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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.

UNIVERSITY OF UTAH
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Case No. 10154

BRIEF OF RESPONDENT

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

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Clk. Supreme Court, Utah

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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 RESPONDENT

NATURE OF THE CASE

The appellant has appealed from a decision of the District Court in the Third Judicial District, the Honorable Stewart M. Hanson, Judge, finding that the State Land Board was entitled to deposits of sand and gravel on certain lands in eastern Utah, that the State Land Board had the power to lease and dispose of the sand and gravel without the consent of the State Department of Fish and Game, and determining that Section 65-7-10, U.C.A. 1953, did not limit the Land Board's power to lease or otherwise dispose of minerals in accordance with its otherwise recognized statutory powers.

DISPOSITION IN LOWER COURT

The respondent State Land Board filed suit in the Third Judicial District Court, Salt Lake County, against the State Department of Fish and Game, claiming that certain sand

and gravel deposits on a section of land in eastern Utah were, by virtue of the provisions of 65-1-15 and 16, U.C.A. 1953, reserved to the State Land Board and under its control and management. Respondent sought a declaratory judgment quieting its right, title, and interest in the sand and gravel in and on the subject lands. The Department of Fish and Game filed an answer, denying that the sand and gravel in the subject lands were mineral, and by way of affirmative defense, alleged that even if the sand and gravel were mineral so as to be reserved to the State Land Board, the consent of the Department of Fish and Game was required prior to lease or other lawful disposition. A motion for summary judgment was filed by the respondent and judgment entered in favor of the respondent and against the appellant on the 23rd day of April, 1964.

RELIEF SOUGHT ON APPEAL

The respondent submits the decision of the District Court should be affirmed.

STATEMENT OF FACTS

The respondent submits the following statement of facts as being a more correct statement of the evidence actually before the District Court and the record on appeal and with being in accord with the principle of law that the evidence on appeal will be reviewed in the light most favorable to the trial court's decision.

On July 19, 1926, the State Land Board sold the following described land: Section 32, Township 3 South, Range 25 East, S.L.M., Utah. The lands are situated in Uintah County, and were sold to Henry H. Ruple of Vernal, Utah

(Plaintiff's Exhibit 1). The Certificate of Sale contained the following reservation:

“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, upon compliance with the condition and subject to the limitations of Chapter 107, Session Laws 1919, as amended Session Laws 1921.”

Subsequently, on March 18, 1946, then Governor Herbert B. Maw issued a patent to Lilly Ruple, covering the subject lands and containing the same reservation (Plaintiff's Exhibit 2). Subsequently, the lands were acquired and are at the present time held by the appellant Utah State Department of Fish and Game, subject to the reservations contained in the original Certificate of Sale and patent, and further subject to the statutory reservations of minerals reserved in the sale of State lands, as provided under Section 65-1-15 and 16, U.C.A. 1953 (R. 41).

On January 27, 1964, the Director of the Department of Fish and Game advised the Land Board that it did not consider the sand and gravel deposits on the subject lands to be mineral, and that it did not consent to the issuance of any lease on the subject lands (Plaintiff's Exhibit 3). Subsequently the respondent filed the instant action, alleging that the sand and gravel deposits on the subject lands were reserved by the Land Board at the time of the original sale to Mr. Ruple. The Land Board contended that the sand and gravel deposits were “minerals” within the statutory and patent reservations. In answer, the State Department of Fish and Game denied that the sand and gravel deposits were minerals within the meaning of the reservations, and pled that even assuming they are, consent of the

Department of Fish and Game to any disposition was necessary prior to leasing (R. 5).

At the time of hearing on motion for summary judgment, it was stipulated between the parties:

“MR. BOYCE: * * * that there are deposits of a geological substance on the plaintiff’s lands known as sand and gravel and these substances are in such quantity and such quality as to be economically and commercially usable, and that they can be extracted from the subject lands by normal processes of quarrying, which is a normal means of recovery in the State of Utah.

“MR. DEWSNUP: I think that defendant would stipulate essentially to that, but on such a proviso that if the sand and gravel present on this particular property were located in an area where there would be a very near use so that there would be no particular haul as far as distance was concerned, it would be commercially feasible. But this I would deny, it would be feasible to haul these substances at great distance. But certainly if this land were located in Salt Lake County the sand and gravel on it could be considered to be commercially usable.

“MR. BOYCE: I would agree with that, but there are limitations which are normally attendant to any process of removing sand and gravel, being their economic marketing. I would merely ask the Court to take judicial knowledge of the economic population conditions in the area where these lands are located.” (R. 43, 44.)

Contrary to the assertion of the appellant, it is obvious from the stipulation of the parties that the sand and gravel deposits are present in commercial quantities on the subject lands, limited only by economic demand. However, since it is obvious that the dispute between the Department of Fish and Game and the State Land Board is over the proposed disposition of the sand and gravel, a demand

market for the product does obviously exist. Based upon the above evidence, the trial court entered judgment for the respondent as prayed.

ARGUMENT

POINT I.

THE SAND AND GRAVEL DEPOSITS ON THE SUBJECT LANDS ARE MINERALS WITHIN THE MEANING OF 65-1-15 AND 16, U.C.A. 1953, AND THE RESERVATIONS CONTAINED IN THE CERTIFICATE OF SALE AND PATENT COVERED THE SUBJECT LANDS.

65-1-15, U.C.A. 1953, provides:

“All coal and other mineral deposited in lands belonging to the state of Utah are hereby reserved to the state. Such deposits are reserved from sale, except on a rental and royalty basis as provided by law, and the purchaser of any lands belonging to the state shall acquire no right, title or interest in or to such deposits, but the rights of such purchaser shall be subject to the reservation of all coal and other mineral deposits, and to the conditions and limitations prescribed by law providing for the state and persons authorized by it to prospect or mine, and to remove such deposits, and to occupy and use so much of the surface of said lands as may be required for all purposes reasonably incident to the mining and removal of such deposits therefrom;
* * *

“Salts and other minerals in the waters of navigable lakes and streams are likewise reserved to the state and shall be sold by the state land board only upon royalty basis. * * *”

65-1-16, U.C.A. 1953, provides:

“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.”

Both these sections were enacted prior to the time the State Land Board made any disposition of the subject lands. Laws of Utah, 1919, Ch. 107, § 1.

From the above sections it is clear that the Legislature intended to reserve all mineral resource in State lands that may be valuable. The support of the common schools was best served by such a reservation. The fact that the Legislature has sought to mention salts of navigable lakes and streams makes it rather obvious that the Legislature intended a broad definition of minerals, and since sand and gravel when recoverable in commercial quantities clearly fit into that category, the trial court's determination that the sand and gravel in the subject lands was reserved is clearly correct.

Further, in addition to the statutory limitations above mentioned, the reservations placed in the patent and certificate of sale issued by the Land Board evidence an intent to carry out the statutory mandate to its fullest extent.

Mineral

It is, of course, obvious that whether the sand and gravel involved in this lawsuit is reserved to the Land Board or is held by the Department of Fish and Game depends upon what is encompassed by the term “mineral” as it is used in 65-1-15 and 16, U.C.A. 1953, and the patent and certificate of sale reservations, which are obviously included to implement the statute.

The question of what substances are mineral and what substances are non-mineral has been treated by the Utah

courts in a fairly definitive fashion. In *Nephi Plaster and Manufacturing Co. v. Juab County*, 33 Utah 114, 93 Pac. 53 (1907), the Utah Supreme Court ruled that gypsum, which bears geological similarities to sand gravel, is a mineral. The court ruled that mines and minerals were not limited to subterranean excavations nor to metalliferous deposits. The court cited with approval the decision of the United States Supreme Court in *Northern Pacific Ry. Co. v. Soderberg*, 188 U.S. 526 (1903), where the Supreme Court held that granite quarries were mineral in character. It was argued in the *Nephi Plaster* case, which concerned the taxability of certain substances, that the constitution defining taxable minerals should be construed on the basis of the ejusdem generis rule. The provision and statute in question bore similarity to 65-1-16, U.C.A. 1953, which was subsequently adopted in 1919. The court rejected the contention that ejusdem generis was applicable, and indicated that the construction of the statute was such that the Legislature could not have contemplated the application of the ejusdem generis or other limiting rule. The court stated:

“* * * From the foregoing it thus seems clear to us that where we find the terms ‘mines and minerals’ used in grants or in reservations, in instruments of conveyance, in statutes or constitutions, under the modern construction the former is not limited to mere subterranean excavations or workings, nor is the latter limited to the metals or metalliferous deposits, whether contained in veins that have well-defined walls or in beds or deposits that are irregular and are found at or near the surface or otherwise.”

In *Deseret Livestock Co. v. State*, 110 Utah 239, 171 P.2d 401 (1946), this court considered the question of whether salt in solution was a mineral. The court quoted from 36

Am. Jur., *Mines and Minerals*, Section 4, and adopted the accepted legal definition of minerals contained therein. The court stated:

“* * * ‘Accordingly a number of authorities prefer to define a “mineral” as any natural substance having sufficient value to be mined, quarried, or extracted for its own sake or its own specific use.’ Under this definition it is apparent that the salt found in the waters of Great Salt Lake because of its quantity is a ‘mineral’ and is valuable for its own sake.”

Further, the court stated:

“Under the Federal mining statutes and the rulings of the courts, the word ‘minerals’ includes not only such valuable metals as gold, silver, cinnabar, lead, tin, copper, and iron, but also such varied substances as agate, diamonds, coal, asphaltum, petroleum, natural gas, shale, granite, limestone, marble, slate, feldspar, fluor spar, *building sand, gypsum, silica rock, paint stone*, borax, sulphur, alum, carbonate and nitrate of soda, water, saline springs and deposits, etc.”

It is apparent, therefore, that Utah precedent has adopted the position that, if the substance under consideration is sufficiently valuable to be sought for its own sake apart from the soil, the substance may be deemed mineral. Accepting this well established definition as the premise, it is apparent that sand and gravel is a mineral within that definition.

Geological Evidence

Volume III, 1963, *Minerals Yearbook, Area Reports*, page 1080, notes that in the year 1963 there was produced in Utah sand and gravel of a value of \$20,954,000. This clearly evidences the fact that sand and gravel, when found in sufficient quantity and quality to be commercially mar-

ketable, satisfies the definition of mineral noted in the above cases.

In *Mineral and Water Resources of Utah*, Bulletin 73, 1964, published by the Utah Geological and Mineralogical Survey, it is noted:

“Sand and gravel deposits consist of unconsolidated rock fragments which have been moved and sorted by natural processes so that most of the finer and very coarse fragments have been separated from them. Sand and gravel are widely used in the construction industry because they provide strength, durability, and bulk at low unit cost. Because they are so abundant, so universally used, and relatively low priced, their mineral resource value has not always been fully appreciated. * * *

“The large quantities of sand and gravel used in the State reflect the abundant supply of high quality material available to the consumer at low cost. Much of the material can be used with minimum screening, washing, and crushing; transportation costs are minimal because of the proximity of many source areas to transportation facilities and to the principal users.

* * *

“The market for sand and gravel has progressively expanded up to the present and will probably continue to increase in the future, particularly in the expanding urban areas. The resources of sand and gravel are ample to supply the market in the foreseeable future. Large construction projects, such as the Flaming Gorge Dam, make large but temporary demands on normally little developed deposits away from the large urban areas. Much of the material in the eastern and southern parts of the State is in presently inaccessible canyons. Locally, some sand and gravel deposits are becoming unavailable for use in some of the rapidly expanding urban areas. In such areas, more expensive

crushed rock, lightweight aggregate, or other materials may partially supplant sand and gravel in the construction industry.”

It is apparent from this that sand and gravel have a high commercial value in Utah when it is found in sufficient quantity and quality as to be commercially usable. Further, it is apparent that valuable deposits of sand and gravel are rather well defined in Utah and are certainly considered mineral by geologists and mineralogists.

Further, it is well settled that sand and gravel in general have a recognized industrial mineral worth. In *Industrial Minerals and Rocks*, 3rd Ed., (Mudd Series), it is stated:

“Sand and gravel together constitute the *mineral raw materials* of largest volume produced from the earth. In 1958, as reported by the U.S. Bureau of Mines, 680,080,000 tons of sand and gravel (including industrial sand) were produced in the United States. The nearest competitor was crushed rock of which 532,818,000 tons were produced. Coal, both bituminous and anthracite accounted for only 431,616,689 tons in the same year. In dollar value, sand and gravel were exceeded only by cement, crushed rock and fuels. *Hence it is a major unit of the mineral-producing industry.* As an example, one plant in California operates around the clock at an average rate of 1,500 tons per hour, and at peak intervals has shipped over 4,000 tons per hour, all by trucks. Nevertheless, it is controlled by one man through a panel of push buttons that control the crushing, screening, washing, grading, stock piling, and reclaiming of the products.”

Further, contrary to some opinions, it is apparent that there are definitive geological specifications defining sand and gravel, and that the industry has reached a rather sophisticated standard of determining the value of sand

and gravel deposits and identifying the length and depth of sand and gravel beds. *Industrial Minerals and Rocks, supra*, 739, 741.

Further, geologists, although defining sand and gravel as consisting of "continuously graded unconsolidated materials," clearly recognize that commercial sand and gravel deposits are generally classified geologically into four categories, and have been able to define with substantial specificity the geological and mineralogical qualities of commercial sand and gravel, such that persons reasonably acquainted with the substance have definite standards for determining what in fact is sand and gravel as distinct from worthless alluvium.

Further, there are definite recognized forms of mining, quarrying, and dredging sand and gravel, and the processing and manufacturing involves sophisticated plant design and processing. *Industrial Minerals and Rocks*, 745, 758. See also Bates, *Geology of the Industrial Rocks and Minerals*, Ch. 5, p. 82 (1960).

There is no question that sand and gravel have recognizable characteristics such that when found in sufficient quantity to be commercially valuable, are clearly recognizable from other earth substances and from the soil itself. Thus, in *Mineral Facts and Problems*, Bulletin 585, (Bureau of Mines 1960), p. 706, it is stated:

"Methods of formation and deposition have imparted physical characteristics to sands and gravels that largely determine the commercial value for a particular use and influence the manner of exploitation.
* * *

This same work supports the position that sand and gravel is an identifiable geological mineral which has sub-

stantial worth in commercial industry. It is further recognized that extracting processes are such that sand and gravel is recoverable by recognized mining techniques. Mineral Facts and Problems, *supra*, 706, 707.

Therefore, from what has been noted above as to the geological and mineralogical aspects of sand and gravel, it is apparent that this substance, when related to the judicial test laid down in the *Nephi Plaster* and *Deseret Livestock* cases, *supra*, is mineral, depending upon the quantity and quality of the deposit. In the instant case it is stipulated by the parties that the sand and gravel present upon the subject lands is in such quantities and of such quality as to be commercially minable and marketable. It is obvious, therefore, that under any reasonable definition of mineral — judicial, mineralogical, or industrial — the present deposits must be deemed mineral and hence encompassed within the statutory reservation.

Opinion of Attorney General.

The appellant relies in part for its contention that sand and gravel is not a mineral within the reservation provisions of 65-1-15 and 16, Utah Code Annotated 1953, on an opinion of the Attorney General (55-088, Biennial Report 1956, page 166), wherein the Attorney General ruled that sand and gravel was not mineral. It is submitted that the appellant can take no comfort from this contention. There is no evidence before the court that the Land Board ever relied upon the opinion of the Attorney General in advancing or relinquishing any claims to sand and gravel deposits. To the contrary, the fact that the instant controversy is before the court itself rebuts the contention that the Land Board has followed the interpretation of the Attorney General. Consequently, there is no long history of

administrative interpretation or legislative acquiescence in such interpretation which would support a conclusion that the provisions of 65-1-15 and 16 intended to exclude sand and gravel from the definition of mineral.

Further, the opinion of the Attorney General, it is respectfully submitted, lacks any real substance. First, the opinion did not consider a definition of the term "mineral" nor did the opinion mention or consider the application of the *Nephi Plaster* case, *supra*, or the *Deseret Livestock* case, *supra*. The opinion cited cases not involving legislative enactments but construction of reservation clauses in deeds. It is obvious that there is a substantial difference between the intention of the parties to a deed where they are dealing with specific parcels of land and the intention of a legislature providing for a broad policy that would reserve the mineral wealth of the state for the common schools. In the latter case, no specific parcels of land were involved but rather an intent to encompass the broadest form of the definition of the term "mineral" so that the wealth existing in state lands, which has worth separate and apart from the agricultural uses of the land, shall be reserved for the common schools. It is submitted that it was the intention of the Utah Legislature to define the term "mineral" as broad as possible. This is evidenced by three factors in 65-1-15, U.C.A. 1953. First, the term "salts" is used with reference to other minerals, evidences a legislative awareness that the term mineral is not limited to subterranean material or metalliferous ores. Second, the language of 65-1-15 totally prohibits the State from alienating its mineral interests, thus evidencing an across-the-board policy applicable to all minerals. Third, the only area which the Legislature excepted from the reservation of minerals to the State in any sale

of lands was where the lands were "improved farm lands," thus indicating that where the primary purpose for acquisition of the land was agricultural and where the predominant use of the lands would be for farming, inconsistent mineral uses should not be allowed. This indicates that the Legislature intended that the term mineral be distinct from agricultural, thus giving the term "mineral" the broadest possible construction. Consequently, it is apparent that there are several weaknesses to the above mentioned Attorney General's opinion.

It is noteworthy that subsequently, the Attorney General was asked to pass upon the question of whether clay would be deemed to be reserved as a mineral within the statutory reservations. In that opinion (56-075, Biennial Report 1958, page 189),¹ the Attorney General answered in the affirmative and expressly mentioned both the *Deseret Livestock* case and the *Nephi Plaster* case, and relied upon at least one early decision of the Department of Interior (*Aldritt v. Northern Pacific Railroad Co.*, 25 L.D. 349). The Attorney General concluded that since clay was valuable in its own right, apart from the agricultural and soil usages, it would be deemed mineral within the definition of mineral as adopted by prior Utah cases. Subsequently, the Attorney General ruled that volcanic cinders were reserved as minerals (57-031, Biennial Report 1958, page 195). There is no rational basis for saying that if volcanic cinders and clay are to be deemed minerals because they are valuable in their own right, defined sand and gravel deposits of commercial worth, which are also valuable in their own right, are not mineral. Consistency of definition, both legal and mineralogical, requires a determination that sand and

¹ This opinion was apparently written by a different assistant attorney general.

gravel under such circumstances be classified as mineral. Consequently, the subsequent opinions of the Attorney General and the very shallow reasoning of the first opinion would seem to attest to the correctness of the trial court's decision in the instant case and give no support to the appellant's position.

Judicial Construction.

The cases which have considered the question of whether sand and gravel is mineral within the terms of particular statutes or deeds are in hopeless confusion. A great number of the cases turn on the particular intention of the parties as respects (1) particular land or (2) the purpose of the initial conveyance. However, in 95 A.L.R.2d 846, it is noted:

“It is the general rule that a conveyance or exception of ‘minerals’ in a deed, lease, or license includes all mineral substances which can be taken from the land, and that, in order to restrict the meaning of the term, there must be qualifying words or language indicating that the parties contemplated something less general than all substances legally cognizable as minerals. Either as an application of the above rule generally, or by way of a specific statement consistent with it, the * * * cases support the viewpoint that the term ‘mineral’ or ‘minerals,’ as used in real-property instruments which have been judicially construed, includes clay, sand, or gravel, at least in the absence of other language indicative of a different intention.”

Admittedly, there are cases to the contrary. However, these cases are not helpful in the construction of the term “mineral reservations” as respects the public domain. Thus, the three cases relied upon by the Attorney General's opinion, heretofore mentioned and cited by the appellant

in its brief, do not involve questions of the construction of statutory reservation clauses governing the public domain.

In *Beck v. Harvey*, 196 Okla. 270, 164 P.2d 399 (1944), the court rejected the contention that sand and gravel was included within a mineral reservation. The reservation reserved a "one fourth mineral royalty." The court felt that the deed reserving the mineral royalty did not contemplate that sand and gravel be covered. The court noted that oil and gas was the usual substance in which a mineral royalty was reserved.² The court quoted from a previous case which had applied the ejusdem generis rule and determined that sand and gravel was not a mineral as that term was contemplated by the parties. The case of *State v. Hendrix*, 196 Okla. 596, 167 P.2d 43 (1946), applied the Beck rule where the reservation was "* * * in and to all of the oil, petroleum, gas coal, asphalt and all other minerals of every kind or character in and under, and that may be produced from certain lands * * *." This case also involved a private-party conveyance and the court in applying the ejusdem generis rule of the Beck case excluded sand and gravel. It is apparent, therefore, that since the *Nephi Plaster* case rejected the application of the ejusdem generis rule to the same language as is used in 65-1-15 and 16, U.C.A. 1953, these cases are not precedent to the instant problem. They involve the construction of specific deeds and specific parcels of land and not the broad legislative policy of a state endeavoring to protect its mineral wealth for the use of the common schools. The same is true in *Farrell v. Sayre*, 129 Colo. 368, 270 P.2d 190 (1954).

It is submitted that the better reasoned and more relevant cases and authorities have found sand and gravel to be

² To this extent the court was notoriously naïve as mineral royalties are usually payable on any substance extracted under a mining contract.

a mineral in situations comparable to this one. In 36 Am. Jur., *Mines and Minerals*, Section 5, it is stated:

“Under the Federal mining statutes and the rulings of the courts, the word ‘minerals’ includes not only such valuable metals as gold, silver, cinnabar, lead, tin, copper, and iron, but also such varied substances as * * * fluorspar, building sand, gypsum, silica rock, paint stone, * * *.”

In 58 C.J.S., *Mines and Minerals*, Section 2(3), it is generally stated:

“In a broad sense, gravel and sand may be considered minerals; but in a commercial sense they may or may not be minerals, according to the circumstances under which the terms are used.”

With respect to the quoted statement from *Corpus Juris Secundum*, it should be borne in mind that it has been stipulated between the parties that the sand and gravel in deposit on the subject lands is of such a nature as to be commercially useable and profitable.

In *Watkins v. Certain-Teed Products Corp.*, 231 S.W.2d 981, the court noted that sand and gravel, if it has sufficient worth to be commercially marketable, would be deemed mineral within the terms of a deed reserving minerals. In *Hendler v. Lehigh Valley Rr. Co.*, 209 Pa. 256, 58 A. 488, the Pennsylvania Supreme Court expressly recognized the definition of mineral as being “any inorganic substance found in nature, having sufficient value, separated from its situs as part of the earth, to be mined, quarried or dug for its own sake or its own specific uses.” This definition is similar to that adopted by the Utah cases. The court stated that if common building sand was of sufficient commercial value to be mined in its own right, it would be deemed mineral

but if the sand were merely an indistinguishable part of the surface, having only limited and sporadic use, it would not be deemed mineral. It was the position of the Pennsylvania Supreme Court that the Legislature, in enacting the statute which was in question, intended to protect the commercial interests in the land, and whether sand or gravel would be deemed mineral would be determined by the economic aspect of the question. Thus, the *Hendler* case recognized that sand and gravel could be mineral where it was present in commercial quantity and quality.

In *Matthews v. Department of Conservation*, 355 Mich. 589, 96 N.W.2d 160, the Michigan Supreme Court concerned itself with a question very similar to that involved in the instant case. The Michigan statute in question reserved to the state all minerals. The Michigan Supreme Court ruled that minerals would include metallic and nonmetallic substances and that sand and gravel, being a nonmetallic substance of substantial worth, would be deemed a mineral within the reservation in the Michigan statute. The Michigan Supreme Court noted that the reservation would include sand and gravel even though the lands were sold for agricultural purposes. The court felt that it was the intention of the legislature to reserve to the state all interests in the land, mineral in character, having substantial value apart from agricultural uses.

In *Loney v. Scott*, 57 Ore. 378, 112 Pac. 172 (1910), the Oregon Supreme Court had occasion to consider whether or not sand or gravel was a mineral within the meaning of 32 Stat. 388, allowing placer mining locations under the federal mining laws governing the public domain. The Oregon Supreme Court determined that sand and gravel was a mineral. The court stated:

“The question arises whether building sand is a mineral, within the mineral laws of the United States. The language of section 2329 is: ‘Claims usually called “placers,” including all forms of deposits, excepting veins of quartz, or other rock in place, shall be subject to entry.’ Plaintiffs’ proof tends to show that building sand is a valuable mineral, viz., worth 50 cents per cubic yard, and is marketable in large quantities. George Otis Smith, the director of the United States Geological Survey, in volume 2 of his Report of the Mineral Resources of the United States, for 1907, at page 563, by a tabulated statement shows that more than \$5,000,000 worth of building sand had been produced in the United States in 1906, and as great a value in 1907.

“In *Northern Pac. Ry. Co. v. Soderberg*, 188 U.S. 526, 534, 23 Sup. Ct. 365, 368 (47 L.Ed. 575), the court, in discussing whether granite comes within the term, ‘mineral deposit,’ says: “The words, “valuable mineral deposits” (as used in section 2319, U.S. Rev. St. [U.S. Comp. St. 1901, p. 1424] should be construed as including all lands chiefly valuable for other than agricultural purposes, and particularly as including nonmetallic substances [naming a list, and continuing]. We do not deem it necessary to attempt an exact definition of the word “mineral lands” as used in the act of July 2, 1864 [Act June 2, 1864, c. 217, 13 Stat. 365]. With our present light upon the subject it might be difficult to do so. * * * Indeed, we are of the opinion that this legislation consists with, rather than opposes, the overwhelming weight of authority to the effect that mineral lands include, not merely metalliferous lands, but all such as are chiefly valuable for their deposits of a mineral character, which are useful in the arts or valuable for purposes of manufacture.’ This definition seems broad enough to include building sand, and we are of the opinion that land more valuable for the building sand it contains than for agri-

culture is subject to placer location, and is mineral within the meaning of the United States mining statutes.”

A position similar to that of the State of Oregon was taken in *State v. Evans*, 46 Wash. 219, 89 Pac. 565 (1907), by the Washington Supreme Court. The court expressly rejected the contention that mineral should be limited to commonly recognized metalliferous substances and noted substantial early precedence indicating that paint stone, building stone, gypsum, resin, guano, mica, etc. had been determined to be mineral. Both the Oregon and Washington Supreme Courts were impressed with the broad definition of minerals adopted by the United States Supreme Court in *Northern Pac. Ry. Co. v. Soderberg*, 188 U.S. 526 (1903). In that case, the United States Supreme Court held that granite quarries were mineral in character and that the lands where the granite was located would be mineral lands within the meaning of the laws enacted by Congress. In doing so, the court recognized that Congress had greatly refined the definition of minerals from earlier laws and felt that mineral included lands chiefly valuable for stone and that metallic ores were not the limit of the term mineral. The court stated:

“* * * Indeed, we are of the opinion that this legislation consists with, rather than opposes, the overwhelming weight of authority to the effect that mineral lands include not merely metalliferous lands, but all such as are chiefly valuable for their deposits of a mineral character, which, are useful in the arts or valuable for purposes of manufacture.”

In *Puget Mill Co. v. Duecy*, 1 Wash. 2d 421, 96 P.2d 571 (1939), the Washington Supreme Court noted that the

term minerals, depending on its construction, could either be limited to metallic substances or embrace sand and gravel. See also *LaRowe v. McGee*, 171 Ga. 771, 156 S.E. 591; *Tennessee Valley Authority v. Harris*, 115 Fed. 2d 343 (5th Cir. 1940). In *Cole v. McDonald*, 236 Miss. 168, 109 So. 2d 628 (1959), the Mississippi court ruled that the parties intended to include bentonite and other similar non-metallic substances. Accord: *Cole v. Berry*, 245 Miss. 359, 147 So. 2d 306. In the *United States v. Aitkin*, 25 Philippines 7 (1913), the court ruled that sand and gravel and clay could be deemed minerals as that term was used in common instruments. The court said that whether the material was or was not mineral would be based upon its commercial uses and that if it was present in such quantity and quality as to be commercially useable and identifiable in such quantity as to distinguish it from the soil. If such circumstances existed sand and gravel could be deemed mineral. The court found that the clay was present in such quantity, but that sand and gravel was not.

The *Loney* case, cited above, from Oregon is of substantial weight since it was decided prior to the time the mineral reservation was enacted by the Utah Legislature. Further, it considered the definition of mineral as the term was used on the public domain. Equally important was the decision of *Northern Pacific Ry. v. Soderberg*, supra, where the United States Supreme Court indicated that building stone and other nonmetallic substances would be deemed mineral as respects their use on the public domain.

In *Bumpus v. United States*, 325 F.2d 264 (10th Cir. 1963), the Tenth Circuit Court of Appeals indicated that the word "mineral" does not have a definite meaning but may be used in many senses and that the construction to be

given to the term must depend upon the purposes sought or the intention of the parties, as the case may be. In that case, although the court ruled that gravel was not included within a condemnation instrument, it did so by applying the *ejusdem generis* rule, a rule not applicable to the instant case by virtue of this court's decision in the *Nephi Plaster* case.

In the recent case of *United States v. Schaub*, 163 U.S. 875 (DC Alaska, 1958), the court ruled that sand and gravel was a mineral under the Mining Law of 1872 (30 U.S.C.A., Sec. 222), where the material was valuable for commercial purposes. The court ruled that the defendants had a valid mining location where the sand and gravel was useable for commercial purposes although not of a particularly high value. The court adopted the general public domain rule that "whatever is recognized as mineral by standard authorities on the subject where the same is found in quantities and quality to render the land * * * more valuable" would be deemed mineral. The court stated:

"Although the sand and gravel located by the defendants may be of a coarse variety, there is nothing explicit or implicit within the mining statutes requiring mineral deposits to be useful for special purposes. Sand and gravel of the type sought to be located by the defendants is relatively scarce in Alaska, and being such, are items of value in themselves. Their property characteristics are far more suitable for building purposes than the type to be found close to or on the coast, due to chemical composition of coastal substances. In this sense, the sand and gravel in question is of a superior type. There is no doubt that the land containing the sand and gravel was greatly appreciated in value attributable to its presence. No reason can be found to exist to warrant a distinguishing of gravel

from other deposits used for a similar purpose which the Land Department has consistently upheld as being within the purview of the Act of 1872. The statute makes express reference to 'valuable mineral deposits.' The use of such deposits and their demand are helpful only so far as they determine valuation. Mineral deposits may be just as valuable for one purpose as another, and because a deposit may be limited in its use only for one purpose, there is no reason to deny application of the Act of 1872 if the deposit is valuable and can be marketed at a profit. There is no dispute that the sand and gravel were chiefly valuable for road building and concrete mix. But, if the lands containing these deposits were as valuable and yielded profits comparable to lands containing high-grade sand suitable for glass-making, and the latter would come within the Act of 1872, no distinction can be conceived that would justify a different result.

"At the time of the passage of the Act of 1872, a great deal of the lands were unexplored. It would be a far stretch of the imagination to assume that Congress intended to limit the mining laws only to those minerals known to possess a great value at the time the statute was enacted, where the express intent of Congress was to develop the mining resources of the United States, so as to give value to a greater number of things in the promotion of manufacturing and the arts. To stimulate the growth of our country, Congress encouraged mining activities, and in doing so, intended that substances that can be taken from the earth and marketed at a profit, be subjected to the application of the mining laws.

"Therefore, under the mining laws in effect when the entry herein was made, such entry was valid and the government's claims should be denied."

It is apparent, therefore, that the better reasoned cases and the cases applying the definition of mineral to the pub-

lic domain have found sand and gravel to be included within the definition of mineral where there was a commercial use to which the substance could be put.

Early decisions of the Department of Interior and the courts supported the position that nonmetalliferous substances could be deemed sand and gravel. In *W. H. Hooper*, 1 L.D. 560, and *H. P. Bennet, Jr.*, 3 L.D. 116 (1884), gravelly soil and granite was considered mineral within the purview of the Mining Act of 1872. In *Freezer v. Sweeney*, 8 Mont. 508, the position of the United States Land Department, as respects building stone and other nonmetalliferous deposits, was upheld. That position was confirmed by the United States Supreme Court in *Mullen v. United States*, 118 U.S. 271 (1886), and in *Northern Pacific Ry. Co. v. Soderberg*, supra. Other decisions of the Land Department had recognized stone deposits as being mineral within the mining locations laws. *McGlenn v. Wienbroer*, 15 L.D. 370 (1892); *VanDoren v. Pledsted*, 16 L.D. 508 (1893); *Bennett v. Moll*, 41 L.D. 584 (1912); *Stephen E. Day, Jr., et al.*, 50 L.D. 489 (1924). Consequently, at the time of the passage of the Utah statute, the decisions of the Federal Land Department regarding locatable minerals on the public domain would seem to include sand and gravel and other similar deposits. Further, the Oregon Supreme Court, as respects the locatability of the sand and gravel, had, in *Loney v. Scott*, supra, expressly ruled that sand and gravel was a mineral. These opinions were certainly appreciated by knowledgeable members of the legal professions acquainted with the laws of the public domain at the time the Utah statute was passed. Certainly, therefore, there must have been an intention to give the term "mineral" as broad a construction as possible.

Although in *Zimmerman v. Brunson*, 39 L.D. 310, the department had refused to recognize a mining claim based upon building sand which was of questionable commercial value, in *Layman v. Ellis*, 52 L.D. 714 (1929), the Secretary of Interior for the first time gave substantial consideration as to whether or not sand and gravel would be a mineral such that location could be made under the federal mining laws. The secretary relying upon the definition of the term mineral in *Pacific Coast Marble Co. v. Northern Pac. Ry. Co.*, 25 L.D. 233, which is the same as that in *Northern Pacific Ry. Co. v. Soderberg*, supra, ruled that sand and gravel would have to be deemed a mineral, stating:

“* * * In these publications gravel and sand have uniformly been classed as a mineral resource. They are also included in the list of useful minerals (U.S. Geological Survey Bulletins, Nos. 585, 910) and mineral supplies (U.S. Geological Survey Bulletin No. 666).

“From what has been stated there can be no question that gravel deposits are definitely classified as a mineral product in trade and commerce and have a pronounced and widespread economic value because of the demand therefor in trade, manufacture, or in the mechanical arts.

* * *

“* * * There is no logical reason in view of the latest expressions of the department why, in the administration of the Federal mining laws, any discrimination should be made between gravel and stones of other kinds, which are used for practically the same or similar purposes, where the former as well as the latter can be extracted, removed and marketed at a profit.”

Consequently, it is apparent that in situation where the public domain is involved, sand and gravel has been deemed

to be a mineral and since the Legislature obviously intended that state policy on its public domain would closely follow that of the Federal Government, sand and gravel must be deemed a mineral where present in commercial quantities and thus reserved to the State under 65-1-15 and 16, U.C.A. 1953. See also *United States v. Harris*, 115 F.2d 343 (5th Cir. 1940); *Praeletorian Diamond Oil Assn. v. Garvey*, 15 S.W.2d 698 (Tex. Civ. App. 1929).

The appellant contends that since Congress by the Act of July 23, 1955, 69 Stat. 368, 30 U.S.C. 611, removed sand and gravel, stone, pumice, etc., from the mining laws so far as locations on the public domain is concerned, this evidenced a Congressional dissatisfaction with the decisions of the Department of Interior and the courts. This argument is non sequitur. First, the original pronouncements of the courts that sand and gravel, stone, etc., were minerals for locations under the mining laws were over 70 years old when Congress made the change. Thus, a long history of Congressional inaction in the face of administrative and judicial interpretation rebuts any contention that Congress had not intended those minerals to be included under the Mining Act of 1872. Secondly, Congress did not state that such substances were not mineral, but merely removed them from location. Thus, in Opinion M-36417, February 15, 1957, the Solicitor of the Department of Interior rendered an opinion that Congress did not make a determination or finding that sand and gravel, etc., was not mineral, but rather merely removed the substances from location, since locations of these substances for purposes other than commercial exploitation (recreational and otherwise) had created problems in the management of the public domain. The Solicitor noted:

“* * * The declaration that these materials shall not be deemed to be ‘valuable mineral deposits’ is expressly qualified by the words ‘within the meaning of the mining laws.’ The obvious purpose of this declaration was simply and solely to remove these *minerals* from the operation of the mining laws which in terms includes ‘all valuable mineral deposits in lands belonging to the United States * * *’ (30 U.S.C. sec. 22). Congress has not said that such materials are not valuable mineral deposits within the meaning of the mining laws *and all other laws*, but has clearly and unequivocally limited the application of the definition thus expressed. To arbitrarily ignore that limitation and hold that Congress has thereby determined sand and gravel not to be a mineral under any other law would be to give the act an effect which is contrary to its express provision.

“The position that a declaration by Congress that a material is not thereafter to be locatable under the mining laws is *ipso facto* a determination of its non-mineral character is further shown to be unwarranted by the fact that Congress has heretofore removed a number of minerals from the operation of the mining laws, (although using different language to obtain that result), without any such effect having been ascribed to the legislation. Certainly it cannot be said that in enacting the Mineral Leasing Act of 1920 Congress has determined coal, phosphate, sodium, potassium, oil, oil shale, and gas to be non-mineral. The effect of that act was to restrict the meaning of the phrase ‘all valuable minerals’ as used in the mining laws. In removing sand and gravel from location under the mining laws Congress could very well have provided for its disposition under the Mineral Leasing Act rather than the Materials Act, and such action would obviously not be construed as a determination of its non-mineral character. As a matter of fact, Congress might for one reason or another declare any

mineral now subject to the mining laws not to be 'a valuable mineral deposit' within the meaning of those laws and otherwise provide for its disposition without thereby determining its character as a 'mineral' one way or another.

“* * * If these mineral materials in a given case meet the standard definition for 'valuable minerals' as applied to low-grade deposits they must be deemed valuable and being minerals they are 'valuable minerals' even though they are no longer such within the meaning of the mining law. See *Solicitor's Opinion*, M-36379 (Oct. 3, 1956). The history of Public Law 167 bears this out since it clearly shows that the sole purpose of this provision of the act was to remove these 'minerals' from the operation of the mining laws and to provide otherwise for their disposal.

“If Congress has intended by Public Law 167 to quit-claim to surface owners deposits of sand and gravel theretofore reserved to the United States under other laws, it is reasonable to assume that appropriate language to effect that grant would have been included in the act. Since grants by the United States are always construed most favorably to the interest of the *grantor*, the existence of such a grant must clearly appear. The only intent which can reasonably be ascribed to the action taken by Congress is that it intended to transfer the disposition of deposits of sand and gravel owned by the United States from one set of laws to another. There is nothing in the act or in its legislative history to indicate that by virtue of its operation the United States was to lose title to any deposits of sand and gravel which it theretofore owned. Therefore, deposits of sand and gravel which were the property of the United States prior to enactment of Public Law 167 continue to be so and can be disposed of only in the manner directed by Congress.”

It is apparent, therefore, that the appellant can take no comfort from the fact that in 1955 Congress for one reason or another saw fit to amend the mining location laws respecting Federal public domain.

It is apparent from all the authorities from the various disciplines that sand and gravel when present in commercially marketable quantities is a mineral and hence reserved to the State under the provisions of 65-1-15 and 16, U.C.A. 1953.

Statutory Construction

The appellant in its brief argues that the Legislature could not have intended sand and gravel to be a mineral because in certain instances the extraction of sand and gravel would destroy the surface use. This overlooks the fact that many other forms of mineral extraction destroy surface uses. Placer mining itself contemplates extracting the mineral close to the surface by removing overburden or otherwise using the surface. See *Yuba Investment Company v. Yuba Consolidated Gold Fields*, 184 Calif. 469, 194 Pac. 19; *Trklja v. Keys*, 49 Calif. App. 2d 24, 121 P.2d 54. Thus, in *Reynolds v. Iron Silver Mining Co.*, 116 U.S. 687, it was determined that placer mines by their nature involve the attempt to extract mineral which is generally found in the softer materials which cover the earth's surface and not underneath the earth in veins or lodes. In *Clipper Mining Co. v. Eli Mining & Land Co.*, 194 U.S. 220, the court noted:

“A ‘placer location’ is not a location of lodes or veins underneath the surface, but is simply a claim of a tract or parcel of ground for the sake of loose deposits of mineral upon or near the surface. A lode or vein may be known to exist at the time of the placer location or not known until long after the patent therefore has

been issued. There being no necessary connection between the placer and the vein, Congress * * * has provided that in an application for a placer patent the applicant shall include any vein or lode of which he has possession, and that if he does not make such inclusion the omission is to be taken as a conclusive declaration that he has no right of possession of such vein or lode. If, however, no vein or lode within the placer claim is known to exist at the time the patent is issued, then the patentee takes title to any which may be subsequently discovered.”

As was noted in *U.S. v. Schaub*, supra, holding sand and gravel to be a mineral at the time of the passage of most of the acts involving the public domain, including that reserving minerals to the State of Utah, not all the minerals in the public domain were known nor was their particular value or location specified by the Legislature. The intention was to reserve all potential mineral wealth for use by the State. The fact that surface lands may be interfered with is no basis to preclude mineral development, since the surface in all forms of mineral recovery activity is to a greater or lesser extent impeded. Coal, when outcrops are close to the surface, is mined by a stripping process which completely destroys the surface and involves no tunnels or shafts. See Meiners, *Strip Mining Legislation*, 3 Natural Resources Journal, 442 (1964). Consequently, since the Legislature provided for various forms of leases and mining locations, 65-1-18, U.C.A. 1953, it is apparent that the term “mineral” has no relationship to its location; rather, it is deep in the ground, near the surface, placer or lode.

At the time of the passage of the reservation provisions (65-1-15 and 16, U.C.A. 1953), the Land Board noted that pursuant to the reservations, several applications for the purposes of prospecting and mining had been approved

for coal, oil, gas and asphaltum. Further, the State was deeply involved in the litigation in *U.S. v. Sweet*, 245 U.S. 643, and was desirous of obtaining maximum value from mineral lands. See *Reports of the State Board of Land Commissioners of the State of Utah, 1908–1924*, Twentieth and Twenty-First Annual Reports, pages 7 through 11; Biennial Report 1919 and 1920, pages 9 through 12.

Certainly where sand and gravel is so diffused in land that it cannot be commercially extracted or produced, it would not be deemed mineral. However, where it is in such quantity and quality that it may be extracted for its own sake and be produced in commercial quantities which are usable and sellable, it would be incongruous not to hold that sand and gravel was a mineral. It is submitted, therefore, that the legislative intent and statutory construction support sand and gravel as being a mineral.

Although the State Department of Fish and Game may have undertaken other activities for the surface, this only demonstrates a failure of that agency to fully appreciate the nature of the legal interest they held and to take sufficient steps before acquiring land to make certain that its mineral development would not interfere with the projected uses.

It is submitted that the decision of the trial court holding that sand and gravel is a mineral within the provisions of 65–1–15 and 16, U.C.A. 1953, should be affirmed.

POINT II.

THE TRIAL COURT CORRECTLY RULED THAT 65-7-10, U.C.A. 1953, DID NOT REQUIRE THE CONSENT OF THE DEPARTMENT OF FISH AND GAME FOR THE MAKING OF ANY MINERAL LEASE BY THE LAND BOARD WHERE THE DEPARTMENT OF FISH AND GAME DID NOT HOLD THE INTEREST LEASED.

At the time of trial, the appellant contended that 65-7-10, U.C.A. 1953, required that before any mineral lease could be let by the State Land Board, it would be necessary that the Department of Fish and Game give its consent. 65-7-10 provides that mineral leases shall be made exclusively by the Land Board. It thereafter provides that the Land Board should obtain the consent of the "state agency using or holding such land." It is submitted that the intention of the Legislature in enacting that provision was to govern the situation where a State agency owned a total fee, but where the lands were sought to be leased for the mineral interest. Since the State Land Board has substantial experience and special knowledge relating to the leasing of mineral interests, any mineral lease would be made by the State Land Board to insure that the lease was made in accordance with the best interests of the State. However, where the State agency did not have a complete fee, but merely had surface title, it would not be holding or using the mineral estate, and as a consequence, the State Land Board would not have to obtain the consent of the other State agency before leasing the mineral interests, the title to which would be in the State Land Board.

Several things support this position. First, 65-7-10, U.C.A. 1953, was enacted in 1955 (Laws of Utah 1955, Chapter 128, Section 10). 65-1-18, U.C.A. 1953, provides that the State Land Board may issue leases for exploring and producing oil and gas or for prospecting and mining

purposes “upon any portions of the unsold lands or mineral interests of the state.” This provision was re-enacted in 1959 after substantial change (Laws of Utah 1959, Chapter 132, Section 1). Consequently, it would appear that in order to give harmony to both sections, 65–7–10 must be construed as being applicable only to the case where the Land Board does not own the mineral interest which is sought to be leased. Further, 65–1–19, U.C.A. 1953, provides:

“The board may lease for prospecting and mining purposes the deposits of coal or other mineral or minerals that may be in lands sold with a reservation of mineral deposits, and may lease such deposits in unsold lands belonging to the state.”

This provision would apply to the situation in the instant case, since the State Land Board is the owner of the mineral interest, including the sand and gravel, which is mineral. Therefore, in order to construe the various provisions in harmony, it is apparent that the consent of the holding or using agency need only be obtained where the holding and using agency is holding or using the estate sought to be leased.

Further supporting this position is the fact that subsequent to the 1955 enactment of 65–7–10, U.C.A. 1953, 65–1–95, U.C.A. 1953, was enacted (Laws of Utah 1959, Chapter 132, Section 11). This provision provides:

“All state agencies using or holding any state lands *or mineral* interests shall forthwith furnish the state land board, on forms to be provided by the board, a statement of the consent or non-consent of such agency to the issuance by the state land board of any oil and gas lease under the terms of this act upon such lands or mineral interests. * * *”

This section is substantially more specific than 65-7-10, thus supporting the conclusion that the Legislature did not intend 65-7-10 to be applicable to mineral interests which the State Land Board owned. If 65-7-10 were applicable to such a situation, there would have been no need for the enactment of 65-1-95, and further, 65-1-95 would not have to have been so specifically drawn to cover the situation where State agencies were using or holding any "state lands or mineral interests." The addition of the term "or mineral interests" in 65-1-95 supports the conclusion that 65-7-10 did not apply to the case where the State agency merely had the surface rights and the mineral interest was owned by the Land Board.

There may be situations where it would be good land management for the Land Board to consult with other State agencies before issuing mineral leases (other than those for oil and gas) for the mineral estate where the surface is owned by another department. The trial court recognized this in its Memorandum Decision, and stated:

"That the State Land Board has the right to the sand and gravel without the consent of the State Department of Fish and Game. As a matter of courtesy, however, the State Land Board should inform the Fish and Game Department of its intention to go upon the lands and remove the same."

However, whether this consultation should be made a mandatory requirement is up to the Legislature, and it has not as yet made itself specific in this regard. Indeed, there are a number of reasons in opposition to a requirement that the mineral interest be leased only with the consent of the surface owner. The royalties derived from the leasing of mineral interests are trust funds held for support of the common schools. *Duchesne County v. State Tax Commis-*

tion, 104 Utah 365, 140 P.2d 335. As a consequence, the trustee owes a duty to use the corpus of the trust in such a manner as will bring the maximum benefit to the beneficiary. By allowing other State departments to restrict the trustee's power, the purpose of the grants under the Enabling Act (Sections 6, 7, 8, 9, 10, and 12, 28 Stat. 107, July 16, 1894, as implemented by 65-1-64, 65 and 67, U.C.A. 1953) would be violated.

Since the title to the mineral deposit of sand and gravel on the subject lands is in the State Land Board, and 65-7-10, U.C.A. 1953, does not require the consent of the surface agency where it does not own the mineral interest, the trial court's ruling that the Land Board could lease the mineral interest without consent of the Department of Fish and Game should be affirmed.

CONCLUSION

It is apparent that the appellant's position as respects sand and gravel being a mineral is not in harmony with the intention of the Legislature in reserving mineral interests to the State. Further, it is apparent that geologists, mineralogists, lawyers, and judges, as well as persons of industry, have long recognized sand and gravel to have a mineral status when it is present in commercially usable quantities. The broad reservation provisions of statutes relating to the public domain in not referring to any specific lands and attempting to provide for a broad policy which would have prospective as well as present application, would be frustrated by such a narrow construction as the appellant urges this court to adopt. It is submitted, therefore, the trial court correctly determined that the sand and gravel deposits present in the subject lands were mineral and under the jurisdiction of the State Land Board.

Further, it is obvious that the appellant's contention to give unneeded authority to other State agencies over mineral and land interests in which they have no title cannot be sustained. It is apparent that the trial court's decision should be affirmed.

Respectfully submitted,

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