1964

State Land Board v. State Department of Fish and Game : Brief of Appellant

Utah Supreme Court

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IN THE

SUPREME COURT

OF THE

STATE OF UTAH

STATE LAND BOARD,
Plaintiff-Respondent,

vs.

STATE DEPARTMENT OF FISH AND GAME,
Defendant-Appellant.

Case No.
10154

BRIEF OF APPELLANT

Appeal from the Judgment of the
Third District Court for Salt Lake County
Hon. Stewart M. Hanson, Judge

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NATURE OF THE CASE

This is an appeal to determine whether sand and gravel are mineral in character within the reservation of Section 65-1-16, U. C. A. 1953, and in the event such substances are considered to be mineral, then to further determine whether the State Land Board is required to obtain the consent of the State agency using or holding the land whereon the sand and gravel are situated, under the provisions of Section 65-7-10, U. C. A. 1953.

DISPOSITION IN LOWER COURT

The lower court held that sand and gravel were mineral in character and, therefore, reserved to the State under Section 65-1-16, and further held that the Land Board had authority to lease sand and gravel as minerals without obtaining the consent of the State agency using and holding the land.

RELIEF SOUGHT ON APPEAL

Appellant on appeal requests the court to classify sand and gravel as non-mineral in character, or in the alternative, to hold that, even if they are mineral in character, they may only be leased by the Land Board after it obtains the consent of the State agency utilizing the lands where the sand and gravel are situated.

STATEMENT OF FACTS

The land in question is owned by the Utah State Department of Fish and Game and is all of Section 32, T. 3 S., R. 25 E., S. L. M. This land was a State school section which was sold under contract to a private party, and a patent from the State of Utah duly and regularly issued to said purchaser under date of March 18, 1946, "reserving to the State of Utah, all coal and other minerals in the above lands and to it, or persons authorized by it, the right to prospect for, mine and remove coal and other minerals from the same * * *" (Exhibits P-1, P-2).

The Department of Fish and Game thereafter purchased the land in question from the private party, with

the private party reserving minerals in the same language that the State had reserved minerals in the patent (T. 2). In the late fall of 1963, the Land Board advised the Department of Fish and Game that it intended to lease the subject land for sand and gravel purposes to a party who had made application for such lease, and the Department of Fish and Game replied that sand and gravel were not considered to be minerals under rulings of the Attorney General's Office, and that further, the Land Board was required to obtain the consent of the Department of Fish and Game prior to leasing any minerals on lands owned and controlled by the Department, and that the Department could not give its consent to a surface stripping of sand and gravel materials (T. 3 and 4). Thereafter the Land Board instituted the present litigation for a determination that sand and gravel were mineral in character within the meaning of the statutory reservation, and the Department of Fish and Game answered, denying that sand and gravel were minerals, and further setting up by way of an affirmative defense the fact that the Land Board must first obtain the consent of the Department prior to leasing minerals on Department land, and that such consent had reasonably been withheld.

At the hearing in the lower court, it was stipulated that there are certain quantities of sand and gravel on the land in question and that these substances could be used in a commercially feasible manner if located near areas where there was a significant demand. Counsel for the Land Board asked the court to take judicial notice of the communities in northeastern Utah where there might be

a market for sand and gravel substances (T. 4-6). It is reasonably clear from the stipulation that the sand and gravel in question are common varieties without any peculiar or unique features.

ARGUMENT

POINT I.

SAND AND GRAVEL ARE NOT MINERALS WITHIN THE MEANING OF SECTION 65-1-16, U. C. A. 1953.

The first question for determination is whether sand and gravel are to be considered mineral deposits within the meaning of Section 65-1-16, U. C. A. 1953, which provides as follows:

> "All applications to purchase, approved subsequent to May 12, 1919, shall be subject to a reservation to the state of all coal and other mineral deposits in said lands, with the right to the state or persons authorized by it to prospect for, mine and remove the same as provided by law, and all certificates of sale and all patents issued therefor shall contain such reservation."

It is clear that all minerals included within the above language were reserved by the State of Utah when it issued its patent under date of March 18, 1946, and the State still holds and controls minerals so reserved in the section of land in question. When the Department of Fish and Game purchased the land, it acquired everything that the private seller had obtained from the State of Utah, but, of course,

did not acquire any greater rights than the State had relinquished to the private purchaser.

The State of Utah has never considered sand and gravel to be minerals within the statutory language quoted above. The specific question was raised, however, in 1955 when the State Land Board inquired as to whether these substances could be considered minerals, and the Attorney General ruled that they were not. See Opinion 55-088 issued under date of August 16, 1955 and appearing in Biennial Report of Attorney General, June 30, 1956, at page 166. After reviewing a number of cases, Attorney General E. R. Callister observed:

> "In view of the foregoing authorities, it is the opinion of this office that gravel is not within the meaning of our statute subject to reservation by the State of Utah in the absence of express language in the conveyance to that effect."

Then, under date of July 9, 1956, Attorney General E. R. Callister answered a further question posed by the State Land Board, i.e., whether clay could be considered a mineral within the mineral reservation clause. See Opinion 56-075, dated July 9, 1956, Biennial Report of Attorney General, June 30, 1958, at page 189. The Attorney General in that opinion reviewed a considerable number of cases from Utah and other jurisdictions and concluded that clay had a special intrinsic quality which justified its treatment as a mineral. But, the Attorney General was careful to distinguish clay from sand and gravel:

> "There are cases on both sides of this question and an attempt has been made to reach a rational

conclusion based upon the intention of the Legislature, and on a careful consideration of the intrinsic qualities of clay itself *as compared with ordinary soil deposits or sand and gravel.*

"* * *

"Clay is to be distinguished from such other components of the earth's under surface as sand and gravel by its distinct mineral composition, whereas sand and gravel for general commercial use are merely aggregations of rocks or conglomerations of mineral fragments.

"* * *

"The value of sand and gravel as distinguished from clay, usually is entirely dependent on location and accessibility, and they are not of distinct or unusual worth in and of themselves since substitutions of other materials can be made in such filling, grading and cement making operations."

The following year the Attorney General was further asked by the State Land Board whether volcanic cinders could be considered mineral in character within the meaning of the mineral reserve clause. Attorney General E. R. Callister concluded that volcanic cinders properly were mineral in nature. See Opinion 57-031, issued under date of April 11, 1957, appearing in Biennial Report of the Attorney General, June 30, 1958, at page 195. Again the Attorney General was careful to explain that sand and gravel clearly were not mineral in character, even though it might appear that they were similar in some respects to volcanic cinders:

"The two types of substances which are the common exceptions from the definition as minerals when found under this state's surface are gravel

and ordinary sand. They are valuable only in respect to their use as fill and in respect to their location. They are not generally considered to be intrinsically valuable in and of themselves.

"As to volcanic cinders, they might or might not have intrinsic value, depending on the use to which they are put. Certainly, they could be used as sand and gravel are used.

"However, the usual use made of such cinders is in the making of building blocks. Their unique value in such process is their extremely light weight combined with strength. Because of this they are of more use than other substances in such construction."

It is submitted that the foregoing opinions of the Attorney General are correct, although it must be recognized that there is a difference of judicial opinion as to whether sand and gravel should be considered to be mineral in character. The pattern of decisions relating to whether sand and gravel could be minerals for the purpose of making valid locations under the Federal mining laws is interesting. The Supreme Court of Oregon in *Loney* v. *Scott,* 57 Ore. 378, 112 Pac. 172, held that sand and gravel could be considered mineral under the mining laws, and pointed out the economic uses to which sand and gravel were then being employed. The Federal Land Department apparently disagreed with the *Loney* conclusion. (See *Zimmerman* v. *Bennson,* 39 L. D. 310; *Lindley on Mines,* Vol. 1, 3rd Ed., Sec. 93.) Thereafter, the Secretary of the Interior determined that sand and gravel could be considered mineral in character. (See *Layman* v. *Ellis,* 52 L. D. 714 (1929) and *United States* v. *Barngrover,* 57 I. D. 533 (1942).)

The most significant factor in the Federal pattern, however, is that Congress did not agree with the geological niceties perceived by the Secretary of the Interior, and in the Act of July 23, 1955, 69 Stat. 368, 30 U. S. C. A., Sec. 611, Congress specifically provided:

> "No deposit of common varieties of sand, stone, gravel, pumice, pumicite, or cinders and no deposit of petrified wood shall be deemed a valuable mineral deposit within the meaning of the mining laws of the United States so as to give effective validity to any mining claim hereafter located under such mining laws."

It is obvious that Congress either never had intended that sand and gravel should be considered to be minerals locatable under the Federal mining laws, or that, if such a treatment had been justified under earlier statutes, Congress felt that there was no longer any justification for treating common varieties of such substances as mineral. It is believed that the Utah Legislature would take the same view if this court were to declare sand and gravel to be mineral in their common varieties.

Utah case law on the question under discussion is not very helpful. It is true that this court has ruled that minerals can include substances removed from the earth by processes other than subterranean excavations. (See *Nephi Plaster and Manufacturing Co.* v. *Juab County*, 33 Utah 114, 93 Pac. 53 (1907), wherein it was held that gypsum was a mineral.) The Utah court has also ruled that salt in solution in the Great Salt Lake was mineral in character because of the great quantity contained in the waters of

the lake. (See *Deseret Livestock* v. *State*, 110 Utah 239, 171 P. 2d 401 (1946)). However, there is no language in the Utah cases suggesting that sand and gravel of common varieties would be mineral. In fact, there is some rational basis for believing that the general legislative intent was to exclude common varieties of sand and gravel from the mineral reserve clause. These substances are commonly found at or near the surface of the earth in a variety of mixtures and qualities and are, in fact, part of the earth itself, and in many cases part of the surface of the earth. Section 65-1-17, U. C. A. 1953, suggests that minerals are underground deposits as distinguished from surface substances:

> "Lands in which minerals are reserved, the surface of which has a value for other purposes, may be sold under the provisions of law relating to the sale of state lands, subject to such reservation."

Section 65-1-20, U. C. A. 1953, similarly distinguishes between surface uses by surface owners and mineral development and extraction by those having mineral interests. There simply is nothing in Utah legislation suggesting that common varieties of sand and gravel were contemplated by the Legislature in the mineral reserve clause.

Turning now to a consideration of general case law in other jurisdictions, it must be admitted that there is a split of judicial authority. All cases agree that common varieties of sand and gravel in marginal quantities, not commercially valuable, are not minerals within the meaning of either a statutory reservation or a private reservation or grant. The split in authority appears when usually val-

uable deposits of sand and gravel of high quality or unique characteristics are discovered. In such situations some courts have held that those substances should be treated as mineral and some courts have held that they should not. It cannot be denied that sand and gravel are mineral in nature within a very broad classification, because many substances not considered to be mineral within the meaning of mineral grants and reservations must be classified as mineral within such broad geological classifications. This is illustrated by the following summary:

> "While the word 'minerals' includes, in a technical sense, all natural inorganic substances forming a part of the soil, the term is used in so many senses, dependent upon the context, that such a definition is obviously too broad, for it would throw little, if any, light upon what was meant in a particular case. So, to apply the word in the signification in which it is employed in the scientific division of all matter into the traditional three kingdoms, to a grant of land containing an exception of the minerals, would be absurd, since all land belongs to the mineral kingdom, and the exception could not be given effect without destroying the grant. * * *"

(Am. Jur., Vol. 36, page 283.)

But one should not be misled into thinking that such a broad classification of the term "mineral" can have any realistic probative value in ascertaining the legislative intent in the mineral reserve clause. While various substances have been considered to be mineral in nature, the general judicial rule is that sand and gravel are not:

> "In application of the foregoing principles of construction, an unqualified grant or reservation

> of minerals has been held to include not only the coal, iron, etc., but also such substances as oil and gas, diamonds, fluor spar, gypsum, granite, shale, paint stone, pulpstone, freestone, and other substances. Limestone is not included in a grant or reservation of minerals and neither is sand, gravel or clay. * * * (Am. Jur., Vol. 36, Sec. 35, pp. 306-07.)

The foregoing general rule as stated by American Jurisprudence is confirmed by Corpus Juris Secundum:

> "In a broad, general sense, as belonging to one of the three great divisions of matter, animal, vegetable, and mineral, gravel and sand may be considered as minerals, but in a commercial sense, they have been held, according to the circumstances of the particular case, to be minerals and also not to be minerals." (C. J. S., Vol. 58, Sec. 2(3), page 21.)

Speaking more specifically with regard to statutory and deed language either granting or reserving minerals, the following general rule is announced:

> "Sand and gravel ordinarily are not included within a grant or reservation of minerals or of mineral royalty, although there is on the land involved sand or gravel susceptible of commercial production and use. * * *" (C. J. S., Vol. 58, Sec. 155, pp. 324-25.)

There are a great number of cases which could be quoted and argued at length for both the pro and con position as to whether common varieties of sand and gravel should be minerals. Generally, those cases holding sand and gravel in commercially valuable deposits to be mineral,

do so on the theory that such substances can be classified as mineral within broad geological definitions, and further, upon the ground that the legislative or grantor reservation was to reserve anything of broad mineral character which was commercially valuable beyond the specific purpose for which the land was sold. Those cases holding common varieties of sand and gravel not to be mineral in nature, without regard to whether they appear in commercially valuable deposits, have done so largely on the theory that sand and gravel are so common and compose such a substantial part of the surface, and under surface, of the land as to be beyond the statutory or grantor intent in the reservation of minerals; and further, that sand and gravel are not any particular mineral, but simply fragments of a great many different minerals (rocks) which have no value as to the particular minerals, but only as to the fragmentary aggregate. The general feeling seems to be that the Legislature, or the grantor, should specifically identify and reserve such common substances as sand and gravel if the intent is to reserve them, because otherwise they would not ordinarily be considered within a mineral reserve clause and should, therefore, pass to the grantee.

It is submitted that the past rulings of the Utah Attorney General are correct; that the history and pattern of mining locations under Federal statutes have shown that sand and gravel in common varieties should not be considered to be mineral; and that the statements quoted above from American Jurisprudence and Corpus Juris Secundum accurately state the general rules of judicial construction of mineral reserve clauses.

Without detailing the facts and rationale of each case, the following list of authorities is suggested as fully supporting the above quoted general rule that sand and gravel are not minerals:

Authorities

Cases:

Barker v. Mintz, 215 Pac. 534 (Colo., 1923)

Beck v. Harvey, 164 P. 2d 399 (Okla., 1944)

Farrel v. Sayre, 270 P. 2d 190 (Colo., 1954)

Hendler v. Lehigh Valley R. Co., 58 A. 486 (Pa., 1904)

Holloway Gravel Co. v. McKowen, 9 So. 2d 228 (La., 1942)

Irion v. Lyons, 113 So. 857 (La.)

Kinder v. LaSalle County Carbon Coal Co., 141 N. E. 537 (Ill., 1923)

Lillington Stone Co. v. Maxwell, 166 S. E. 351 (North Carolina, 1932)

Lord Provost of Glasgow v. Farie, L. R., 13 App. Cas. 657

Psencik v. Wessells, 205 S. W. 2d 658 (Tex. 1947)

Shell Petroleum Corp. v. Liberty Gravel & Sand Co., 128 S. W. 2d 471 (Tex. Civ. App.)

Staples v. Young, 1 Ir. Rep. 135 (1908)

State v. Hendrix, 167 P. 2d 43 (Okla., 1946)

Steinman Development Co. v. W. M. Ritter Lumber Co., 290 Fed. 832 (D. C., 1922)

U. S. v. Aitken, 25 Philippine 7, 14

Waring v. Foden, 1 Ch. 276 (Eng., 1936)

Watkins v. Certain-Teed Products Corp., 231 S. W. 2d 981 (Tex. Civ. App.)

Winsett v. Watson, 206 S. W. 2d 656 (Tex., 1947)

Witherspoon v. Campbell, 69 So. 2d 384 (Miss.)

Treatises:

17 A. L. R. 166

86 A. L. R. 969, 989

1 A. L. R. 2d 790

It is believed that the court's attention should be called to a matter of practical consequence. The issue on appeal will have a *stare decisis* result which will affect every person who has purchased lands from the State of Utah. Up to this point, the Land Board, as well as the purchasers, has believed that sand and gravel were not minerals and, therefore, that these sustances passed with the land to the purchaser. This is obvious from the fact that the Land Board has accepted and relied upon the opinions from the Attorney General's office for the last nine years without questioning them in any legal proceeding until the present one. No private owners of land purchased from the State are parties to this proceeding. But, if this court determines that common varieties of sand and gravel are mineral within the meaning of the reserve clause, these private parties will automatically be divested of a valuable aspect of ownership which both they and the Land Board previously thought had passed to private ownership.

Another practical problem is that the Land Board presently is leasing as sand and gravel simple fill dirt

which is utilized by the Department of Highways in the construction of the freeway program and other road projects. Perhaps no particular problem is involved when a lease of that nature is executed between two State agencies of that type. But a problem has arisen in the instant case in that deposits of sand and gravel could be sold by the lessee for fill dirt purposes. It might be argued that the sand and gravel could not be extracted from the earth unless it was being used for specific commercial sand and gravel purposes and not as fill dirt, but the practical fact is if the lessee removes the substances containing some common varieties of sand and gravel, he is doing so because it is commercially practicable for him to do so. It would thus be difficult to judicially regulate the removal of the surface of the earth which had some deposits of sand and gravel in order to determine whether these substances, after their removal, were being utilized for a legitimate purpose.

In various parts of the State of Utah, the Department of Fish and Game has re-seeded many bench lands to greatly improve their value for wildlife grazing. A type of gravel appears in all of these lands, and if the Land Board can lease these gravel deposits to the Department of Highways or to private road contractors, the entire surface of these areas can be stripped and used as fill dirt. It is doubtful whether the Department of Fish and Game could be protected under any bond or other arrangement required for the protection of surface owners. (See Section 65-1-20, U. C. A. 1953.) The discussion immediately above simply

illustrates that private landowners who have purchased land from the State would be in a similar position if the Land Board could likewise lease their lands for a variety of purposes which would serve to excuse extensive surface stripping to remove sand and gravel substances.

It is, therefore, believed that the Legislature did not intend common varieties of sand and gravel to be reserved to the State under the mineral reserve clause, and that this court should declare such substances to be non-mineral in nature, at least so far as the mineral reserve clause is concerned.

POINT II.

THE LAND BOARD CANNOT LEASE ANY MINERALS ON LAND HELD OR USED BY OTHER STATE AGENCIES WITHOUT FIRST OBTAINING THE CONSENT OF THE AGENCY SO CONCERNED.

If the court concludes that the common varieties of sand and gravel are not included within the mineral reserve clause, then it is unnecessary to consider this point. But, if the court holds that sand and gravel are mineral in character so as to be included within the reservation, then appellant contends that the Land Board must still obtain the consent of the Department of Fish and Game, because that Department owns, controls, and beneficially utilizes the land in question for wildlife purposes.

Section 65-7-10, U. C. A. 1953, provides as follows:

> "Mineral leases of all state lands, shall be made exclusively by the land board *with the consent of*

> *the state agency using or holding such land.* The proceeds from mineral leases in all state lands with the exception of trust lands administered by the land board, shall be deposited in the general fund."

It is difficult to see how the above language is susceptible of any other interpretation. The statute includes all mineral leases of all State lands, and says that such leases shall be made exclusively by the Land Board *with the consent of the State agency using or holding such land.* The statute does not say that mineral leases may be made by the Land Board *without* the consent of the State agency. The position of the Land Board in this case and the holding of the lower court was exactly to that effect. How it can be contended or how it can be held that a statute requiring the consent of the State agency can mean that the consent of the State agency is not required is beyond the imagination of the appellant.

It is submitted that the State agency using or holding the land cannot arbitrarily or unreasonably refuse to give its consent. Certainly the legitimate interests of the agency using or holding the land must be balanced with the economic benefits to be derived by the State in the mineral lease proposed by the Land Board. If the Land Board felt in a particular instance that the State agency was being unreasonable and that the interests which the agency desired to protect were of less significance than the benefits to be derived from a mineral lease, it is clear that the Land Board could bring an appropriate action to show that consent was unreasonably being withheld by the agency, and the court could judicially declare that the consent must be

given in view of the respective interests of the State of Utah.

But that issue is not involved here. There is no allegation or claim that the Department of Fish and Game in any respect had been unreasonable in withholding its consent. In fact, counsel for the Land Board stated in open court that:

> "I will stipulate there are valid reasons that the State Department of Fish and Game would have, based upon their functions in game management, wild life management, which would reasonably allow them, in good faith, to refuse to lease the sand and gravel on the subject lands for exploitation." (T. 4.)

The obvious intent of the Legislature was that the Land Board not be allowed to issue mineral leases on lands being actively and beneficially used by other agencies without coordinating with such agencies, informing them of the nature and scope of the proposed mineral lease and obtaining the consent of the agency concerned.

A practice not directly material in this case but which justifies brief mention to illustrate a related problem is the following: The Department of Fish and Game purchases with its own funds (derived from the sale of hunting and fishing licenses and not from tax monies) large tracts of land from private owners who own mineral rights.

The Department does not buy mineral rights but it always insists upon language in the conveyance declaring that sand and gravel are not minerals and that they, there-

fore, pass as part of the surface ownership to the Department. This is so because the lands thus purchased would be greatly damaged if sand and gravel could be removed by the grantor who reserved mineral rights. But after the lands are thus purchased by the Department, they become State land, even though the Department by statute is authorized to hold title in its own name. (Section 23-2-20, U. C. A. 1953.) Does this mean that the State Land Board can issue mineral leases on common varieties of sand and gravel obtained by the Department through the purchases discussed above? If so, the concern of the Department in excluding sand and gravel from the grantor's mineral reservation would be a hollow protection, because the Land Board could immediately lease the sand and gravel to the same grantor and he then could do the very thing which the Department did not want him to do. The Department would not have purchased the land if the grantor had not agreed to convey sand and gravel. What a strange sequence of events there would be if the same grantor could thus obtain the same sand and gravel which he conveyed to the Department by leasing the same from the State Land Board. No objection would be made if such a mineral lease of sand and gravel were to be issued only after the consent of the Department had been given, but to permit the Land Board to issue such leases without obtaining such consent is not only impractical and unreasonable — it is directly contrary to the very clear requirement of Section 65-7-10, U. C. A. 1953.

CONCLUSION

Common varieties of sand and gravel, even though available in quantities which would justify a commercial use, should not be considered to be minerals within the meaning of the mineral reserve clause of Section 65-1-16, U. C. A. 1953.

Even if this court should hold that sand and gravel are minerals within the mineral reserve clause, it is clear that when these minerals appear on lands owned or used by other State agencies, the Land Board must obtain the consent of the agency involved and cannot arbitrarily issue such leases without obtaining such consent.

Respectfully submitted,

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