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NOTES

IS GRAVEL A MINERAL? THE IMPACT OF WESTERN NUCLEAR ON LANDS PATENTED UNDER THE STOCK RAISING HOMESTEAD ACT

Edward A. Amestoy

I. INTRODUCTION

The Stock Raising Homestead Act of 1916¹ (SRHA) reserved to the federal government all coal and other minerals contained within the lands patented under the Act.² Today this reservation affects over 33 million acres of land in the Western United States.³ With the recent resource development of these lands, questions concerning what types of substances are included as minerals under the SRHA reservation have arisen. In *Watt v. Western Nuclear, Inc.*,⁴ the Supreme Court determined that gravel was a reserved mineral under the SRHA reservation. The tests used by the Supreme Court in reaching this decision will affect what will be considered a reserved mineral under the SRHA mineral reservation in the future.

II. FACTS

Western Nuclear purchased land on which an open gravel pit was located. The original conveyance of the land was made in 1926 by Patent Number 974013, issued pursuant to the SRHA. The patent reserved all the coal and other minerals to the federal government. Western Nuclear, as part of its mining and milling operations, used gravel obtained from the open pit.

In 1975, the Wyoming Office of the Bureau of Land Management (BLM) cited Western Nuclear for trespass upon the mineral estate. After a hearing, the BLM determined that the gravel on and underlying Western Nuclear's land was reserved to the federal government.⁵

1. Stock Raising Homestead Act of 1916, ch. 9, 39 Stat. 862 (codified at 43 U.S.C. §§ 291-301 (1976)), *suspended by* The Taylor Grazing Act of 1934, ch. 865, 48 Stat. 1269, (codified at 43 U.S.C. §§ 310-316(o) (1976)) *repealed by* the Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, § 702, 90 Stat. 2787 (codified at 43 U.S.C. §§ 1701-1782 (Supp. II 1978)) [hereinafter cited as SRHA]. Valid existing patents were unaffected by the repeal.

2. 43 U.S.C. § 999 (1976).

3. Department of the Interior, Report of the Director of the Bureau of Land Management, Statistical Appendix, Table 17 at 22 (1948).

4. 103 S. Ct. 2218 (1983).

5. *Id.* at 2222.

Western Nuclear appealed the decision to the Interior Board of Land Appeals, which affirmed the BLM holding.⁶ Thereafter, Western Nuclear petitioned for review in the United States District Court for the District of Wyoming.⁷ The district court also affirmed the BLM decision stating, "it is evident from the legislative history, contemporaneous definitions and court decisions that the mineral reservation in the SRHA of 1916 is broad enough to include gravel as a mineral."⁸

Western Nuclear then appealed the decision to the Court of Appeals for the Tenth Circuit.⁹ That court reversed the district court's holding, reasoning that gravel was not a reserved mineral under the SRHA reservation.¹⁰

The case was appealed to the United States Supreme Court.¹¹ The Court, in a 5-4 decision, reversed the court of appeals.¹² In concluding that gravel was a reserved mineral under the SRHA reservation,¹³ the Court stated that a substance would be considered a reserved mineral if it could be "removed from the soil . . . [and] used for commercial purposes."¹⁴

III. BACKGROUND

In 1862, Congress enacted the Homestead Act¹⁵ which allowed any person twenty-one years of age or older to enter upon and cultivate 160 acres of land.¹⁶ Mineral lands were exempted from this sale by the General Mining Law of 1872.¹⁷ Land was considered mineral in character if it was more valuable for its minerals than for any other purpose.¹⁸ However, the system was abused because of inadequate methods of classification.¹⁹ As a result, nearly all of the mineral resources in the eastern part of the United States were privately acquired.²⁰ President Theodore Roosevelt acted to prevent further abuse by withdrawing from all forms of entry 66 million

6. 85 I.D. 129 (1978).

7. *Western Nuclear, Inc. v. Andrus*, 475 F. Supp. 654 (D. Wyo. 1979), 664 F.2d 234 (10th Cir. 1981), *sub nom.* *Watt v. Western Nuclear, Inc.*, 103 S. Ct. 2218 (1983).

8. *Western Nuclear*, 475 F. Supp. at 663.

9. *Western Nuclear, Inc. v. Andrus*, 664 F.2d 234 (10th Cir. 1981).

10. *Id.* at 242.

11. *Watt v. Western Nuclear, Inc.* 103 S. Ct. 2218 (1983).

12. *Id.* at 2219.

13. *Id.* at 2232.

14. *Id.* at 2228.

15. 43 U.S.C. §§ 161-263 (1970), *repealed by* the Federal Land Policy and Management Act of 1976, § 702, Pub. L. No. 94-579, 90 Stat. 2787 (codified at 43 U.S.C. §§ 1701-1782 (1978)).

16. 43 U.S.C. § 161 (1970).

17. 30 U.S.C. §§ 21-54 (1976).

18. *Northern Pac. R. Co. v. Soderberg*, 188 U.S. 526 (1903).

19. Reeves, Geraud & Moran, *Development of Federally Reserved Minerals in Fee Lands*, 1 AMERICAN LAW OF MINING § 3.1, 467 (Rocky Mtn. Min. L. Found. 1982).

20. HIBBARD, A HISTORY OF THE PUBLIC LAND POLICIES at 515-17 (1965).

acres of land presumed valuable for coal.²¹

In order to preserve minerals for future public use while allowing agricultural settlement, President Roosevelt urged an amendment to the homestead laws reserving the minerals from surface patents.²² He pointed out to Congress that some public lands could be beneficially used for production of subsurface mineral fuels, as well as for agriculture.²³

The Coal Lands Acts of 1909²⁴ and 1910,²⁵ severed rights to coal from the surface estate.²⁶ These Acts allowed agricultural entries on the lands previously withdrawn by President Roosevelt, but reserved the rights to the coal to the federal government.²⁷

The Agricultural Entry Act of 1914²⁸ allowed entry for agricultural purposes under the homestead or desert land laws to lands withdrawn or classified as valuable for phosphate, nitrate, potash, oil, gas or asphaltic materials. The Act provided for a patent to the surface estate and reserved the particular minerals for which the land had been withdrawn.²⁹

By 1916 Congress recognized that the lands still available for homesteading in the west were suitable primarily for grazing rather than farming.³⁰ A larger grant of land was necessary to support a farm/ranch. The Stock Raising Homestead Act of 1916³¹ increased the amount of land a homesteader could claim from 160 to 640 acres.³² The passage of this act marked the defeat of a movement to retain government ownership of the remaining lands and lease them for grazing.³³ Thus, the Jeffersonian ideal of farmers making the land their own through individual efforts was preserved.³⁴ Since many valuable minerals were passing into private

21. *Id.* at 523.

22. 41 CONG. REC. 2806-08 (1907).

23. *Id.*

24. 30 U.S.C. § 81 (1976).

25. 30 U.S.C. § 85 (1976).

26. Mall, *Federal Mineral Reservations*, 20 ROCKY MTN. MIN. L. INST. 399 (1975) [hereinafter cited as Mall]. The 1909 Act allowed an entryman who had entered lands which were later withdrawn from entry as coal lands to complete his settlement, but he received a patent which reserved rights to coal. The 1910 Act opened withdrawn coal lands to agricultural entry, subject to a reservation of the coal.

27. *Id.* at 403.

28. 30 U.S.C. §§ 121-123 (1976).

29. *Id.*

30. Gallinger and Arnott, *The Rights of Surface Owners Over Federally Reserved Coal as Defined By Federal Surface Mining Legislation*, 1 PUB. LAND L. REV. 57, 58 (1980) [hereinafter cited as Gallinger].

31. SRHA, *supra* note 1.

32. *Id.* at § 291.

33. Gallinger, *supra* note 30, at 59.

34. 52 CONG. REC. 520-521 (1915) (remarks of Rep. Baker): "One of the purposes of the bill is to restore and improve the grazing capacity of the lands, . . . and at the same time to furnish homes thereon for the people of this country We want homes and not tenants even if the Government of the

ownership under previous government acts, the SRHA simply provided for a patent which reserved "*all the coal and other minerals*"³⁵ to the federal government.

IV. MINERAL RESERVATIONS

The common law of private severances has little applicability to the questions raised by patent severances.³⁶ "Private mineral severances are construed according to the specific intent of the parties as shown by the language used in the deed."³⁷ On the other hand, "[t]he rights and duties of those who claim through statutory patents are governed by the language of the statute."³⁸ It is the general rule that "[p]atent mineral reservations are construed according to the purpose for which the legislative body granted the surface and reserved the minerals. Therefore, the statute authorizing the patent controls the reservation if the patent language is erroneous or even if the reservation is omitted from the patent."³⁹

Federal grants are to be construed broadly in favor of the government with no rights passing by implication.⁴⁰ However, federal grants of land resources are "to receive such a construction as will carry out the intent of Congress,"⁴¹ and "are not to be so construed as to defeat the intent of the legislature, or to withhold what is given either expressly or by necessary or fair implication"⁴²

V. LEGISLATIVE INTENT

To ascertain the intent of a Congressional act one "must look to the condition of the country when the acts were passed as well as the purpose declared on [the Act's] face"⁴³ Legislative history, consisting of floor debates, committee reports, and amendments may be used to aid in the construction of a statute.⁴⁴

In *Western Nuclear*, the Supreme Court majority did not look to the congressional intent of the SRHA, but instead they looked to Congress'

United States should be the landlord."

35. SRHA, *supra* note 1, at § 299 (emphasis added).

36. Twitty, *Law of Subjacent Support and the Right to Totally Destroy Surface In Mining Operations*, 6 ROCKY MTN. MIN. L. INST. 497 (1961) [hereinafter cited as Twitty].

37. Mall, *supra* note 26, at 410.

38. Gallinger, *supra* note 30, at 60.

39. Mall, *supra* note 26 at 410.

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

41. *Leo Sheep Co. v. United States*, 440 U.S. 668, 682 (1979), *citing* *Winona & St. Peter R.R. Co. v. Barney*, 113 U.S. 618, 625 (1885).

42. *Leo Sheep* at 682-83, *citing* *United States v. Denver & Rio Grande R.R. Co.*, 150 U.S. 1, 14 (1893).

43. *Winona & St. Peter R.R. v. Barney*, 113 U.S. 618, 625 (1885).

44. Mall, *supra* note 26, at 411.

underlying purpose in creating the mineral reservation within the SRHA. They reasoned that "Congress' purpose in severing the surface state from the mineral estate was to encourage the concurrent development of both the surface and subsurface of SRHA lands."⁴⁵ The majority concluded that this purpose was "best served by construing the mineral reservation to encompass gravel."⁴⁶

The Supreme Court minority, however, took a broader view and looked to the Congressional intent and policy considerations behind the enactment of the SRHA. They reasoned that the ultimate Congressional purpose for enacting the homestead laws was to settle the west.⁴⁷ They concluded that it was the general belief of Congress that more states were needed "*where each citizen is the sovereign of a portion of the soil, the owner of his home and not the tenant of some (perhaps) distant landlord.*"⁴⁸

Clearly, Congress' main purpose in land grant legislation was to promote the settling of the west.⁴⁹ However, the Supreme Court, by applying the fiction that Congress' general purpose was to keep the subsurface mineral resources for public ownership and conservation, has implicitly concluded that Congress intended to retain all federal resources.⁵⁰ "The result . . . is to impute to Congress an intention to promote sound national development and conservation of federal resources."⁵¹

When construing a statute, the court may look to a contemporaneous interpretation of a statute by an officer or agency charged with its administration.⁵² Thus, a court may refer to judicial interpretations of a word in cases decided before an act was passed.⁵³

A pre-SRHA Interior Department decision, *Zimmerman v. Brunson*,⁵⁴ held that gravel was not to be considered a mineral under the mineral reservations of the previous homestead laws.⁵⁵ It was only a short time after the *Zimmerman* decision that the Department of Interior began drafting

45. 103 S. Ct. at 2226 (1983).

46. *Id.* at 2225.

47. *Id.* at 2237-38 (Powell, J., dissent).

48. *Id.* at 2238, citing H.R. REP. NO. 626, 63d Cong., 2d Sess. 11 (1914) (emphasis in original).

49. Wilkinson, *The Field of Public Land Law: Some Connecting Threads And Future Directions*, 1 PUB. LAND L. REV. 1, 30-31 (1980) [hereinafter cited as Wilkinson].

50. *Id.* at 32. Wilkinson made this statement in relation to the cases of *United States v. Union Pac. R. Co.*, 353 U.S. 112 (1957) and *United States v. Union Oil Co.*, 549 F.2d 1271 (9th Cir. 1977), *cert. denied sub nom. Ottoboni v. United States*, 435 U.S. 911 (1977). These cases addressed the scope of mineral reservations and indicates how the courts interpret these types of cases.

51. Wilkinson, *supra* note 49, at 32.

52. *Udall v. Tallman*, 380 U.S. 1, 16 (1965) *reh'g denied*, 380 U.S. 989 (1965).

53. Comment, *The Meaning of Minerals In the Stock-Raising Homestead Act Mineral Reservation*, 16 LAND & WATER L. REV. 33, 36 (1981).

54. 39 I.D. 310 (1910).

55. *Id.*

the SRHA.

Both the Tenth Circuit and the Supreme Court minority relied on *Zimmerman* as evidence that the Department of the Interior and Congress did not intend gravel to be included as a reserved mineral when the SRHA was enacted. The Supreme Court majority however, dismissed *Zimmerman* by stating that they could not infer that Congress was aware of the decision, or that Congress understood that gravel was not included in the mineral reservation.⁵⁶ Prior to the enactment of the SRHA, the *Zimmerman* decision was criticized as being inconsistent with the Department of Interior's previous rulings⁵⁷ and was overruled in 1929 by *Layman v. Ellis*.⁵⁸ However, it cannot be ignored that the Interior Department did not consider gravel to be a reserved mineral under the homestead laws when the SRHA was enacted.

A. What is a "Mineral"?

Generally, there are four tests which have been developed by the courts to determine what is to be considered a mineral: the separate value test, the energy resource test, the portion of the surface test and the settled expectations test. Each will be discussed separately.

1. Separate Value Test

Prior to *Zimmerman*, the Department of the Interior recognized that land containing deposits of other common substances constituted "mineral land" if the deposits were found "in quantity and quality sufficient to render the land more valuable on account thereof than for agricultural purposes."⁵⁹ The Supreme Court followed this rationale in *Northern Pacific Railway v. Soderberg*.⁶⁰ In *Soderberg* the Court held that lands chiefly valuable for granite quarries were mineral lands under an 1864 statute granting certain property to railroads. The Court reasoned that "mineral lands include not merely metalliferous lands, but all such lands that are chiefly valuable for their deposits of a mineral character which are useful in the arts or valuable for the purposes of manufacture."⁶¹

Zimmerman was not completely at odds with this approach. In that decision, the Secretary of the Interior had stated that gravel was not to be

56. 103 S. Ct. at 2224 (1983).

57. *Id.* at 2224 n.7. By the time the SRHA was enacted, a leading contemporaneous treatise had pointed out that *Zimmerman* was inconsistent with the Department of Interior's traditional treatment of the issue of what was a "mineral." 2 LINDLEY ON MINES § 424 at 996 (3d ed. 1914).

58. 52 I.D. 714 (1929).

59. 103 S. Ct. 2218, 2224 n.7 (1983).

60. 188 U.S. 526 (1903).

61. *Id.* at 536-37.

considered a mineral unless the deposits "[possessed] a peculiar property or characteristic [which gave] them a special value."⁶²

The Interior Department reaffirmed the use of this test in *United States v. Isbell Construction Co.*⁶³ In *Isbell*, the Department held that gravel was a mineral⁶⁴ pursuant to a mineral reservation under the Taylor Grazing Act.⁶⁵ The Department stated that, "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."⁶⁶

In *Western Nuclear*, the district court relied upon this test in determining that gravel was a reserved mineral.⁶⁷ The district court stated that a substance was a mineral if it was found to be valuable at any point in time.⁶⁸ The Supreme Court followed this rationale by adopting the *Isbell* language. The Court concluded that in order for a substance to be a reserved mineral under the SRHA, it must first be capable of being "taken from the soil and used for commercial purposes."⁶⁹

The problem with this definition of mineral is that the value of a substance is subject to change over time. Due to inflation, technological changes or an increasing population, a substance which once had little value may suddenly become a mineral reserved to the Federal Government. "Thus it would appear that a gravel pit located adjacent to the right-of-way of a proposed interstate highway might be deemed a 'valuable mineral deposit,' whereas one remotely located might not."⁷⁰

Clearly, this definition is too broad, and could conceivably include as a "reserved mineral" anything of value either upon or under SRHA lands. One commentator has noted that, "[l]andowners have sold 'moss rock,' common rock on which moss has grown, to contractors to decorate fireplaces and homes. The rock has become 'valuable,' but it is absurd to think that this common rock should now be included in a mineral reservation to the government."⁷¹

62. 39 I.D. 310, 312 (1910).

63. 78 I.D. 385 (1971).

64. *Id.* at 391.

65. 43 U.S.C. § 315(g) (1976).

66. 78 I.D. 385, 391 (1971) (emphasis in original).

67. *Western Nuclear, Inc. v. Andrus*, 475 F. Supp. at 662 (D. Wyo. 1979).

68. *Id.*

69. 103 S. Ct. at 2229 (1983). The Supreme Court majority also relied on 1 AMERICAN LAW OF MINING § 3.26, 552 (Rocky Mtn. Min. L. Found. 1982) "A reservation of minerals should be considered to sever from the surface all mineral substances which can be taken from the soil and which have a separate value." *Id.*

70. Carpenter, *Severed Minerals as a Deterrent to Land Development*, 51 DEN. L.J. 1, 14 (1974) [hereinafter cited as Carpenter].

71. Note, *Public Lands—The Inclusion of Gravel in a Mineral Reservation to the United States Under the Stock-Raising Homestead Act. Western Nuclear v. Andrus*, 18 LAND & WATER L. REV. 201, 216 (1983).

2. Energy Resource Test

President Theodore Roosevelt first suggested to Congress that by including a mineral reservation in land patents, public lands could be used for production of subsurface mineral fuels, as well as for agriculture.⁷²

In *Skeen v. Lynch*,⁷³ the Tenth Circuit determined that oil and gas were reserved minerals under the SRHA reservation.⁷⁴ In reaching this conclusion, the court stated that the SRHA mineral reservation was to be construed broadly.⁷⁵

The Ninth Circuit continued this trend of broad interpretation in *United States v. Union Oil Company of California*.⁷⁶ In that case the court found that geothermal steam used to generate electrical power was a reserved mineral under the SRHA reservation.⁷⁷ Even though geothermal steam was probably not contemplated to be a reserved mineral by Congress in 1916,⁷⁸ the Ninth Circuit concluded that the intent of Congress was to "reserve unrelated subsurface resources, particularly energy sources"⁷⁹ to the federal government.

In *Western Nuclear*, the Tenth Circuit Court of Appeals applied the energy resource rationale used in *Union Oil*, and concluded that gravel was not a reserved mineral under the SRHA reservation.⁸⁰ The court stressed the differences between geothermal steam and gravel. "To us, there is a vast difference between geothermal steam and gravel. Gravel is certainly not an unrelated subsurface energy resource."⁸¹

To strictly apply the energy resource test would eliminate precious substances like gold and silver from the mineral reservation. Obviously, this cannot be what Congress intended. However, as one commentator suggests, the energy resource test should be applied to deal with new substances, or new uses for substances.⁸² This construction would both broaden the scope of the mineral reservation to include new energy

72. 41 CONG. REC. 2806 (1907). "Enactment of such legislation would provide title to . . . the surface land as separate and distinct from the right to the underlying mineral fuels in regions where these may occur."

73. 48 F.2d 1044 (10th Cir. 1931).

74. *Id.* at 1046.

75. *Id.*

76. 549 F.2d 1271 (9th Cir. 1977), *cert. denied*, 434 U.S. 930 (1977).

77. *United States v. Union Oil Co. of Cal.*, 549 F.2d at 1274.

78. *Id.* at 1273-79.

79. *Id.* at 1279.

80. *Western Nuclear*, 664 F.2d at 242. (1982).

81. *Id.* at 241.

82. Note, *supra* note 72, at 216. President Roosevelt intended the mineral reservation to reserve the "underlying mineral fuels" from the surface estate. See *supra* note 72. Therefore, new substances not commonly recognized as minerals and which are not useful as an energy resource should not be included as a mineral under the energy resource test.

resources, and also retain the substances commonly recognized as reserved minerals such as gold and silver.

3. *Portion of the Surface Test*

This test was first applied to the SRHA mineral reservation in *State ex rel. State Highway Comm'n v. Trujillo*.⁸³ The New Mexico Supreme Court concluded that because gravel formed a part of the surface and could not be obtained without destroying the surface, and had no exceptional characteristics distinguishing it from the surrounding soil, it was not a mineral.⁸⁴ However, the holding of this case has been criticized because it appears that the court used private deed rules of construction to interpret a patent mineral reservation.⁸⁵

In *State Land Board v. State Dep't of Fish and Game*,⁸⁶ the Utah Supreme Court held that gravel was not reserved to the State under a mineral reservation.⁸⁷ They reasoned that since sand and gravel were such widely occurring materials in the earth's surface, to reserve them to the grantor would in many instances nullify the grant by allowing the state to destroy the surface estate in order to obtain the gravel.⁸⁸

The Tenth Circuit also applied this test in *Western Nuclear*. The court stated:

In our view, the gravel lying under and upon the appellant's land is so closely related to the surface estate, that it is a part and parcel of it. If such common substances were considered to be included within the mineral reservation, then under all the many patents issued pursuant to the Stock Raising Homestead Act, the patentees would own only the dirt, and little or nothing more.⁸⁹

The protection of the surface estate is a strong policy argument. to include a substance like gravel, which makes up a part of the soil, as a reserved mineral takes away the surface owner's sovereignty over the soil. In effect, the patentee would merely have a grazing lease, and would be the tenant of the mineral owner. This would be contrary to the intent of Congress, which was to provide SRHA lands for settlement,⁹⁰ allowing each citizen to be the sovereign of a portion of the soil.⁹¹

83. *State ex rel. State Highway Comm'n v. Trujillo*, 82 N.M. 694, 487 P.2d 122 (1971).

84. *Id.* at 696, 487 P.2d at 124.

85. Comment, *supra* note 54 at 40. The New Mexico Supreme Court apparently based its decision on an A.L.R.2d annotation dealing with gravel as a reserved mineral in private deed mineral reservations. *See* Annot., 95 A.L.R.2d 843 (1964).

86. 17 Utah 2d 237, 408 P.2d 707 (1965).

87. *Id.* at 239, 408 P.2d at 708.

88. *Id.*

89. *Western Nuclear*, 664 F.2d at 242.

90. Gallinger, *supra* note 30, at 59.

91. *See supra* note 34.

The weakness of this argument is that Congress provided for compensation to the surface owner if his lands were damaged by any mining activity.⁹² Because Congress expressed a national policy of conserving mineral resources and provided a statutory procedure for the surface owner to recover damages,⁹³ "it is clear that Congress intended that the holder of the mineral estate should be able to destroy the surface if required by his mining operations to do so."⁹⁴

The Supreme Court majority in *Western Nuclear* correctly disposed of the portion of the surface test and concluded that the surface estate was meant to be used jointly by the patentee and the mineral entryman.⁹⁵ They reasoned that Congress foresaw the destruction of the surface estate by giving the mineral entryman "the right to exclusive possession of 'all the surface included within the lines of [his] locatio[n]' and the right to extract minerals lying beneath the surface."⁹⁶ As one commentator suggests, minerals would not be conserved for the use of future generations if the owner of the surface could prevent mining because it interfered with the use of the surface estate.⁹⁷

One court has applied the surface use theory to SRHA lands. In *Occidental Geothermal, Inc. v. Simmons*,⁹⁸ the United States District Court for the District of Wyoming concluded that the federal government could build and operate geothermal power plants on SRHA lands.⁹⁹ They reasoned that since geothermal steam was a reserved mineral under the SRHA reservation, the federal government could use as much of the surface as necessary to remove and utilize the mineral.¹⁰⁰

4. *Settled Expectations Test*

This test was first recognized in *Leo Sheep Co. v. United States*.¹⁰¹ In that case the Supreme Court held that the federal government had not impliedly reserved an easement across land originally granted under a

92. 43 U.S.C. § 299 (1976). Section 299 states that any person who acquires from the United States the right to mine and remove mineral deposits "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 . . . upon payment of the damages to crops or other tangible improvements to the owner thereof."

93. Twitty, *supra* note 36, at 515.

94. *Id.* at 514.

95. *Western Nuclear*, 103 S. Ct. at 2226, *citing* H.R. REP. No. 35, 64th Cong., 1st Sess. 4, 18 (1916).

96. *Western Nuclear*, 103 S. Ct. at 2227, *citing* 30 U.S.C. § 26 (1976).

97. Twitty, *supra* note 36, at 515.

98. 543 F. Supp. 870 (1982).

99. *Id.* at 877.

100. *Id.* at 878.

101. 440 U.S. 668 (1979).

railroad land grant statute.¹⁰² The Court stated:

Generations of land patents have issued without any express reservation of the right now claimed by the Government. Nor has a similar right been asserted before This Court has traditionally recognized the special need for certainty and predictability where land titles are concerned, and we are unwilling to upset settled expectations¹⁰³

The Supreme Court dissent in *Western Nuclear* emphasized that the purpose of the SRHA was to settle the West.¹⁰⁴ Homesteaders made their claims and developed their ranches with the expectation of perpetual ownership and control of the land.¹⁰⁵ Since the SRHA was first enacted, patentees and their successors have treated the gravel as part of their surface estate.¹⁰⁶

The first attempt by the Department of Interior to acquire ownership of gravel on SRHA lands did not occur until . . . 1975. One would think it is now too late, after a half-century of inaction, for the Department to take action that raises serious questions as to the nature and extent of titles to lands granted under the SRHA. Owners of patented land are entitled to expect fairer treatment from their government.¹⁰⁷

The minority correctly analyzed *Leo Sheep*, but incorrectly used the Common Varieties Act of 1955¹⁰⁸ to support their conclusions.¹⁰⁹ Since the surface owners had used gravel for many years prior to 1975, they were led to believe that they owned the gravel. Sixty years of inaction by the federal government is strong evidence that they did not consider gravel a reserved mineral under the SRHA mineral reservation.

VI. CONCLUSION

The term "mineral" and the precise scope of the SRHA mineral reservation cannot be expressly defined. However, substances such as sand,

102. *Id.* at 682.

103. *Id.* at 687.

104. *Western Nuclear*, 103 S. Ct. at 2237-38.

105. Gallinger, *supra* note 30, at 62.

106. Note, *supra* note 72, at 218.

107. *Western Nuclear*, 103 S. Ct. at 2238.

108. 30 U.S.C. §§ 601-615 (1976). Section 611 provides that "[n]o deposit of common varieties of sand, stone, gravel . . . shall be deemed a valuable mineral deposit within the meaning of the mining laws so as to give effective validity to any mining claim hereafter located under such mining laws." The Common Varieties Act appears to state that gravel is not a mineral. However, a "locatable mineral" under the mining laws and a "reserved mineral" under the SRHA reservation are not the same thing. Carpenter, *supra* note 71, at 13-14. In fact it is the position of the Department of the Interior that because of this difference, the change in the mining law did not affect the SRHA. *United States v. Isbell Construction Co.*, 78 I.D. 385, 389-90 (1971) (quoting from *Solic. Op.*, M-36417 of Feb. 15, 1957).

109. *Western Nuclear*, 103 S. Ct. at 2236-37.

gravel, and common rocks and stones should not be included in such a definition.

The majority in *Western Nuclear* should have relied on *Zimmerman v. Brunson*. This case represented the recognized position of the Interior Department when the SRHA was enacted, and indicates that gravel was not considered a mineral under the SRHA mineral reservation.

The separate value test relied upon by the majority in *Western Nuclear* creates an overly broad definition of the term "mineral." It raises more questions than it answers and will be the source of future litigation. For these same reasons, the separate value test should not be used to interpret the SRHA mineral reservation.

The energy resource test could be used to interpret the SRHA mineral reservation, but a narrow reading of *Union Oil* would exclude such substances as gold and silver from the definition of "mineral." However, if *Union Oil* was read to apply to new energy resources, Congress' purpose of reserving subsurface mineral fuels would be accomplished, while retaining commonly recognized minerals like gold and silver within the SRHA mineral reservation.

The portion of the surface test should not be used. By enacting the SRHA, Congress intended to convey the surface estate to the patentee while reserving the subsurface energy resources. From the provisions providing compensation to the surface owner for damages caused by mining activity, it is clear that Congress anticipated the destruction of the surface estate to utilize these resources.

The Supreme Court majority should have applied the settled expectations test of *Leo Sheep* to determine the meaning of "mineral" under the SRHA mineral reservation. By not claiming ownership in commonly occurring substances like gravel for nearly 60 years, the surface owners have the right to expect that these materials were part of the surface estate. To now take these substances away from the surface owner will raise serious questions as to the extent of land titles granted under the SRHA. As stated by the Supreme Court in *Leo Sheep*, there is a "special need for certainty and predictability where land titles are concerned."¹¹⁰

Gravel is not a valuable energy resource. Moreover, the federal government did not claim ownership of the gravel until 60 years after the enactment of the SRHA. In view of these facts and the Supreme Court's decision in *Leo Sheep*, the Supreme Court should have held that gravel was not a mineral reserved under the SRHA mineral reservation.

110. *Leo Sheep Co.*, 440 U.S. at 687.