Jeff Fugate
Office of the Attorney General
1300 Broadway Suite 700
Denver, CO 80203

December 7, 2017

Via Email and US Mail

Re: Dill Pit, DRMS Permit M-2009-077
Application to convert from 110 to 112 permit
Sand and Gravel as "Minerals" in reservation language

Dear Mr. Fugate:

You and I have discussed the status of the application by Tracy and Ed Grimes to convert Permit No. M-2009-077 from an existing 110 permit to a 112 permit. Tracy and Ed Grimes are the owners of 100% the surface of the permit area, and the owners of more than 50% of the mineral estate in those lands.

Legal right of entry is a required element of any permit application. C.R.S. 34-32.5-112(1)(c)IV) and Rules 6.3.7 and 6.4.14. In the course of the application approval process, the applicants were informed that the Division of Reclamation, Mining, and Safety requires that they obtain the consent of all of the mineral owners to show that they have the legal right to enter. Apparently this is being made a condition of approval of their permit conversion. According to an email dated August 17, 2017 from Wally Erickson to Bruce Humphries, the State's position is as follows:

> "Regarding legal right to enter: The AGO has responded to Peter [Hays]'s informal inquiry. *Although not explicitly required under C.R.S. 34-32.5-112(1)(c)IV) or Rules 6.3.7 and 6.4.14, the majority interest holder should attain an agreement with the minority interest holders addressing right to enter*. Obviously, if the deed clarifies sand and gravel are assigned to the surface owner and not the mineral owners, then right to enter is limited to the surface owner of record." (Italics added).

Mr. and Ms. Grimes consulted me about this issue, and after discussing it with you and agreeing on this approach, I am offering this letter to outline the state of the law in Colorado concerning the respective rights of surface and mineral owners, as well as the rights of owners of undivided fractional interests in minerals to develop their minerals with the consent of fewer than all the other mineral owners. It is the applicant's position that sand and gravel is included in the surface estate. The applicant asserts further that, even if the sand and gravel are part of the mineral estate, the co-tenant of a mineral estate has the right to develop it without the consent of the other co-tenants. These positions are well supported by case law and statute.

1580 LINCOLN STREET, SUITE 1280 DENVER, CO 80203
303.860.1800 TEL 720.484.3730 FAX | CHAYES@HAYESLAWFIRMLLC.COM

1. **The general rule in Colorado is that sand and gravel are considered to be part of the surface estate.**

The majority rule in nearly every state, including Colorado, holds that the owner of the surface of a tract is the owner of, and has the right to develop, sand and gravel on their lands. The leading treatise entry on the subject is "Clay, Sand and Gravel as Minerals Within Deed, Lease or License", 95 A.L.R. 2d 843. See also George Reeves, "The Meaning Of The Word "Minerals", 54 North Dakota Law Review 419 (1978).

Colorado courts have ruled on this issue in a number of cases, the most important of which are *Farrell v. Sayre*, (270 P.2d 190 (Colo. 1954), and *Morrison v. Socolofsky*, 600 P.2d 121 (Colo. App. 1979). In *Farrell v. Sayre*, the Supreme Court construed the following reservation contained in a deed from Sayre to Carleno: "…and excepting and reserving all mineral and mineral rights and rights to enter upon the surface of the land to extract the same." Carleno conveyed his interest to Farrell, who gave a gravel lease to the Denver and Salt Lake Railroad Company. Sayre objected, citing his mineral reservation, and the case eventually went to the Supreme Court, which held in favor of Farrell, stating:

> "We might conclude this opinion by saying that if the contentions of defendant Sayre and the findings of the trial court were to be upheld, it is tantamount to saying that, originally, by the Carleno deed, Sayre retained all that he granted thereby: that the deed served no useful purpose, and the grantee received nothing." 270 P.2d at 192.

Farrell v. Sayre remains good law in Colorado.

In *Morrison v. Socolofsky*, the Court of Appeals ruled on a reservation of "oil, gas and other minerals". The court determined that the word "minerals" does not include sand and gravel as a matter of law. The court went on to find that a reservation of "minerals" would not include sand and gravel in the absence of a clear expression of the intent of the parties to the deed. 600 P.2d 122.

The Tenth Circuit held in *United States v. Hess*, 194 F.3d 1164 (10th Cir. 1999); (after remand, 348 F.3d 1237 (10th Cir. 2003)) that a reservation of "all oil and gas, coal and other minerals" from a land exchange patent under the Indian Reorganization Act did not include sand and gravel as a matter of law. The court reasoned that there was no expression of Congressional intent to that effect in the language of the statute that authorized, but did not require, the Secretary of the Interior to reserve minerals from patents issued in land exchange transactions. The court declared that Colorado law should be applied to the question of how the reservation at issue in the case should be interpreted under the facts of that particular case. 194 F.3d 1173.

Following remand and a second appeal, the court (in *U.S. ex rel Southern Ute Indian Tribe v. Hess*, 348 F.3d 1237 (10th Cir. 2003)) found that Colorado's law, as expressed in *Farrell v. Sayre* and *Morrison v. Socolofsky*, is that

> "First, if a majority of the …property is underlain with gravel and such gravel cannot be mined without disturbing the property's surface, *the general rule applies that a mineral reservation of all minerals does not include gravel*. Second, that general rule can be overcome upon a finding that the parties to the contract nevertheless intended for the word "mineral," as used in the reservation, to include gravel." 348 F.3d 1247 – 48. (Italics added).

In its summary of the case's holding, the court reiterated its statement of the general rule: "Under Colorado law, the general rule is that gravel is not treated as a mineral within a general mineral reservation when gravel underlies a majority of the surface of the property." *Id.*, 1250.

To put it in the terms of Mr. Erickson's memo to Mr. Humphries, a deed does not need to clarify that the sand and gravel are assigned to the surface owners rather than the mineral owners. The default rule in Colorado is that sand and gravel are included in the surface estate, even in the face of a deed reservation of "minerals," unless there is a clear expression of intent by the parties to a deed that the grantor would retain the sand and gravel.

2. An owner of an undivided fractional interest in minerals has the right to develop their estate without the concurrence of the owners of the other fractional interests

Even conceding, for the sake of the argument, the question of whether sand and gravel are "minerals" included in a mineral reservation, it is also the rule in Colorado that the owner of a fractional interest in a mineral estate has the right to use and develop that estate without the consent of the other owners of fractional interests in that same estate. The legislature addressed this issue in Title 34, Article 44, C.R.S. In particular, §34-44-103 C.R.S. declares that:

> "If two or more persons own any mine they shall be considered tenants in common. Any one or more of such tenants in common shall have the right to enter upon, occupy, prospect, develop, and work said mine in a minerlike manner, extracting, milling, and disposing of the ore from the common property without the consent of any nonworking tenant in common, subject to accounting to the nonworking tenant in common for his proportionate share of the net profits of such mining operations."

Even if sand and gravel were minerals included in a mineral reservation (which they are not), the Grimeses, who own 5/8ths of the mineral estate in the subject tract, would not need the consent of the other mineral interest owners to develop their interest. They would have to account to their co-tenants for their proportionate share of the net profits from production, but would not need to get them to agree in advance.

Finally, the administrative law issue presented by Mr. Erickson's email to Mr. Humphries should be addressed. That message states that the consent of other mineral owners *should* be obtained, even though it is not explicitly required by statute or rule. In this context, it should be noted that an administrative agency has the right to interpret its statutes and regulations, but it does not

have the right to create new legal obligations that are not provided for in legislation. The statement that there is no "explicit" requirement in statute to obtain the consent of the other mineral owners is an acknowledgment that there is no such requirement at all. If it is not set forth in the statute or regulation, the Division does not have the right to impose it. We are not aware of any rulemaking or interpretive guidance from the Board that supports Mr. Erickson's imposition of this requirement.

It is our understanding that the Division has not found any other issues with the application for conversion of this permit. We believe that the Division's requirement to obtain the consent of other mineral owners in the permit area is not supported by case law, statute, or regulation. Accordingly, we urge the Attorney General's office and the Division of Reclamation, Mining and Safety to approve this permit.

Please contact me if I can answer any additional questions.

Very truly yours,

Christopher G. Hayes

Cc: Client
HB Humphries

NOW IS IT A MINERAL? THE SUPREME COURT TAKES ANOTHER LOOK AT SAND AND GRAVEL[1]

Bjork Lindley Little PC

The United States Supreme Court has considered the question of whether sand and gravel are "minerals" twice in the last twenty years. In the more recent case, *BedRoc Ltd. LLC v. United States*[2], the court considered the meaning of the word "mineral" as used in a reservation of "oil and gas and other valuable minerals" in favor of the United States from a patent issued under the Pittman Act of 1919. In the earlier case, *Watt v. Western Nuclear*,[3] the court pondered the meaning of the same word, used in a reservation of "coal and other minerals." In *Western Nuclear*, the court found that the reservation of "minerals" included sand and gravel. In *BedRoc Ltd.*, the court found that sand and gravel were not included in the reservation of "valuable minerals." What's going on here? Why is it so hard to figure out whether or not sand and gravel are minerals?

I. The Significance of Ambiguity in Federal Patents

One reason is that the term "mineral" is inherently ambiguous, since the word is used in

---

[1]This paper was presented to the Colorado Bar Association Natural Resources and Energy Law Section on September 10, 2004. The author represented Amicus Curiae National Stone, Sand and Gravel Association in *BedRoc Ltd. LLC v. United States* and in *United States v. Hess*.

[2]541 U.S. _____, 124 S. Ct.1587 (2004).

[3]462 U.S. 36 (1983).

many ways. The strictest definition of a "mineral" is as a naturally-occurring inorganic substance having a definite chemical composition and physical structure[4]. Considered this way, things like quartz, feldspar and gold fit the definition readily, while things like coal (organic substance; no fixed chemical composition; no definite physical structure) and oil and gas (organic substance; no fixed chemical composition; fluid physical structure) do not, nor do sand and gravel (inorganic substance; indefinite chemical composition; indefinite physical structure). Under this most restrictive definition, a reservation of "minerals" would not include oil or gas, let alone sand and gravel. It probably would not include coal. That is one reason why reservations of minerals usually name coal, oil and gas specifically. However, minerals have an economic definition as well as a physical one.

When we add the concept of the economic mineral, that is "things that have value and can be severed from the ground," finding the meaning of the mineral reservation becomes more complicated. The concept of "value" is inextricably linked to the question of whether or not certain substances are "mineral" for legal purposes. The General Mining Act of 1872[5], for example, provides that "valuable mineral deposits" in lands belonging to the United States shall be open to location. The Common Varieties Act of 1955[6] removed sand and gravel from the operation of the General Mining Act and provided that common sand and gravel were no longer

---

[4]Hurlbut, Dana's Manual of Mineralogy 18th Ed. (1971).

[5]30 U.S.C. § 22.

[6]30 U.S.C. § 611.

to be locatable as "valuable minerals," unless they had some quality giving them distinct and special value. There is a substantial body of case law that concerns itself with the question of the economic definition of a "valuable mineral." (*See,* for example, *Andrus v. Charlestone Stone Products*[7]; *United States v. Coleman*[8] ; *Associated General Contractors v. [Utah] Board of Oil, Gas & Mining*[9]). In addition, the question of whether a substance is a "valuable mineral" in the general sense, the way gold, metallic ores, coal, and oil and gas are, is distinct from the question of whether a particular deposit of a particular substance has economic value. Deposits of sand and gravel may have great economic value in certain places, but their value depends on location and proximity to market; they are not considered intrinsically valuable unless they have distinct and special qualities. Economic value in place can change over time, and what was once worthless can become valuable as a result of changes in development patterns, markets, and transportation technology. It is this shifting question of value, as opposed to the physical nature of a substance, that causes the difficulty in construing the reservation of minerals from a federal patent.

In *Watt v. Western Nuclear*, the Supreme Court was required to interpret the extent of the

---

[7]436 U.S. 604 (1978) (holding that water is not a valuable mineral for purposes of locating claims under the General Mining Act. The Supreme Court passed up the chance to consider the nature of gravel in that case).

[8]390 U.S. 599 (1968)

[9]38 P.3d 291 (Utah 2001)

reservation of "coal and other minerals" to the United States from patents granted under a statute that had the purpose of encouraging settlers to populate and cultivate the rangelands of the West. The Court found the word "minerals" to be ambiguous, and held that the term must be interpreted in "light of the use of the surface estate that Congress contemplated." 462 U.S. at 52. There was little doubt that ordinary gravel was not considered to be an economic mineral at the time the statute was enacted.[10]

The Court first had to deal with the dictionary definition, finding that

> In the broad sense of the word, there is no doubt that gravel is a mineral, for it is plainly not animal or vegetable. But, the scientific division of all matter into the animal, vegetable or mineral kingdom would be absurd as applied to a grant of lands, since all lands belong to the mineral kingdom.' . . . If all lands were considered 'minerals' under the SRHA, the owner of the surface estate would be left with nothing. 462 U.S., 43.

But the Court also had to deal with the problem of the dual economic and physical definitions:

> "For a substance to be a mineral reserved under the SRHA, it must be not only a mineral within one or more familiar definitions of that term, *as is gravel*, but also the type of mineral that Congress intended to reserve to the United States under the SRHA." *Id*., 44. (Italics added).

Then, the Court engaged in a bit of sleight of hand, defining the reservation negatively in terms of Congress's intent as applied to the grant. The Court, mindful of the statutory goal of settlement, defined the term "mineral" to mean "substances that are mineral in character (*i.e.*, that 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*." 462

---

[10] *Zimmerman v. Brunson*, 39 L.D., 310 (1910).

U.S. at 53. (Italics added.) The Court relied on its interpretation of Congressional intent to find that Congress meant to encourage the concurrent development of the surface and the subsurface, and did not mean to entrust the development of mineral resources to persons "whose interests were known to lie elsewhere,"[11] and used that inference of intent to hold that gravel was a mineral for purposes of the Stock Raising Homestead Act ("SRHA").[12] Justices Powell, Rehnquist, Stevens and O'Connor strenuously dissented from that holding and its logic. Commenters since have pointed out that the standard articulated in *Western Nuclear* is circular and likely to lead to more, not less, uncertainty over the meaning of the term[13] Over the years, the *Western Nuclear* standard has been applied to reservations of minerals from patents issued under the Taylor Grazing Act,[14] the Indian Reorganization Act[15] and the Pittman Act[16]; it has

---

[11]462 U.S. at 56

[12]39 Stat. 862 (repealed 1976)

[13]Justice Powell was the first, 462 U.S. 61. Justice Stevens wrote a separate dissent stating that he would not have accepted the case for review by the Supreme Court, as it was adequately adjudicated in the Tenth Circuit. Justice Stevens also dissented from the *BedRoc Ltd., LLC* decision.

[14]*Poverty Flats Land & Cattle v. United States*, 788 F.2d 676 (10th Cir. 1986).

[15]*United States v. Hess*, 194 F.3d 1164 (10th Cir. 1999); following remand and subsequent appeal, 348 F.3d 1237 (2003). The *Poverty Flats* and *Hess* decisions both turned on

been applied under the SRHA to "minerals" such as scoria[17], geothermal heat[18], caliche[19], and, of course, gravel. In general, the courts have been quite willing to find that any economic substance was reserved to the United States under the SRHA, while they have been less willing to extend the SRHA reasoning to reservations under other statutes.

The issue arose In *BedRoc Ltd. LLC* under the Pittman Underground Water Act of 1919[20]. That Act authorized the grant of patents to settlers in Nevada who developed underground water resources; the statute required that patents would be subject to a reservation of "coal and other valuable minerals in the lands . . . together with the right to prospect for, mine and remove the same." The patent that was the subject of *BedRoc Ltd, LLC* was for 560 acres located about 65 miles north of Las Vegas; it was issued in 1940 to Newton and Mabel Butler.

---

the fact that the patents involved derived from land exchanges, not statutory land grants. Therefore, the Congressional intent factor that figured so prominently in *Western Nuclear* did not apply.

[16] *BedRoc Ltd.*

[17] *Hughes v. MWCA, Inc.*, 12 Fed. Appx. 875 (10th Cir. (NM.) 2001).

[18] *Rosette Inc. v. United States*, 277 F.3d 1222 (10th Cir. 1999); *United States v. Union Oil Co. Of California*, 549 F.2d 1271 (9th Cir. 1977).

[19] *Poverty Flats.*

[20] 41 Stat.293 (repealed 1964).

In 1993, the Butlers sold the property to Earl Williams, who began extracting sand and gravel and selling it into the regional market. The BLM promptly served him with a trespass notice under 43 C.F.R. 9239.0-7 (1993). Williams and his successors in interest appealed, and the United States prevailed at the IBLA, the District Court and the Ninth Circuit. The dispute ultimately made its way to the United States Supreme Court. The United States argued there that, the Supreme Court having found in a nearly identical case (*Watt v. Western Nuclear*) that sand and gravel are minerals for purposes of a nearly identical reservation, precedent required that the Supreme Court affirm the Ninth Circuit's decision in this case. The appellants argued that the Pittman Act reservation was different than that of the SRHA and, in any case, *Western Nuclear* was wrongly decided and should be overturned. The appellants felt that they had a good shot at prevailing, because three of the four justices who dissented from the *Western Nuclear* decision were on the bench when *BedRoc Ltd*. was accepted for review.[21]

However, rather than overturning *Western Nuclear,* a plurality of the *BedRoc Ltd*. Court[22] distinguished it, finding that the Pittman Act reserved "coal and other valuable minerals," while the SRHA reserved "coal and other minerals." To the Court, the difference was as night and day. According to the *BedRoc* Court, the *Western Nuclear* Court had been required to interpret an ambiguous term, making it necessary to resort to "speculat[ion] about Congressional intent with

---

[21] Justices Rehnquist, O'Connor, Powell and Stevens dissented in *Western Nuclear*; only Justice Powell had retired in the interim.

[22] Justices Rehnquist, O'Connor, Scalia and Kennedy were the plurality.

respect to the scope of the amorphous term 'minerals' [as used in the SRHA]."[23] By contrast, the Court found the addition of the modifier "valuable" in the Pittman Act was enough to render Congress' intent clear. The *BedRoc Ltd*. Court found that sand and gravel were not valuable minerals when Congress enacted the Pittman Act in 1919: "[they] were, and are, abundant throughout Nevada; they have no intrinsic value; and they were commercially worthless in 1919 due to Nevada's sparse population and lack of development. Thus, even if Nevada's sand and gravel were regarded as minerals, no one would have mistaken them for valuable minerals."[24] The Court then went on to say that "[b]ecause we readily conclude that the 'most natural interpretation' of the mineral reservation does not encompass sand and gravel, we 'need not consider the applicability of the canon that ambiguities in land grants are construed in favor of the sovereign'[as they had done in *Western Nuclear*]."[25]

Finally, the court relied on the statutory context of the Pittman Act, reasoning that Congress must have intended that, for purposes of the Pittman Act, "valuable minerals" meant the same thing as "valuable mineral deposits" under the General Mining Act of 1872. Because no one could have legally located a claim on sand and gravel under the General Mining Act in 1919, Congress could not have intended the term "valuable mineral" to include sand and gravel

---

[23] 541 U.S. _____, slip op. at 6.

[24] *Id.*, slip op. at 8.

[25] *Id.*, at 8 , citing *Amoco Production Co. v. Southern Ute Tribe,* 526 U.S. 865, 880 (1999).

when it passed the Pittman Act. Thus, the court was able to reach a sensible result without having to overturn *Western Nuclear*, which was only twenty years old.

This did not please everyone. Justices Thomas and Bryer, for example, noted in their concurrence that Congress used the terms "minerals" and "valuable minerals" more or less interchangeably in the text of the Pittman Act. Those justices stated that the court placed too much reliance on the word "valuable" as a modifier. They wrote that they believed the court to have erred in *Western Nuclear* when it found sand and gravel to be minerals; however they acknowledged that significant reliance interests would be upset if the court overruled *Western Nuclear*, and did not advocate doing so.

The dissent [26] stated that Congress' intent in reserving minerals under the Pittman Act was the same as that expressed in the SRHA and, therefore, the holding in this case should be the same as in *Western Nuclear*. The dissenters, too, pointed out that the terms "mineral" and "valuable mineral" were both used in the Pittman Act, and stated that "the single word 'valuable', in short, cannot support the weight the Chief Justice places on it."[27].

II. The Meaning of the Term in State Law

In contrast to the Supreme Court's apparent ambivalence on the nature of sand and gravel, most state jurisdictions subscribe to the rule that the terms "mineral" and "valuable mineral" do not include ordinary sand and gravel when used in a conveyance or reservation, unless the deposit has some unique value, or the parties to the transaction clearly state their intent

---

[26] Justices Stevens, Souter and Ginsburg dissented

[27] *Id.*, dissent at 3

that the reservation should include it. *See* "Clay, Sand and Gravel as Minerals Within Deed, Lease or License", 95 ALR2d 843; G. Reeves, The Meaning of the Word "Minerals."[28] One significant reason for this is that state courts are usually construing contracts between private parties; the policy concerns that weigh down public lands issues are generally absent. The outcome of the decision may allocate rights between private parties but will not normally affect general policy. In private contract disputes, the meaning of the contract governs first, and if that is not clear on its face, the court will look at extrinsic evidence of the intent of the parties to find the correct interpretation. In most of the reported cases, the meaning of the terms depends on the circumstances of the transaction and the relative positions of the parties. In federal cases, by contrast, there is a canon of construction that holds that ambiguity is to be resolved in favor of the United States.

Land conveyances involving split estates, in which the seller reserves the minerals and conveys the surface (or vice versa), are commonplace, and most people think they know what "minerals" and "surface" mean. However, when the seller claims that his reservation of minerals includes sand and gravel, and those substances make up the bulk of the surface, then what has the buyer actually gotten out of the transaction? (*See*, for example, *Morrison* v. *Socolofsky*[29]; *Farrell v. Sayre*[30], both holding that the buyer of the surface estate has not gotten the benefit of

---

[28]54 NDL. Rev. 419 (1978).

[29]270 P.2d 190 (Colo. 1954)

[30]600 P.2d 121 (Colo. App. 1979)

her bargain if the mineral estate reserved by the seller includes gravel with the attendant right to destroy the surface in the process of mining it). Most courts seem to be reluctant to construe an ambiguous contract term in a way that would deprive the surface buyer of the benefit of his bargain, and as a result most have held that the reservation of minerals does not include ordinary sand and gravel where the intent of the parties is not absolutely clear to the contrary.

Why is the rule different when applied to federal lands? One reason is that interpretation of federal conveyances follows its own set of rules. The canon of construction holding that all grants are construed to favor the sovereign, and ambiguities should always be resolved in favor of the United States[31], works against all land grant patentees generally. There is an additional canon holding that, in any grant from the United States, only that which is specifically named passes and what is not named, is reserved to the United States. Together, these make it very tempting for the surface management agencies to argue that sand and gravel are always the property of the United States whenever there is a split estate. For example, in cases where the United States has exercised its power of eminent domain to take property for public purposes, it usually excepts minerals and leaves the mineral estate with the condemnee, presumably to hold down the condemnation award amount. In those cases, the United States does not consider sand and gravel to be part of the mineral estate; if they were, they would remain with the condemnee, along with the right to extract them. Instead, the United States argues, they are part of the surface estate, and the courts have tended to agree[32].

---

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

[32] *See Burkey v. United States*, 25 Ct. Cl. 566 (1992); *Bumpus v. United States*, 325 F.2d

It only takes a little bit of examination to see how pernicious the combination of these two canons can be (at least from the perspective of a private landowner) when applied to the question of whether sand and gravel are minerals for purposes of a reservation from a federal patent. Applying the two maxims together to a grant from the United States subject to a reservation of "minerals", restricts the grant and expands the reservation. If the term "minerals" is inherently ambiguous, and any ambiguity in land grants is resolved in favor of the government, then sand and gravel always goes with the government. If a grant from the United States only conveys that which is specifically named and reserves everything else to the government, then sand and gravel always stays with the government unless there is a grant of the full fee without any reservation of minerals.

The two maxims (which were cited in *Western Nuclear* and are invariably cited by the United States in any case involving the scope of a grant or reservation), derive from *Northern Pac. R. Co. v. Soderberg*[33] and from *Caldwell v. United States*.[34] In *Soderberg*, the Court was called on to decide whether granite could be a "valuable mineral deposit" under the General Mining Law. If it was not, then certain lands containing deposits of useful granite would be

---

264 (10th Cir. 1963). In these decisions, the courts reasoned that sand and gravel were not included in the mineral estate because otherwise the United States would be deprived of the very thing it sought in the condemnation action - the surface. *See Cumberland Mineral Co. v. United States*, 206 Ct. Cl. 797, 513 F.2d 1399 (1975) to the same effect.

[33]188 U.S. 526 (1903)

[34]250 U.S. 14 (1919)

included in a railroad land grant (which excluded lands that were "mineral in character") and would not be open to entry and location. If it was, then those lands would be excluded from the grant to the railroad. The Court declared that ambiguity is resolved in favor of the sovereign and found that the term "valuable minerals" was not limited to metallic ores, but could include granite as well. Therefore the lands in dispute did not pass to the railroad.

In *Caldwell*, the issue was the scope of a license to a railroad company that granted the right to use "timber necessary for the construction of [a] railroad." The railroad felled the trees from its right of way, used the big timber for railroad construction and claimed the right to use or sell the slash and smaller timber, arguing that "timber" meant the felled trees including slash and other lumber derived from them. The Court disagreed, holding that the railroad could use only the timber necessary for railroad construction, under the doctrine that "nothing passes except what is conveyed in clear and explicit language-inferences being resolved not against but for the government."[35]

Although these canons make sense individually as matters of policy, when combined they can render a patent worthless, because they can literally swallow up the surface estate. This was the threat presented in *BedRoc Ltd LLC*, and it appears that the Court so perceived it. Rather than reach such an outcome, it found that the meaning of "valuable minerals" in this context was not ambiguous; it therefore was able to avoid having to apply the rules concerning ambiguity in land grants, while at the same time it limited *Western Nuclear* without overturning it.

III. Conclusions

---

[35] *Id.*, at 20-21.

Ordinary sand and gravel are not generally considered to be minerals in private party transactions where "minerals" are conveyed or reserved. Sand and gravel are minerals if the parties to a private transaction intend them to be and clearly state their intention. They are minerals if the United States is claiming them under the mineral reservation from patents issued under the Stock Raising Homestead Act. The *BedRoc Ltd. LLC* decision appears to have limited the *Western Nuclear* holding, but did not overturn it. Therefore, reservations of minerals from patents under other land grant statutes must be reviewed to determine whether Congress clearly and unambiguously intended that sand and gravel be reserved; it is not possible to state generally that all reservations of minerals under federal patents either include or exclude sand and gravel.