Opinion No. 61-12

January 25, 1961

BY: OPINION OF EARL E. HARTLEY, Attorney General Norman S. Thayer, Assistant Attorney General

TO: Fred M. Standley, Special Assistant Attorney, General, Legal Section Highway, Department, P. O. Box 1641, Santa Fe, New Mexico

QUESTION

FACTS

On October 23, 1957, the State of New Mexico, acting through its Commissioner of Public Lands, issued to the New Mexico State Highway Commission Permit No. RW-14045, entitled "Grant of Material Site". The permit authorized the highway commission to use certain lands in Valencia County, New Mexico, as a source of surfacing materials for constructing, maintaining and operating a public highway. The permit contained a general clause reserving minerals.

On March 4, 1960 the State of New Mexico, acting through its Commissioner of Public Lands, issued a "Mining Lease", No. M-13945, to a private person. This lease entitled the lessee to explore, produce, and remove sand and gravel from the same lands that were covered by RW-14045.

The State Highway Commission has removed certain amounts of sand and gravel from the subject lands for the construction of public highways. In a contest proceeding held before the Commissioner of Public Lands, the Commissioner ruled that sand and gravel are minerals, that they were reserved under the mineral reservation clause in RW-14045, and that the right to remove sand and gravel did not pass to the State Highway Commission.

QUESTIONS

1. Was the Commissioner of Public Lands correct in determining that sand and gravel are minerals, and that they were reserved in RW-14045?

2. Should any action be taken to contest the ruling of the Commissioner of Public Lands?

3. If the answer to the first question is in the affirmative, should the State Highway Commission bring an action for declaratory judgment to determine the amount owing for the sand and gravel removed for public highways?

CONCLUSIONS

1. Yes.

2. See Analysis.

3. See Analysis.

OPINION

ANALYSIS

This office has twice ruled on the question whether sand and gravel are minerals. Attorney General's Opinion No. 4816, November 8, 1945, observed that the question was uncertain, but that the majority of decided cases indicated that sand and gravel are "minerals", within the common meaning of that word. That opinion was adhered to in Attorney General's Opinion No. 5568, July 23, 1952.

The position of the Supreme Court of New Mexico on this question is indicated in **Board of County Commissioners of Roosevelt County vs. Good,** 44 N.M. 495, 105 P. 2d 476 (1940), in which this language appears:

"It cannot be contended that caliche rock in a precious metal. Indeed, it is not a metal at all, but is, in the ordinary acceptation, a mineral simply as is also sand, gravel and ordinary clay. "Mineral", in ordinary and common meaning, is a comprehensive term, including every description of stone and rock deposit whether containing metallic or nonmetallic substances."

Moreover, it has been the consistent administrative practice of the Commissioner of Public Lands to classify sand and gravel as minerals, and to consider them as included within a general reservation of minerals such as the reservation contained in RW-14045. This long standing interpretation of the statutes giving the commissioner of public lands power to reserve "minerals" in leases or contracts relating to state lands is entitled to great respect and should ordinarily control the construction of the same statutes by the courts. **State ex rel., Otto vs. Field,** 31 N.M. 120 Pac. 1027, (1925). The **Field** case, at page 160 of the official reports, also held that persons dealing with the land department are chargeable with notice of the rules and regulations of the land office. Therefore, persons dealing with the land office are charged with notice that that office has classified sand and gravel as minerals that are reserved under a general mineral reservation clause.

On the basis of this authority, it is our opinion that sand and gravel are minerals and that the right to remove sand and gravel did not pass to the State Highway Commission under RW-14045. Hence, the determination of the Commissioner of Public Lands was correct.

In answer to your second question, this office does not pursue a policy of instituting lawsuits where there is little possibility of success. Since the principle that sand and

gravel are minerals has been settled and generally accepted for many years, we advise that no action be taken to contest the ruling of the Commissioner of Public Lands.

In answer to your third question, if a fair or reasonable price cannot be agreed on through negotiations, we feel that the State Highway Commission can properly bring an action for declaratory judgment to determine the amount to be paid for sand and gravel removed for public highway purposes. The determination of price is an actual controversy as contemplated by our declaratory judgment law, Section 22-6-1, et seq., N.M.S.A., 1953 Compilation, and declaratory judgment is a proper means of resolving the question.