recreational, convalescent, and health sites.

As the classification of the land as chiefly valuable for the use for which it is desired is a prerequisite to its sale, it is believed that the enactment of the proposed bill will in no manner interfere with the administration of other public land laws and will fill a need that has long existed for a method for the disposal, under proper restrictions, of small tracts of land to those who have need therefor. [^{9/}]

^{6/} 43 CFR 3603.1 was revised, effective shortly before BLM issued its Notice, but its substance was not changed. See 43 CFR 3601.71 and 3601.72, 66 FR 58892, 58898, col. 1, 58904, col. 3 (November 23, 2001).

^{7/} In January 2003 JWR’s appeal was dismissed for failure to file a statement of reasons for appeal; in September 2003 we granted JWR’s motion to intervene in this appeal. In April 2002, we issued a stay of BLM’s decision, conditioned, among other things, on New West’s posting a bond to cover any eventual royalties.

^{8/} Ch. 317, 52 Stat. 609.

^{9/} House Report No. 1876, 75th Cong., 3rd Sess., dated March 3, 1938, to accompany H.R. 8008, at 1-2, quoting an August 7, 1937, letter to the Hon. René L. DeRouen, Chairman, Committee on the Public Lands.

Representative Izak, who introduced the bill, explained to his colleagues that it was “offered primarily in the interest of war veterans, to permit them to take up a little piece of ground out in the desert.” ^{10/}

The Senate Committee on Public Lands and Surveys amended the House bill by adding language that authorized the Secretary to lease as well as sell tracts and a provision that the law would not apply to lands in the Territory of Alaska. ^{11/} Senator McCarran, who introduced the bill in the Senate, stated that the bill “provides that when, in the opinion of the Secretary of the Interior, small isolated tracts of land throughout the various sections of the public domain should be sold or leased, they may be sold or leased. For instance, there are places where there are small tracts of land, say 5 acres in a tract, which may be utilized for little homestead purposes, such as service stations, and the like.” ^{12/}

^{10/} Congressional Record, 75th Cong., 3rd Sess., at 5490 (April 18, 1938).

^{11/} Senate Report No. 1715, 75th Cong., 3rd Sess., dated April 20, 1938, to accompany H.R. 8008, at 1. The Senate report included a letter from Charles West dated December 18, 1937, to the Hon. Alva B. Adams, Chairman, Committee on Public Lands and Surveys with the same language as in the letter to the House Committee. It also included a February 23, 1938, letter from M. L. Wilson, Acting Secretary of Agriculture, to R. F. Camalier, Clerk, Committee on Public Lands and Surveys, stating in part:

“Your attention is drawn to the fact that the bill authorizes an outright sale of 5-acre tracts of land within areas reserved by the Secretary of the Interior for other purposes, and, although the sales are to be made under rules and regulations prescribed by the Secretary, it will probably be very difficult to limit the subsequent uses of such tracts, once sales by the Government have passed fee-simple titles to individuals. While it is probably desirable to make some provision for the kinds of sites and for the uses specified in the bill (so far as these sites and uses are not inconsistent with the principal purpose to which given larger tracts of public lands may have been devoted), it is a question whether this should not be done under some system of revocable permits or licenses granting a privilege to use the tract in question for the specific purpose, and not giving a fee-simple title. A considerable number of such licenses have been granted in the national forests, where the system has permitted a variety of uses, such as those described in this bill, without subjecting the forests to the uncontrolled uses which fee-simple titles to small tracts might encourage.”

Id. at 3.

^{12/} Congressional Record, 75th Cong., 3rd Sess., at 6275.

As introduced and enacted, the Small Tract Act included a proviso “that patents for all tracts purchased under the provisions of this Act shall contain a reservation to the United States of the oil, gas, and other mineral deposits, together with the right to prospect for, mine, and remove the same under such regulations as the Secretary may [prescribe].” ^{13/}

The regulations that the Secretary has prescribed have consistently limited this right to exploit reserved minerals to leasable minerals. The original regulations were contained in Circular 1470, dated June 10, 1940. 43 CFR 257.14 provided:

Minerals. Any deposits of coal, oil, gas or other minerals subject to the leasing laws, in the lands patented or leased under the terms of this law, may be disposed of to any qualified person under applicable laws and regulations in force at the time of such disposal. No provision is made at this time to prospect for, mine, or remove the other kinds of minerals that may be found in such lands, and until rules and regulations have been issued, such reserved deposits will not be subject to prospecting or disposition.

5 FR 2284, 2286 (June 19, 1940) (emphasis supplied).

This regulation was revised in 1947, but the distinction between minerals subject to the leasing laws and other kinds of minerals was maintained:

§ 257.15. *Minerals.* Any lease or patent issued under the act will reserve to the United States (a) all deposits of coal, oil, gas or other minerals, together with the right to prospect for, mine, and remove the same under such regulations as the Secretary may prescribe * * * . Any minerals subject to the leasing laws, in the lands patented or leased under the terms of the act may be disposed of to any qualified person under applicable laws and regulations in force at the time of such disposal. No provision is made at this time to prospect for, mine, or remove the other kinds of minerals that may be found in such lands, and until rules and regulations have been issued, such reserved deposits will not be subject to prospecting or disposition.

12 FR 3664, 3666 (June 5, 1947) (emphasis supplied). ^{14/}

^{13/} Ch. 317, 52 Stat. 609.

^{14/} 43 CFR 257.15(a), as revised in September 1950, provided the same, 15 FR 6222, 6224 (September 16, 1950), as did the revision published in December 1954.

(continued...)

In The Dredge Corporation, 64 I.D. 368 (1957), the appellant argued it could locate mining claims on lands that had previously been classified for disposition under the Small Tract Act. The Deputy Solicitor held that was not so.^{15/} On appeal,

^{14/} (...continued)

19 FR 8835, 9130 (December 23, 1954).

In January 1955 this regulation was renumbered and its last sentence was revised slightly to read:

§ 257.16 *Minerals; timber.* (a) * * * Until rules and regulations have been issued, the other kinds of minerals that may be found in such lands are not subject to prospecting or disposition.

20 FR 365, 368 (January 15, 1955). This regulation was in effect when BLM issued the patents in 1959.

^{15/} “Among the regulations adopted by the Secretary is one (43 CFR, 1956 Supp., 257.16) which provides that leases, like patents, will reserve to the United States all deposits of coal, oil, gas, or other minerals, together with the right to prospect for, mine, and remove the same under such regulations as the Secretary may prescribe. The regulation provides further that while minerals subject to the leasing laws (30 U.S.C., 1952 ed., sec. 181 *et seq.*) in lands patented or leased under the Small Tract Act may be disposed of under applicable laws and regulations in force at the time of such disposal, other kinds of minerals which may occur in such leased or patented lands are not subject to prospecting or disposition until regulations have been adopted.

“As the act provides that reserved minerals in lands subject to its provisions may be prospected for, mined, and removed only under applicable law and such regulations as the Secretary may prescribe and as the Secretary has not to date prescribed regulations permitting prospecting on lands under lease or patent pursuant to the Small Tract Act, it follows that those lands are not subject to location under the mining laws.

“The appellant contends that the fact that the Secretary has issued no regulations relating to mining on those lands is proof that the mining laws apply. This is not so. The act makes the reserved minerals

(continued...)

the U. S. District Court for the District of Nevada rendered summary judgment for the Secretary:

The next issue raised by plaintiff is that the Secretary's acts of issuing the regulation found in 43 CFR. Sec. 257.15 then failing to issue further regulations dealing with the disposal of minerals not subject to the Mineral Leasing Act made the land in question open to location under the mining laws.

The Small Tract Act provided that the Secretary of the Interior has discretion to sell or lease land "under rules and regulations as he may prescribe." The Secretary issued a regulation (43 C.F.R. Sec. 257.15) clearly stating that "No provision is made at this time to prospect for, mine, or remove the other kinds of minerals (sand and gravel included) that may be found in such lands, and until rules and regulations have been issued, such reserved deposits will not be subject to prospecting." Similar to his discretionary powers granted under the Mineral Leasing Act, under the Small Tract Act the issuance of regulations is a matter of the Secretary's discretion.^{16/}

This decision was affirmed. The Dredge Corporation v. Penny, 362 F.2d 889 (9th Cir. 1966).^{17/}

^{15/} (...continued)

subject to disposition only under applicable laws 'and such regulations as the Secretary may prescribe.' The Secretary has prescribed that there shall be no prospecting for or disposition of the reserved deposits at this time and until he prescribes regulations permitting the prospecting for, mining and removal of such reserved deposits the lands in which such deposits may be found are not open to location under the mining laws."

64 I.D. at 373-74 (footnote omitted).

^{16/} The Dredge Corporation v. Penny, (U.S. D.C., D. Nev., Civil No. 475, May 18, 1964). The District Court's decision is not reported. The quotation from its decision is found in Frank Melluzzo, 72 I.D. 21, 24 (1965). The parenthetical language "(sand and gravel included)" in the quotation from the District Court's decision is not in the text of 43 CFR 257.15.

^{17/} "The Act does not provide that reserved minerals shall continue open to entry and location. Instead it leaves to the Secretary the question of how and to what extent they shall be made available. In our judgment the Regulation was a proper exercise of administrative discretion under the Act." The Dredge Corporation v.

(continued...)

In 1954, the Congress amended the Small Tract Act. It did so in response to a request that the Secretary of the Interior initially made in 1948. The Secretary explained that one of the principal purposes for the request was to “add community site purposes to those for which sites may be leased or sold. The term ‘community site purposes’ would include municipal uses as well as such common public uses as general meetings and educational, civic, and religious activities.”^{18/}

The Department’s proposed bill also changed the language of the 1938 Act requiring that any patent for purchase of a tract contain a reservation of the oil, gas, and other mineral deposits. Section 2 read: “Patents for all tracts purchased under the provisions of this act shall contain a reservation to the United States of the oil, gas, and all other mineral deposits, together with the right to prospect for, mine, and remove the same under such regulations as the Secretary may prescribe” (emphasis

^{17/} (...continued)

Penny, 362 F.2d 889 (9th Cir. 1966) at 890.

^{18/} House Report No. 2212, 80th Cong., 2nd Sess., June 4, 1948, to accompany H.R. 5555, at 2, quoting a February 20, 1948, letter from Oscar L. Chapman, Acting Secretary of the Interior, to the Hon. Joseph W. Martin, Jr., Speaker of the House of Representatives. The letter continued:

“The number of uses for which the tracts may be leased or sold would be reduced to four principal classifications – residence, recreation, business, and community site – instead of the present unwieldy seven. The other present uses will fit into the proposed four classes. This change is suggested in order to simplify the administration of the act and to provide greater flexibility in classification for lease or sale purposes.”

Subsequent reports repeated this explanation. House Report No. 318, 81st Cong., 1st Sess., March 25, 1949, to accompany H.R. 2820, at 2, quoting a February 25, 1949, letter from Oscar L. Chapman, Under Secretary of the Interior, to the Hon. Andrew J. Somers, Chairman, Committee on Public Lands; House Report No. 344, 83rd Cong., 1st Sess., May 5, 1953, to accompany H.R. 2512, at 2-3, quoting a December 17, 1951, letter from Dale E. Doty, Assistant Secretary of the Interior, to the Hon. Sam Rayburn, Speaker of the House of Representatives; Senate Report No. 1330, 83rd Cong., 2nd Sess., May 13, 1954, to accompany H.R. 2512, quoting a July 29, 1953, letter from Assistant Secretary of the Interior Orme Lewis to the Hon. Hugh Butler, Chairman, Committee on Interior and Insular Affairs, 1954 U. S. Code Congressional and Administrative News at 2332. See section 1, Ch. 270, 68 Stat. 239, 43 U.S.C. § 682a (1970).

supplied). ^{19/} The word “all” was added, but no comment on that addition was made by the Department or by the committees that considered the bill. In the Senate, Senator Watkins offered the following explanation:

The purpose of this bill is to modernize the so-called Small Tract Act, to extend its application and improve its administration.

The language of the existing law has been rewritten throughout for clarity. Most of the changes are not important. The most important change is to permit the leasing of small tracts, even though unsurveyed. This provision will be of particular value in Alaska, where most of the land is not surveyed. The bill also extends the leasing authority to small tracts in the O and C lands in Oregon, but with appropriate safeguards.

The bill should do much to stimulate the development of Alaska. [^{20/}]

The enactment of the 1954 amendment brought section 2 of the Small Tract Act into close alignment with section 9 of the Stock-Raising Homestead Act of 1916 (SRHA). ^{21/} That section required that all patents issued under that Act 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 Supreme Court decided the reservation in section 9 of the SHRA included gravel in Watt v. Western Nuclear, Inc., 462 U.S. 36 (1983). The Court noted that the Congress intended, in severing the surface estate from the mineral estate, to encourage concurrent development of the surface and the subsurface of the land. Id. at 50. For this reason, the Court said, “the determination of whether a particular substance is included in the surface estate or the mineral estate should be made in light of the use of the surface estate that Congress contemplated.” Id. at 52.

Given Congress’ understanding that the surface of SHRA lands would be used for ranching and farming, we interpret the mineral reservation in the Act to include substances that are mineral in character (i.e., that

^{19/} House Report No. 2212, 80th Cong., 2nd Sess., June 4, 1948, at 3; House Report No. 318, 81st Cong., 1st Sess., March 25, 1949, at 3; House Report No. 344, 83rd Cong., 1st Sess., May 5, 1953, at 5.

^{20/} Congressional Record, 83rd Cong., 2nd Sess., 6644 (May 17, 1954).

^{21/} Ch. 9, 39 Stat. 864, 43 U.S.C. § 299 (1970). Sections 1-8 of the Stock-Raising Homestead Act were repealed by Pub. L. 94-579, Title VII, § 702, 90 Stat. 2789.

are inorganic), that can be removed from the soil, that can be used for commercial purposes, and that there is no reason to suppose were intended to be included in the surface estate. * * * This interpretation of the mineral reservation best serves the congressional purpose of encouraging the concurrent development of both surface and subsurface resources, for ranching and farming do not ordinarily entail the extraction of mineral substances that can be taken from the soil and that have separate value.

Id. at 53-54. The Court noted its conclusion that gravel was a mineral for purposes of the SRHA was supported by the fact that “gravel has been treated as a mineral under two federal land-grant statutes that, like the SRHA, reserve all minerals to the United States.” Id. at 56-57. ^{22/}

Recently, the Court distinguished the language in section 9 of the SRHA from the reservation of “all the coal and other valuable minerals” in section 8 of the Pittman Underground Water Act of 1919 ^{23/} in deciding that sand and gravel were not included as “other valuable minerals.” Bedroc Limited, LLC v. United States, 124 S. Ct. 1587, 1592 (2004).

[1] In our view, the language of section 2 of the Small Tract Act cannot meaningfully be distinguished from that of section 9 of the SRHA of 1916, and it should be interpreted the same way. The SRHA was the most recent homestead act when the Congress considered making small tracts available for “little homestead purposes,” as Senator McCarran described it, in 1938. There is no indication in the legislative history of the Small Tract Act that Congressional interest in promoting use of both the surface estate and the mineral estate changed between 1916 and 1938. ^{24/}

Persons purchasing small tracts for residence, recreation, business, or community purposes have even less interest than farmers and stockmen in exploiting

^{22/} The Court referred to Solicitor’s Opinion M-36379 (October 3, 1956), and our decision in United States v. Isbell Construction Co., 4 IBLA 205, 78 I.D. 385 (1971), involving 43 U.S.C. 315g (1970), a provision of the Taylor Grazing Act of 1934.

^{23/} Ch. 77, 41 Stat. 293, 295.

^{24/} The Congress had the same interest during its deliberations on the Pittman Act from 1916-1919. Earl Williams, 140 IBLA 295, 306-313 (1997). See Norman J. Singer, 2B Statutes and Statutory Construction 53.05 (6th ed., 2000).

the mineral resources under their tracts. See Watt v. Western Nuclear, Inc. at 56.^{25/} As discussed above, since the Act was enacted the Secretary's regulations have protected these purchasers from the destruction of their surface estates by limiting the exercise of the right to prospect for, mine, or remove minerals to leasable minerals. Locatable and salable minerals have not been subject to prospecting or disposition. The sand and gravel in this case have been exploited only because the successors to the patentees have commercially exploited it rather than occupy and improve the tracts.

When Congress enacted the Small Tract Act in 1938, it was the Department's view that gravel was a locatable mineral under the mining law, Layman v. Ellis, 52 L.D. 714 (1929), although that view was contrary to its earlier view. In rewriting the language of the 1938 law in 1954 "for clarity," as Senator Watkins put it, Congress reduced any ambiguity on the question of what mineral deposits might be included under the reservation language by adding the word "all."

Because sand and gravel are mineral in character, *i.e.*, inorganic, can be removed from the soil, can be used for commercial purposes, and there is no reason to suppose the Congress intended them to be included in the surface estate of small tracts, we hold that sand and gravel are included in the reservation of "all other mineral deposits" under the Small Tract Act, 43 U.S.C. § 682a (1970). We do so in accordance with "the established rule that land grants are 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." United States v. Union Pacific R. Co., 353 U.S. 112, 116 (1957).

^{25/} "If we were to interpret the SRHA to convey gravel deposits to the farmers and stockmen who made entries under the Act, we would in effect be saying that Congress intended to make the exploitation of such deposits dependent solely upon the initiative of persons whose interests were known to lie elsewhere. In resolving the ambiguity in the language of the SHRA, we decline to construe that language so as to produce a result at odds with the purposes underlying the statute."

Therefore, in accordance with the authority delegated to the Interior Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, BLM's January 3, 2002, decision is affirmed.

Will A. Irwin
Administrative Judge

I concur:

C. Randall Grant, Jr.
Administrative Judge

ADMINISTRATIVE JUDGE MULLEN DISSENTING;

The issue of whether sand and gravel deposits are minerals reserved under the Small Tract Act is a matter of first impression. The Board and the courts have considered whether sand and gravel are reserved minerals under other legislation. However, the fact that sand and gravel may have been found to be reserved elsewhere does not automatically impel the conclusion that they were reserved under the legislation in the case at hand. In Western Nuclear, Inc., 35 IBLA 146, 85 I.D. 129 (1978), aff'd., Watt v. Western Nuclear, Inc., 462 U.S. 36 (1983), the Board was called upon to decide whether sand and gravel were included in a reservation of “all the coal and other minerals” in patents issued under the Stock Raising Homestead Act (SRHA), 43 U.S.C. § 299 (2000). In our analysis in Western Nuclear we looked to the purposes of the SRHA and held that sand and gravel were reserved. In its decision, the Supreme Court also looked to the purposes of the SRHA in reaching its conclusion that the sand and gravel were reserved when land is conveyed pursuant to the SRHA. The majority finds that the principles established in that case guide the construction of the reservation in the Small Tract Act. I will not say that this interpretation is unfounded, but I must disagree with it.

The SRHA provides for the patent of tracts up to 640 acres in size.^{1/} The mineral reservation in the SRHA of 1916 was intended to overcome objections to the large acreage to be patented under that act. See Watt v. Western Nuclear, Inc., 462 U.S. 36, 50 (1983); United States v. Union Oil Co. of California, 549 F.2d 1271, 1277 (9th Cir.), cert. denied, 434 U.S. 930 (1977).

In Western Nuclear, the Court eschewed simplistic definitions in determining the scope of the reservation, noting that the term “minerals” was “used in so many senses, dependent upon the context, that the ordinary definitions of the dictionary throw but little light upon its signification in a given case.” Watt v. Western Nuclear, Inc., supra, at 42-43, citing Northern Pacific Railway Co. v. Soderberg, 188 U.S. 526, 530 (1903).

There are other reasonable interpretations, however. In United States v. Isbell Construction Co., 4 IBLA 205, 78 I.D. 385 (1971), the Board held that sand and gravel were reserved in patents issued pursuant to 43 U.S.C. § 315g (2000). In Maurice Tanner, 141 IBLA 373, 382-83 (1997), we cited Western Nuclear when

^{1/} This is 128 times the size of the largest Small Tract Act parcel allowable.

considering whether humate, a soil additive, was a mineral under the SRHA. Of importance, the Supreme Court stated:

[T]he determination of whether a particular substance is included in the surface estate or the mineral estate should be made in light of the use of the surface estate that Congress contemplated. As the Court of Appeals for the Ninth Circuit noted in United States v. Union Oil Co. of California, 549 F.2d 1271, 1274 [(9th Cir.)], cert. denied, 434 U.S. 930 (1977), “[t]he agricultural purpose indicates the nature of the grant Congress intended to provide homesteaders via the Act.” See Pacific Power & Light Co., 45 I.B.L.A. 127, 134 (1980) (“Where there is a dispute as to whether a mineral resource is included in the [SRHA] reservation, it is helpful to consider the manner in which the material is extracted and used”).

Watt v. Western Nuclear, Inc., supra, at 52 (emphasis added; footnote omitted). When holding that sand and gravel were reserved, the Court found it significant that “gravel can be taken from the soil and used for commercial purposes.” Id. at 55.

The Court found its conclusion that sand and gravel was a reserved mineral to be “supported by the treatment of gravel under other federal statutes concerning minerals,” citing as an example this Board’s decision in United States v. Isbell Construction Co., supra, in which we held that sand and gravel are reserved in patents issued under the Taylor Grazing Act (TGA). See Watt v. Western Nuclear, Inc., supra, at 56-57

In acts passed after the SRHA, Congress made reservations embracing all minerals a routine feature for patents. Examples include the Taylor Grazing Act, the Small Tract Act, the Recreation and Public Purposes Act of 1926, the Mining Claims Occupancy Act of 1962, and the Public Land Sales Act of 1964. However, the interpretation of what is a mineral has not excluded all substances that can be removed from the soil and used for commercial purposes from conveyances having a mineral reservation. In Poverty Flats Land & Cattle Co. v. United States, 788 F.2d 676 (10th Cir. 1986), the court held a reservation of minerals in an exchange patent issued pursuant to the Taylor Grazing Act did not include “caliche,” which “consists of small rocks, dust, soil, and sand” around which carbonate salts solidified to form a matrix. Id. at 677. In United States v. Hess, 194 F.3d 1164 (10th Cir. 1999) (Hess I), in which the court held that sand and gravel were not reserved under a reservation of minerals in an exchange patent issued under the Indian Reorganization Act,

25 U.S.C. § 463e (2000). On remand, the Federal District Court found that a particular sand and gravel deposit was reserved, and in United States v. Hess, 348 F.3d 1237 (10th Cir. 2003) (Hess II), the court again held that the sand and gravel was not reserved. In Hess II, the court declined to apply the general principle recognized in Western Nuclear that land grants are construed favorably to the United States government and that nothing passes except what is conveyed in clear and explicit language. In doing so, the Court emphasized that the patent in Hess was an exchange patent and that the surface owners and “the government exchanged properties after seven years of negotiations.” 348 F.3d at 1242.^{2/}

In Bumpus v. United States, 325 F.2d 264, 266-67 (10th Cir. 1963), the court applied the maxim “ejusdem generis” and held that sand and gravel were not included in a reservation by a private landowner of “oil, gas and other minerals” in a conveyance to the United States.^{3/}

In Earl Williams, 140 IBLA 295, 303 (1997), we held that sand and gravel were included in a reservation of minerals under the Pittman Underground Water Act of 1919, 43 U.S.C. §§ 351-355 (1958). In that Act, Congress reserved “all the coal and other valuable minerals.” The Williams decision was reversed by the Supreme Court in BedRoc Limited, LLC, v. United States, 124 S.Ct. 1587 (2004).^{4/} To illustrate the difficulty of the issue before us, I note that when the Court held 6 to 3 that sand and gravel were not reserved under the Pittman Act, it split three ways. The lead opinion, authored by Chief Justice Rehnquist and joined by Justices O’Connor, Scalia, and Kennedy, distinguishes the reservation of “minerals” under the SRHA from the reservation of “valuable minerals” under the Pittman Act on a number of bases. The other five justices did not agree that the reservation under the Pittman Act could be meaningfully distinguished from the reservation in the SRHA. Justices

^{2/} I recognize that good arguments can be advanced for distinguishing the above cited cases. I offer them to demonstrate that the courts do not slavishly apply the definition of “mineral” advanced by the majority, but, rather, the purpose of the act must be closely examined.

^{3/} In Western Nuclear, 35 IBLA at 163-64 n.12, 85 I.D. at 138 n. 12, the Board distinguished the Bumpus holding from the reservation under the SRHA.

^{4/} The decision on appeal was issued after the Williams decision but before the Court issued its BedRoc decision. The briefs filed by the parties advanced arguments for and against the application of the Williams decision, and, following the issuance of the BedRoc decision, the parties to this appeal were provided an opportunity to submit briefs concerning the effect of the Supreme Court’s BedRoc ruling on this appeal.

Stevens, Souter, and Ginsburg dissented, asserting that there was no basis for distinguishing Western Nuclear from BedRoc, and they would have held that Western Nuclear governed and that sand and gravel were likewise reserved under the Pittman Act. Justices Thomas and Breyer agreed that the reservations could not be meaningfully distinguished, but they concluded that Western Nuclear was incorrect, and its reasoning should not be extended to other laws. Because these two Justices joined the other four Justices who distinguished the Pittman Act from the SRHA, a majority was formed to hold that sand and gravel was not reserved. However, only two of the nine Justices would overturn Western Nuclear.

In BedRoc, the Court noted that the Pittman Act applied only in Nevada, but that the SRHA applied to any public lands designated as “stock raising lands.” 124 S.Ct. at 1592. In BedRoc, the Court found that “Congress has textually narrowed the scope of the term by using the modifier ‘valuable.’” 124 S.Ct. at 1593. “We think the term ‘valuable’ makes clear that Congress did not intend to include sand and gravel in the Pittman Act’s mineral reservation.” Id. “Because the Pittman Act applied only to Nevada, the ultimate question is whether the sand and gravel found in Nevada were commonly regarded as ‘valuable minerals’ in 1919” when the Pittman Act was enacted. 124 S.Ct. at 1594. The scope of the reservation in the Small Tract Act is not limited by the use of the modifier “valuable,” and BedRoc does not clearly support the reversal of BLM’s decision in New West.

The Court further noted: “It is beyond dispute that when the Pittman Act became law in 1919, common sand and gravel could not constitute a valuable mineral deposit” under the General Mining Act, citing Zimmerman v. Brunson, 39 L.D. 310 (1910). 124 S.Ct. at 1594. Similarly, in 1959, when the patents were issued to New West’s predecessor in interest, common sand and gravel was not a valuable mineral deposit that could be prospected for, mined or removed pursuant to the general mining law.

The Court did not overrule Western Nuclear, but declined to extend its reasoning to the Pittman Act. It focused on the distinctions between the SRHA and the Pittman Act. The Pittman Act reserved valuable minerals while the SRHA and Small Tract Act reserved minerals without that textual modifier. Finding no ambiguity in the term “valuable minerals” as the Court had found in Western Nuclear, the Court in BedRoc found no reason to apply the rule that land grants be construed in favor of the government nor any reason to examine the legislative history of the Pittman Act.

Recognizing the merits of New West’s argument that BedRoc should be read to limit Western Nuclear to the SRHA, I am faced with the fact that the Court

nevertheless premised its ruling on the term “valuable minerals” in the Pittman Act as distinct from the more general term “minerals” that appears in other legislation. Because the term “minerals” by itself is “used in so many senses, dependent upon the context,” see Western Nuclear, Inc., 462 U.S. at 42-43, I strongly adhere to the view that “the determination of whether a particular substance is included in the surface estate or the mineral estate should be made in light of the use of the surface estate that Congress contemplated.” 462 U.S. at 52.

The majority opinion gives an excellent presentation of the history of the Small Tract Act, and I find no reason to repeat what they have said. As will be seen, however, I find it appropriate to focus on different aspects of that history than they do.

The Small Tract Act, 43 U.S.C. § 682a, authorized the Secretary in his discretion “to sell or lease * * * a tract not exceeding five acres of * * * lands * * * which the Secretary may classify as chiefly valuable for residence, recreation, business, or community site purposes, if he finds that such sale or lease of the lands would not unreasonably interfere with the use of water for grazing purposes nor unduly impair the protection of watershed areas * * *.” That was the intent of the Small Tract Act. As quoted in the majority opinion, the Small Tract Act was enacted to provide a means for individual Americans to acquire and for the Federal Government to divest itself of small parcels of land that was not suitable for agricultural purposes. See H. R. Rep. No. 1876, 75th Cong., 2d Sess (Mar. 2, 1938). I find those two aspects of the Small Tract Act represent an important distinction when comparing the Small Tract Act language with that in the Acts clearly intended to dispose of land found suitable for agricultural purposes, such as the SRHA, the Taylor Grazing Act and the Desert Land Entry Act.

The consequences of receiving title to the land when the Federal Government has retained the minerals is also an important consideration. In this case the Government seeks royalties from New West, the company mining the sand and gravel and from JWR, Inc., the successor in interest of the patentee that has entered into an agreement with New West allowing the removal of the sand and gravel. If the minerals are retained, a party seeking to explore for, mine and remove the minerals has the right to do so, even when the surface owner has built a motel or gas station on the tract and the exploration mining and removal of the sand and gravel will completely render the surface of the tract useless for any purposes Congress had contemplated when the act was passed.

The Small Tract Act limits the acreage conveyed under that Act to no more than 5 acres. Unlike the patent issued for a 640-acre stockraising homestead, for

example, it is very likely that the mining of a sand and gravel deposit on a Small Tract Act parcel will result in the destruction of the entire surface estate.^{5/} It is therefore appropriate to revisit the Isbell case, the first case in which this Board confronted this concern. After acknowledging that sand and gravel had been deemed to be valuable minerals under the mining law for many years, and “would ordinarily be reserved to the United States,” the Board considered “the question of whether the circumstances of this case warrant a finding that this particular deposit was not reserved to the United States, but passed to the patentee.” 4 IBLA at 216, 78 I.D. at 390. The Board found:

The extraction of valuable mineral substances does not deny to the surface patentee the enjoyment of his estate so long as mining activities do not devour the surface. 1 American Law of Mining, § 3.26 (Rocky Mountain Mineral Law Foundation). The reservation of minerals to the United States should be construed by considering the purpose of the grant for reservation in terms of the use intended. By applying such a construction, the reservation of minerals should be considered to sever from the surface all mineral substances which can be taken from the soil and have a separate value. The majority rule appears to be that it makes no difference whether the particular substance was known to be valuable at the time of severance, or becomes known to be of value as the result of future development of the arts and sciences. Such an approach would exclude nothing that is presently or prospectively valuable as extracted substances. Id. However, a minority rule has also developed which emphasizes that the interpretation to be given the term “minerals” is dependent upon popular understanding of what substances are known as minerals at the time of execution of the instrument. New Mexico & Arizona Land Company v. Elkins, 137 F. Supp. 767 (D.N.M. 1956). See also, C. Lindley, A Treatise on the American Law Relating to Mines and Mineral Lands, § 93 (3d ed. 1914).

4 IBLA at 216-17, 78 I.D. at 390-91. The Board then examined a number of cases, specifically referring to Smith v. Moore, 474 P.2d 794 (Sup. Ct. Colo. 1970), in which the court held that the reservation of coal did not include the right to destroy the surface in mining it. The Board stated:

^{5/} The intent of the Small Tract Act was to permit the purchase of mountain and desert lands that were not suitable for agricultural use or grazing. See majority opinion at footnote 9. One could reasonably expect that most of the Small Tract Act parcels contain sand and gravel and little topsoil, if any.

While Smith v. Moore, *supra*, deals with the surface mining of coal rather than sand and gravel, it enunciates a theme that is common to all of these decisions; i.e., the concern by the several courts that the grantor, if he prevailed, would have retained dominion over that which he purportedly conveyed and the grantee would be deprived of the very substance of his bargain without compensation.

It is this aspect of the matter which distinguishes all of the foregoing cases from the case at hand. Here the statute under which the conveyance was made, and which provides the authority for the reservation states:

* * * Where mineral reservations are made by the grantor in lands conveyed by the United States, it shall be so stipulated in the patent, and any person who prospects for or acquires the right to mine and remove the reserved mineral deposits may enter and occupy so much of the surface as may be required for all purposes incident to the prospecting for, mining and removal of the minerals therefrom, and may mine and remove such minerals, upon payment to the owner of the surface for damages caused to the land and improvements thereon. . . . 43 U.S.C. 315g(d). (Emphasis added).

Here the Congress has foreseen the possibility of damage to the surface by reason of the reservation of minerals and has made provision for the owner of the surface to be compensated. This obviates the need for special concern where the mineral in question comprises substantially all of the surface. See discussion and cases collected in 1 Amer. Law of Mining § 3.51.

It is noteworthy that Congress also provided a similar indemnity to surface owners of land patented with a mineral reservation pursuant to a stock raising or other homestead entry for surface damages occasioned by open pit or strip mining. 30 U.S.C. sec. 54 (1970).

4 IBLA at 221-22, 78 I.D. at 393.

In our decision in Western Nuclear, we also addressed this concern:

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.

35 IBLA at 162-63, 85 I.D. at 137-38, footnotes omitted. In both Isbell and Western Nuclear, the provision for compensation provided dispositive evidence of legislative intent to reserve common minerals, whose development would entail destruction of the surface.

In a SOR filed on March 28, 2003, Intervenor JWR, Inc., correctly contends that the Board has “considered as a crucial factor whether the statute in question did or did not provide some protection or compensation to the patentee for the damage of the surface of the patented land.” Noting that the Small Tract Act provides no protection, JWR concludes: “Congress could not have intended to reserve sand and gravel from Small Tract Act patents and allow the surface of such land to be consumed without protection or compensation to the surface owner.” (JWR SOR, 6.) In its July 9, 2004, Response at 3, New West also voices this concern.

BLM attempts to rebut this argument by pointing to cases in which the “Board has upheld the principle of recognizing a damage to the surface owner component.” (July 12, 2004, Response at 24-25.) However, the cases cited by BLM, e.g. H. E. Hunewill Construction Co., Inc., 137 IBLA 101 (1996), involve statutes that specifically provide for surface owner compensation. BLM and the majority overlook the importance the Board placed upon such provisions as evidence of legislative intent to reserve common minerals whose development would entail destruction of the surface. In the Small Tract Act, there is no similar evidence of legislative intent that would support the extension of Isbell and Western Nuclear to reservations in Small Tract Act patents. It is my opinion that the deposits at issue in this appeal did not fall within the scope of the reservation.

BLM also refers to Dredge Corporation v. Penny, 362 F.2d 889 (9th Cir. 1966). In that case the court considered the validity of 16 sand and gravel claims located on land patented under the Small Tract Act.^{6/} In affirming this Department's decision that the claims were invalid, the court assumed without analysis that sand and gravel were reserved and held that the reserved deposit was not open to location under the general mining laws. Citing 43 CFR 257.15(a) (1954), the court noted that the Secretary had provided that "reserved minerals may be disposed of under the Mineral Leasing Act * * * but that such reserved minerals otherwise are not subject to prospecting or disposition." Id. at 890. Unlike the SRHA, the Small Tract Act "does not provide that reserved minerals shall continue to be open to entry and location. Instead it leaves to the Secretary the question of how and to what extent they shall be made available." Id. at 890.

In its Answer, BLM argues that removal of certain minerals from the Mining Law does not limit the scope of the mineral reservation, and we have recognized that the laws pertaining to the disposal of minerals do not necessarily define the scope of what is reserved.^{7/} My reluctance to extend Western Nuclear to the Small Tract Act

^{6/} When considering the validity of a placer claim, the land claimed must be mineral in character. The standard measurement is that each 10-acre subdivision embraced by the claim must be mineral in character. McCall v. Andrus, 628 F.2d 1185 (9th Cir. 1980), cert. denied, 450 U.S. 996 (1981); Laden v. Andrus, 595 F.2d 482, 491 (9th Cir. 1979); United States v. Oneida Perlite Corp., 57 IBLA 167, 88 I.D. 772 (1981); United States v. Nickol, 47 IBLA 183, 187 (1980), and cases cited therein. This measurement is twice the size of the Small Tract Act maximum.

^{7/} After 1920, oil was no longer subject to the mining law, see 30 U.S.C. § 181 (2000) (providing for the leasing of oil), yet it was still held to be reserved under the reservation of "coal and other minerals" under the SRHA. See Skeen v. Lynch, 48 F.2d 1044 (10th Cir), cert. denied, 284 U.S. 633 (1931). In Union Oil, the court recognized that geothermal steam was reserved under the SRHA, even though there was no authority for its disposition until the Geothermal Steam Act of 1970. In Western Nuclear, Inc., 35 IBLA at 165, 85 I.D. at 139, we addressed the effect of the Surface Resources Act of 1955, 30 U.S.C. § 611 (2000), provision that common varieties of sand and gravel were no longer subject to location has on mineral reservations. In Pacific Power & Light, 45 IBLA 127, 137-38 (1980), aff'd, Pacific Power & Light Co. v. Watt, No. C 80-073K (D. Wyo. June 17, 1983), we rejected the argument that scoria was no longer reserved under the SRHA because it was no longer subject to disposition under the mining law. Affirming this Board's Western

(continued...)

does not arise from any of the changes in the laws relating to the disposal of minerals since the date that the statutes were enacted or the date when the patent was issued. My reluctance is a direct response to what the legislators intended to accomplish when enacting those acts, the land subject to each of them and the protection they provide to the surface owner.

There are a number of important characteristics that distinguish the Small Tract Act from the SRHA. Three are worth mentioning again. The first is the size of the tracts that can be obtained under each act. The second is that Small Tract Act tracts cannot be suitable for agriculture or grazing, and under the SRHA it must be suitable for those purposes. The third is the lack of a compensation provision in the Small Tract Act. The presence of a compensation provision in the TGA and SRHA was a critical element in our reasoning in Isbell and Western Nuclear.

Finally, the majority relies heavily on the doctrine “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.” United States v. Union Pacific R. Co. 353 U.S. 112, 116 (1957). However, the Supreme Court did not apply this principle in BedRoc, and other courts have expressly declined to apply this principle when the conveyances containing the reservations were not homestead or railroad grants. E.g., Hess I, 194 F.3d at 1171; Hess II, 348 F.3d at 1243. The Small Tract Act patent is not a grant. It is a conveyance that is purchased.

It is my opinion that the reservation of minerals in the Small Tract Act does not include a reservation of sand and gravel.

Having reached a conclusion contrary to that expressed by the majority regarding the ownership of the sand and gravel, I will express my agreement with them on a related issue. If the retained minerals include sand and gravel, there is no provision in Small Tract Act or the Department’s regulations that would permit the prospecting for or the removal of sand and gravel from any parcel patented under the Small Tract Act. When it commenced its trespass action against New West and JWR, BLM specifically advised New West that, if it intended to continue to mine from the subject land it must begin efforts to enter into a contract with the BLM, for the sale of

²⁷ (...continued)

Nuclear decision, the Federal District Court noted that mineral estate is a flexible entity which expands with the development of the arts and sciences to include more minerals. Western Nuclear, Inc. v. Andrus., 475 F. Supp. 654, 663 (D. Wyo. 1979).

mineral materials. I agree with the majority when it implied that there is no means by which BLM can enter into a contract for the exploration for or removal of the sand and gravel at New West's pit. New West has no option other than to cease its operations until such time as BLM has promulgated regulations providing for the removal of sand and gravel from lands patented under the Small Tract Act. It matters not that the surface owner is willing to allow the extraction of sand and gravel. The "protection" afforded the surface owners by the lack of regulations which would allow removal of sand and gravel from Small Tract Act parcels without compensation to the surface owner applies to willing as well as unwilling surface owners.

R.W. Mullen
Administrative Judge