Opinion No. 45-4816

November 8, 1945

BY: C. C. McCULLOH, Attorney General

TO: Honorable John E. Miles Commissioner of Public Lands State Land Office Santa Fe, New Mexico. Attention: George A. Graham, Attorney

*{*153}* We have your letter of October 31, 1945 wherein you request an opinion of this office concerning the extent of the mineral reservation contained under the Land Office's form of purchase contract, and also the Land Office's form of patent when lands are sold to individuals.

The form of contract for the purchase of public lands used by the Land Office contains the following provision:

"* * * that while the land herein contracted for is believed to be essentially non-mineral land, should mineral be discovered therein it is expressly understood and agreed that this contract is based upon the express condition that the minerals therein shall be and are reserved to the fund or institution to which the land belongs, together with right of way to the Commissioner, or any one acting under his authority, at any and all times to enter upon said land and mine and remove the minerals therefrom without let or hindrance."

The reservation contained in the patent issued by the State of New Mexico for state land contains the following provision:

*{*154}* "* * * and reserving also to the State of New Mexico all minerals of whatsoever kind, including oil and gas, in the lands so granted, and to it, or persons authorized by it, the right to prospect for, mine, produce and remove the same, * * *"

It is noted that in the patent there is specifically reserved "all minerals of whatsoever kind." In the purchase contract, the phrase is that minerals are reserved.

Your specific question relates to whether sand, gravel and building stone are minerals. The following cases have held, in connection with the construction of the word "minerals", that such includes sand, gravel or building stone or other similar non-metallic substances.

Loney v. Scott, 57 Ore. 378, 112 P. 172, 175; Bibby v. Bunch (Ala.) 58 Southern 916, 917; Stowers v. Huntington Development and Gas Co., 72 Fed. 2d 969, 98 A. L. R. 889; Gladys City Oil, Gas & Mfg. Co. v. Right of Way Oil Co., (Tex.) 137 S. W. 171, 177; Nephi Plaster & Mfg. Co. v. Juab County, 93 P. 53; Hartwell v. Camman, 10 N. E. Eq. 128, 64 Amer. Decisions 448; Micklethwait v. Winter (Eng.) 6 Exch. 644; Dunbar Lime Co. v. Utah-Idaho Sugar Co., 17 Fed. 2d 351.

As illustrative of the holdings in the foregoing cases, we quote from the following two cases:

The court stated in the case of Northern Pacific Railway Co. v. Soderberg, 99 Fed. 507, 507:

"In its common and ordinary signification, the word 'mineral' is not a synonym of metal but is a comprehensive term including every description of stone and rock deposits, whether containing metallic substances or entirely non-metallic."

The court stated, in the case of Sult v. A Hochstetter Oil Co., 63 W. Va. 317, 61 S. E. 307, 310, that:

"The term 'mineral' found in a deed, lease or other contract, unqualified and unrestricted by any other clause in the instrument, or by circumstances within the knowledge of the parties, which may reasonably be deemed to have determined their intention, will be given a sufficiently broad meaning and effect to include prima facie every substance that can be gotten from underneath the surface of the earth for the purpose of profit, and will include not merely such articles as coal, iron stone, and free stone, but fire clay and china clay or porcelain clay and also every kind of stone, flint, marble, slate, brick, earth, chalk, gravel and sand, provided only that these articles are under the surface and do not lie loosely upon it."

However, the following cases contained holdings which would indicate that a reservation of the type herein involved might not include the substances in which you are interested:

See Kinder v. La Salle County Carbon Co., 310 Ill. 126, 141 N. E. 537; Brady v. Smith, 181 N. Y. 178, 73 N. E. 963;

The court stated in the case of Kinder v. LaSalle County Carbon Co., 310 Ill. 126, 141 N. E. 537 that:

"A deed, the granting clause of which conveyed only the underlying coal, together with the right to mine the same, with a following quitclaim clause of **all minerals of every description** underlying, made when coal was the only known underlying mineral then having commercial value, though limestone, sand and gravel were known to be on and near the surface, held to embrace only minerals removable by mining operations underground which would not destroy the surface for agriculture."

In view of the above cited authorities which have definitely arrived at inconsistent opinions under various circumstances, it is impossible for this office with certainty to hold that sand, gravel and stone are reserved *{*155}* to the state under the mineral reservation referred to. However, since this would seem to be the weight of authority, at least where it cannot be shown that the parties did not contemplate that such would not

be reserved, we are inclined to the opinion that the state possesses the title to sand, gravel and stone which can be taken off of land on a commercial basis for a profit.

However, we suggest that a declaratory judgment be instituted to conclusively determine this question before any leases of this type of mineral are entered into; that the holder of a contract or patent does not admit the ownership of the state concerning these substances. This office, of course, will cooperate in every way in instituting such an action upon the request of the Commissioner.

By HARRY L. BIGBEE,

Asst. Atty. General