No. 02-1593

IN THE
SUPREME COURT OF THE UNITED STATES

BEDROC LIMITED, LLC; WESTERN ELITE, INC.,

Petitioners,

v.

UNITED STATES OF AMERICA; GALE A. NORTON; BUREAU OF LAND MANAGEMENT; CURTIS TUCKER; UNITED STATES DEPARTMENT OF THE INTERIOR,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED

The Pittman Underground Water Act of 1919 (the "Pittman Act") authorized patents of up to 640 acres of Nevada land to applicants who discovered and successfully developed underground water sources. Pittman Act patents reserve all "coal and other valuable minerals" to the United States. The questions presented are:

(1) Whether the reservation of "valuable minerals" encompassed ordinary sand and gravel (or other ubiquitous common materials) that were worthless at the time of the patent, but which became marketable decades later as development created markets in reasonable proximity to such sand and gravel; and

(2) If *Watt v. Western Nuclear*, 462 U.S. 36 (1983), calls for a *per se* rule that *all* sand and gravel were reserved on land patented by the federal government in the early 20th Century, whether congressional intent would be better served by a rule that such common materials were *not* reserved to the government as "valuable minerals."

RULE 29.6 STATEMENT

BedRoc Limited, LLC, is a Nevada limited liability company that has no parent corporation. No publicly held company owns a 10% or more equity interest in BedRoc Limited, LLC.

Western Elite, Inc., is a Nevada corporation. Western Elite has no parent corporation and no publicly held company holds 10% or more of Western Elite's stock.

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BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals (Pet. App. A, 1a–21a) is reported at 314 F.3d 1080. The opinion of the District Court for the District of Nevada (Pet. App. B, 22a–38a) is reported at 50 F. Supp. 2d 1001. The opinion of the Interior Board of Land Appeals (Pet. App. C, 39a–63a) is reported at 140 IBLA 295 (1997).

JURISDICTION

The judgment of the court of appeals was entered on December 30, 2002. On March 21, 2003, Justice O'Connor granted an extension of time to file a petition to April 30,

2003. The petition was filed timely and this Court granted a writ of certiorari on September 30, 2003. The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Pittman Underground Water Act of 1919, 41 Stat. 293-95 (repealed 78 Stat. 389 (1964)) is set forth at Pet. App. D. (64a-68a), Section 9 of the Stock-Raising Homestead Act of 1916, 39 Stat. 862 (repealed 90 Stat. 2744 (1976)), and Section 3 of the Surface Resources Act of 1955 (the Common Varieties Act), 30 U.S.C. § 611, are set forth at Pet. App. E and F (69a-71a).

STATEMENT OF THE CASE

The BedRoc Patent

Enacted in 1919, the Pittman Underground Water Act (the "Pittman Act") was part of Congress' decades-long effort to encourage settlement and development of the American West. *See* 41 Stat. 293-95 (1919). Focusing on the state where, as a result of inadequate surface water, various homestead laws had been least successful in encouraging development, the Pittman Act authorized permits for individuals to explore for, and then develop, subterranean waters on "unreserved, unappropriated, non-mineral, nontimbered public lands . . . in the State of Nevada." Pittman Act §1. Congress was concerned that after 50 years of land disposition under the mineral land laws, the homestead laws and other land grant laws, "[l]ess than 11 percent of the lands of the State . . . [were] privately owned." H.R. Rep. No. 66-286, at 2 (1919). Congress accordingly sought to facilitate "the future development of Nevada . . . ." *Id.* Water prospectors who found and developed an underground water source could obtain patents

for up to 640 acres of land. By its terms, a Pittman Act patent reserved to the United States "all the coal and other valuable minerals," which in turn would be "subject to disposal by the United States in accordance with the provisions of the coal and mineral land laws in force at the time of such disposal." Pittman Act § 8.

Few prospectors rose to the formidable challenge of finding and developing underground water resources in the arid Nevada desert. As a result, the Pittman Act was widely viewed as a failure when it was repealed in 1964. *See* 78 Stat. 389. Some industrious souls, however, had succeeded in their efforts to discover and develop underground water sources – and thus obtained the benefit of the Pittman Act bargain. Newton and Mabel Butler succeeded in developing underground water and, as a result, secured a patent for 560 acres in Lincoln County, Nevada. JA 20-21. The United States Department of the Interior, U.S. Geological Survey ("USGS"), had designated their land as non-mineral and available for disposition in 1934. *Id.* 16-17. The Butlers were issued Patent No. 1107339 on March 12, 1940. *Id.* 20-21.

Common sand and gravel were abundant and visible on the Butlers' property and in the area generally when the Butler patent issued in 1940, but there was no market for such materials due to the remote location. *Id.* 10, 11. Expansion of the city of Las Vegas by the 1990s created a market for such materials, and the lessee of a successor owner began a sand and gravel operation. *Id.* 10; 314 F.3d 1080, 1083. In February 1993, Earl Williams purchased the property and continued extracting sand and gravel. 314 F.3d at 1083. Petitioner BedRoc Limited, LLC, ("BedRoc")

acquired the property in 1995, and has continued the sand and gravel extraction operation since that time. *Id.*

Sand and Gravel

Sand and gravel are among the most common materials on earth.[1] They result from the erosive forces of water, wind and ice on rock. In addition to being produced by natural forces, sand and gravel can also be produced by man, typically by crushing sandstone and other common rock found throughout the western United States.

The most common uses of sand and gravel are in construction and development activities. Sand and gravel may provide a base for structures and for pavement on a variety of road types from interstate highways to local mine and ranch roads. Sand and gravel are the principal ingredients in concrete and asphalt, used in a wide variety of construction applications.

Most sand and gravel is commercially useless, located too far from any market to be profitably exploited. Its value is situational: Location, location, location is key when it comes to creating some marketable use – and thus a value – for a sand or gravel deposit. Sand and gravel are bulky, heavy, common, low cost products, typically transported by railroad, or heavy gauge trucks, at substantial cost. Deposits therefore tend to be valuable only when located near markets

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[1] Gravel is not a single substance with a fixed chemical composition. Rather, gravel has been defined as "a mixture of pebbles and broken fragments of rock mixed with finer materials such as sand and clay." *Miller Land & Mineral Co. v. State Highway. Comm'n*, 757 P.2d 1001, 1004 (Wyo. 1988) (citing 18A Words & Phrases 444 (1956) (meaning of "gravel").

in which the materials will be used – population centers, or sites for industrial development or road building.

Because their commercial utility is largely location-driven, sand and gravel abundant at a given location may be, and remain, worthless in perpetuity; or they may acquire some commercial importance if the forces of population and economic development bring "uses" to their location. The location of such deposits at an economically feasible distance may in turn facilitate the development of homes, communities, and industrial facilities.[2] In the absence of economically proximate construction and development, most sand and gravel is, and will remain, commercially useless.

Some additional data may add perspective on how the sand and gravel of the Nevada desert were regarded – or whether they was regarded at all – at the times relevant to this case. In 1918, shortly before the Pittman Act, Nevada production of sand and gravel was 25,325 short tons, valued at a mere $3,943 ($0.16/short ton). *Mineral Resources of the United States 1918, USGS, Part II – Nonmetals*, 307. In contrast, 1918 Nevada production of gold, silver, copper,

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[2] This does not mean that all sand and gravel near commercial development will be exploited. The economics of sand and gravel extraction and sale are tight. Sand and gravel are common. One plot of land containing sand and gravel may well be opened with a gravel pit or extraction operation by some enterprising owner who chooses to use his land in that way. An adjacent property, with deposits in all respects equal, may be devoted to other uses –homes, roads and buildings. Even when, by reason of proximity to market, a deposit may have *potential* commercial value, rarely will the value be so great relative to other available uses that it would justify its use as a gravel source.

lead, and zinc had a total value of $48,528,124. *Id.*, *Part I – Metals*, 133A.

In sum, although sand and gravel were abundant on Pittman Act lands in the early to mid-20th Century, those substances were essentially worthless. Even the most enterprising settler could not have sold sand in the desert. Only expansion of Las Vegas and its suburbs, *decades after patent issuance*, created a possible market for sand and gravel on the Butlers' property and allowed extraction to begin.

Agency Determinations

On March 26, 1993, and April 1, 1993, the Bureau of Land Management ("BLM") issued notices of trespass to then-owner Earl Williams, claiming that sand and gravel on the former Butler property were reserved to the United States. JA 22-25, 26-28. Mr. Williams responded by letter on April 16, 1993, stating that "[t]his property is my own personal property and I do not feel that these are valuable minerals . . . ." Pet. App. 41a. BLM held to its view that it owned the sand and gravel. *Id.* In its April 1993 decision, the agency relied primarily on this Court's decision in *Watt v. Western Nuclear, Inc.*, 462 U.S. 36 (1983), to support its decision that sand and gravel were reserved to the Government. *Id.*; JA 30. BLM found Williams in trespass under 43 C.F.R. § 9239.0-7, which provides:

> The extraction, severance, injury, or removal of . . . mineral materials from public lands under the jurisdiction of the Department of the Interior, except when authorized by law and the regulations of the Department, is an act of trespass. Trespassers will

> be liable in damages to the United States, and will be subject to prosecution for such unlawful acts.

Pet. App. 41a-42a; JA 30-31. BLM ordered Williams to cease sand and gravel removal immediately or face prosecution as a willful trespasser. JA 31. To continue operations pending final determination of sand and gravel ownership, BedRoc, and its predecessor, Earl Williams, entered into a series of increasingly detailed agreements with BLM in 1993, 1995, and 2001, pursuant to which they have made substantial payments, akin to royalties, into an escrow account. Ninth Circuit Supplemental Excerpts of Record ("SER") 103, 106-107 & Ninth Circuit Excerpts of Record ("ER") 85; 314 F.3d at 1083.[3]

BLM's ruling was appealed to the Interior Board of Land Appeals ("IBLA"), which affirmed the decision in October 1997. *Earl Williams*, 140 IBLA 295 (1997), Pet. App. 39a-63a. In so doing, the IBLA relied almost entirely

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[3] The 1993 agreement recited that BLM's actions and cessation order had imposed a "severe hardship" on Williams, his employees, and customers, preventing the fulfillment of contractual sales obligations. SER 102. Under the 1995 and 2001 agreements, BedRoc is prohibited from removing sand and gravel from any part of the property not analyzed for compliance with the National Environmental Policy Act ("NEPA") and the Endangered Species Act ("ESA"). ER 84; SER 107. Under the 2001 agreement, BedRoc is required to supply BLM with monthly and yearly reports stating the amount of sand and gravel that has been removed. ER 89-90. BLM has the right to inspect BedRoc's books and records, and can require BedRoc to perform, at its own expense, property surveys if the BLM believes that BedRoc has removed more sand and gravel than reported. *Id.* 90. BedRoc is also required to pay BLM for sand and gravel, in minimum increments of 5,000 tons, in advance of removal from the property. *Id.* 89.

on legislative history of the Pittman Act, concluding that the reservation of sand and gravel to the Government was "consistent with the Congressional purpose" and "in accord with 'the established rule that land grants are construed favorably to the Government, that nothing passes except what is conveyed in clear language, and that if there are doubts they are resolved for the Government, not against it.'" Pet. App. 61a-62a (citing *Western Nuclear*, 462 U.S. at 59). The IBLA did not discuss the understanding of "valuable minerals" at the time of enactment, nor Mr. Williams' contention that the sand and gravel "on his land had no special value when the land was taken to patent, and was therefore not locatable under the 1872 mining laws at that time . . . ." *Id.* 45a.

District Court Proceedings

On July 2, 1998, BedRoc and Williams filed an action in the District Court for the District of Nevada seeking review of the IBLA decision and to quiet title to the sand and gravel. The United States counterclaimed, asserting ownership of "all" minerals underlying the property. ER 13. It demanded an accounting for all previously removed sand and gravel, as well as "silt and other common borrow." *Id.* 25 (¶73 & Prayer). Western Elite, Inc., which had acquired a portion of the property from BedRoc, later joined in the suit.

On cross-motions for summary judgment, the district court ruled that sand and gravel are "valuable minerals" reserved to the United States under the Pittman Act. 50 F. Supp. 2d 1001, 1008. Like the IBLA, the district court rejected the argument that "the sand and gravel deposits on the property were never reserved to the government, since they could not have been profitably mined and marketed in the 1940's." *Id.* at 1005. It likewise declined to apply the

plain language of the Act, finding that "it is best to examine the legislative history and purpose of the disputed statute to discern Congressional intent." *Id.* It found the remarks of Senator Pittman to be "authoritative" – and located a statement by him to the effect that Congress declined to permit "the acquisition of any character of minerals." *Id.* at 1006. Taking this statement as its cue – and without examining what Senator Pittman meant by "minerals" – the district court ruled for BLM. *Id.* at 1008.

The Ninth Circuit's Opinion

The Ninth Circuit affirmed. 314 F.3d at 1090. The court conceded that the "ordinary meaning of the phrase 'valuable mineral' does not evoke images of sand and gravel," but found that "neither does it obviously exclude those substances." *Id.* at 1084. It stated that while sand and gravel are not precious and thus not valuable in that sense, "valuable" can mean "useful." *Id.* In addition, because some parts of the Pittman Act contained the word minerals without the modifier "valuable," the court found that "the significance of the modifier 'valuable' diminishes." *Id.* It thus held that the phrase "valuable minerals" in the Pittman Act mineral reservation clause is ambiguous. *Id.* at 1085.

Turning to the statutory purpose and legislative history, the court noted that the stated purpose of the Pittman Act was to encourage the "exploration for and development of artesian and subsurface waters in the State of Nevada," but found that the larger purpose was to encourage agriculture. *Id.* Reviewing the legislative history of the Act, the Ninth Circuit concluded that Congress intended the Pittman Act mineral reservation "to serve the same purposes and have the same scope as the [mineral] reservation under the [Stock-Raising Homestead Act of 1916]" as defined by this Court in

Western Nuclear. *Id.* at 1086. The Ninth Circuit thus reasoned that "the mineral reservation is to be read broadly in light of the agricultural purpose of the grant itself, and in light of Congress' equally clear purpose to retain subsurface resources . . . for separate disposition and development." *Id.* (quoting *United States v. Union Oil Co. of California*, 549 F.2d 1271, 1279 (9th Cir. 1977)).

The Ninth Circuit rejected BedRoc's contention that ordinary sand and gravel could only be reserved as "valuable minerals" if the particular deposit had economic value sufficient to be deemed "mineral" subject to location under the mining laws at the time of the patent. *Id.* at 1089. Although only "valuable mineral deposits" are subject to development under the General Mining Act of 1872, 30 U.S.C. § 22 *et seq.*, the Ninth Circuit discerned a difference between a valuable *deposit* of minerals and valuable *minerals*. *Id.* This distinction led to the conclusion that sand and gravel are valuable minerals reserved under the Pittman Act even if the particular sand and gravel deposit at issue had (or presumably even if it still has) no economic value whatsoever.[4] *Id.* at 1089-90. Citing *Western Nuclear*, the Ninth Circuit ruled that the application of the reservation to a particular site does not require factual determinations regarding the value of the particular materials at issue on the site, but rather is "a straightforward legal one regarding

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[4] The court reasoned that "valuable minerals" (in the mineral reservation) is broader than "valuable mineral deposits" (locatable under the mining laws) because substances like gold are "valuable minerals" even if found in deposits too small or inaccessible to profitably extract. *Id.* As described below, the Ninth Circuit's reasoning fails to reflect the historic distinction between common and inherently valuable minerals under the mining laws.

congressional intent as to the scope of the mineral reservation contained in the statute." *Id.* at 1090. Accordingly, the court concluded that although only deposits with value could have been located and developed under the mining laws, no such requirement limits the universe of materials reserved to the Government. *Id.*

This Court granted the petition for certiorari on September 30, 2003.

SUMMARY OF ARGUMENT

Common sand and gravel, worthless at the time of a Pittman Act patent, are not "valuable minerals" reserved to the United States by that Act. Ubiquitous, common, ordinary materials such as sand and gravel, lacking both intrinsic value and commercial worth, were not, at the time of the Pittman Act's passage – either in common understanding or under the mining laws – regarded as "valuable minerals." The cost of transporting sand and gravel, and the prevalence of such materials, renders most sand and gravel quite worthless. Thus, if such common materials are ever to be deemed "valuable," it is only when their proximity to market provides them with some commercial worth.

This understanding is consistent with the traditional views of the Department of the Interior – to which this Court has looked in construing similar mineral statutes. Interior historically has treated sand and gravel as either not locatable under the mining laws at all, or locatable only when a particular deposit has commercial worth. Moreover, when judging the commercial worth of gravel for purposes of a mineral reservation, Interior has looked to the value of the deposit at the time of the patent. Likewise, the rights of a

land patent holder on Pittman Act land must be determined by examining the commercial utility of the deposit at the time of the patent grant. For if ordinary sand and gravel ever fall within a reservation of "*valuable* minerals," they fall within that reservation only when they are in fact valuable at the time the patent is issued.

Watt v. Western Nuclear, 462 U.S. 36 (1983), which concerned a reservation of "all . . . minerals," is not to the contrary. The issue presented in this case – concerning the lack of value of the gravel at issue at the time of the patent – was never raised or decided in that case.

Moreover, to the extent that the interpretation of "all . . . minerals" in *Western Nuclear* is said to be authority for a blanket reservation of *all* sand and gravel *regardless* of their commercial value, then it is *Western Nuclear* that is off the mark. The Court's determination in that case that there was ambiguity about the treatment of sand and gravel under the mining laws in the era of the 1916 Stock-Raising Homestead Act and the 1919 Pittman Act arose from a failure to credit the contemporaneous decisions of the Department of the Interior explaining that common sand and gravel were not regarded as "minerals" under the public land and mining laws. To the extent that *Western Nuclear's* analysis is inconsistent with that understanding, it should be disapproved or overruled.

ARGUMENT

I. Common Sand And Gravel Are Not "Valuable Minerals" And, At Most, Could Be Reserved As "Valuable Minerals" Only If They Were Valuable At The Time Of The Patent.

Land patents issued under the Pittman Act reserved to the United States "all the coal and other valuable minerals" on the patented land. The question here is whether the reservation of "valuable minerals" encompasses ordinary sand and gravel on BedRoc's land. Such material is commonly found throughout Nevada, indeed through much of the United States. High transportation costs (and the sheer ubiquity of the material) make it unlikely that most sand and gravel will find any commercial use. As with most sand and gravel, the deposits on BedRoc's land were worthless at the time of patent. The Butlers received a patent for that land in 1940, but it was not until nearly half a century later – after decades of development and economic progress in the Nevada desert created a market for sand and gravel at this once-remote homestead – that BedRoc's sand and gravel became commercially useful and thus attained some monetary value. Because the scope of the property interest conveyed must be determined at the time of conveyance, the absence of value at the time of the patent is decisive: The common sand and gravel on BedRoc's land were not "valuable minerals" when the patent issued, and were therefore not reserved. Worthless common materials are not reserved as "valuable minerals" merely because such materials may eventually acquire some commercial worth.

A. In Ordinary Usage, Ubiquitous, Common, Worthless Materials Are Not Characterized As "Valuable Minerals."

It is highly unlikely that enterprising citizens such as Newton and Mabel Butler, considering whether to prospect for underground water in the hope of acquiring ownership of arid Nevada lands, would have understood the Government's reservation of "valuable minerals" to encompass the locally prevalent, commercially useless, and seemingly quite worthless, sand and gravel comprising much of their desert land. Even if the term "minerals" might reach common materials like sand and gravel (as this Court held in *Western Nuclear,* 462 U.S. at 60), the word "valuable" has a narrowing effect.[5] "Valuable minerals" would readily

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[5] The Ninth Circuit equated "valuable" with "useful," citing Joseph E. Worcester, *A Dictionary of the English Language* (1897). 314 F.3d at 1084. Yet, equating valuable with anything *potentially* useful – as did the Ninth Circuit – would render the term boundless. In any event, most contemporaneous dictionaries belie the Ninth Circuit's suggestion and instead define valuable in terms of monetary worth. *E.g., Webster's New Int'l Dictionary of the English Language* 2264 (1916) (1. Susceptible of being measured or estimated as to value; appraisable. 2. Of financial or market value, esp. in considerable degree; commanding or worth a good price. 3. Of considerable worth in any respect; worthy; estimable; precious.); *The New Universal Dictionary* 533 (1901) (Having value or worth, especially high value; precious; estimable; worthy.); *The American Encyclopœdic Dictionary* 4372 (Rev. ed. 1896); *A Standard Dictionary of the English Language* 1989 (1897); William Browne, *The Clarendon Dictionary* 308 (1898); *New American Standard School Dictionary* 387 (1906); *The New American Encyclopedic Dictionary* 4372 (1911); *The Comprehensive Standard Dictionary of the English Language* 645 (1915); *New Standard Dictionary of the English Language* 2629 (1919); *A Comprehensive Dictionary of the English Language* 554 (1920).

(continued....)

encompass those substances with widely recognized intrinsic value, such as the metalliferous minerals (*e.g.*, gold, silver, and copper). "Valuable minerals" might arguably also cover other uncommon materials (such as marble or granite), recognized as being inherently valuable. But in ordinary parlance, a class of materials denominated "valuable minerals" will comprise only minerals that are usually valuable. Including materials that are usually worthless

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(continued) . . .

Some dictionaries referenced "valuable" as "useful *and* esteemed" or of "great . . . utility." *E.g.*, Noah Webster, *An American Dictionary of the English Language* 1460 (1889) (1. Having value or worth; possessing qualities which are useful and esteemed; precious. 2. Worthy; estimable; deserving esteem.); VIII *The Century Dictionary and Cyclopedia* 6690 (1906) (Capable of being valued; capable of having the value measured or estimated. 2. Of great value or price; having financial value or worth; representing a large market value. 3. Of great moral worth, utility, or importance; precious; worthy; estimable; deserving esteem.); *The American Dictionary and Cyclopedia* 2998 (1899); *Ogilvie's New Imperial Dictionary of the English Language* 1850 (1905-1906); *Clarkson's Standard American Dictionary of the English Language* 1850 (1908); *The American Universities New Unabridged Dictionary* 1850 (1916). A few suggested that "utility" might stand alone. *E.g.*, Joseph E. Worcester, *A Dictionary of the English Language* 1614 (1887) (1. Having value or worth; being possessed of worth or useful properties; of great price; precious; useful. 2. Deserving regard; worthy; estimable.); *The New Universities Dictionary* 740 (1922); *Collier's New Dictionary of the English Language* 883 (1917).

The prevailing definition, therefore, referred to financial worth, or "great" or an "esteemed" utility. The Ninth Circuit's expansive definition requires neither great utility nor even actual utility. That something might *potentially* be useful would render it "valuable" under the Ninth Circuit's view, even if were actually both useless and worthless.

within the class designated as "valuable minerals" strains ordinary usage.

Materials without intrinsic value or financial value are not typically described as "valuable." Likewise, materials that are common and ordinary, precisely because they are common and ordinary, are not typically regarded as "valuable." It is simply a matter of supply and demand.

"Valuable minerals" evokes riches lying beneath the surface (perhaps not yet discovered), not the very grit of the soil being conveyed. Indeed, a grantee of desert land littered with common gravel, sand, clay, or caliche[6] – materials that make planting, ranching, and inhabiting one's property more difficult – would likely have been shocked to learn that by using or removing such material he or she was trespassing upon the "valuable minerals" reserved to the Government.[7]

In sum, in conventional parlance, "valuable minerals" does not – and did not in 1919 – include materials that are usually worthless. If "valuable minerals" can ever include

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[6] Caliche is "gravel, sand, or desert debris cemented by porous calcium carbonate; also, the calcium carbonate itself." Am. Geol. Inst., *Dictionary of Geological Terms* at 70 (1983). *Accord* U.S. Dep't of Interior, Bureau of Mines, *A Dictionary of Mining, Mineral and Related Terms* 165 (1968).

[7] Such common rock materials are often regarded as more burden than boon. This is not to say that occasional use may not be made of native gravel for a farm or ranch road or common clay for some building purpose. Indeed, the record shows that the Butlers found ways to employ native sand and gravel to make their patch of the desert habitable. They used sand and gravel from a sand wash for concrete block. JA 11. They also used those materials to build a concrete floor under an awning off the side of the house and to form pipe to bring water to their fields. *Id.* 11-12.

such materials, then it can do so only in those circumstances where the particular materials in question have actual value.

B. Common Sand And Gravel Were Not Regarded As Minerals Subject To The Mining Laws At the Time Of The Pittman Act And They Have *Never* Been So Regarded Where The Deposit At Issue Lacks Commercial Value.

The general understanding of "valuable minerals" discussed above is fully consistent with the contemporaneous *legal* understanding under the mining laws.

As this Court has emphasized, the *contemporaneous* understanding of a statutory term is the touchstone in determining what Congress intended by that term. *See Amoco Prod. v. S. Ute Indian Tribe*, 526 U.S. 865, 873 (1999). At the time of enactment of the Pittman Act, Interior had explicitly determined that sand, gravel, and other common materials were *not* to be regarded as "minerals" for purposes of the mining laws and mineral reservations absent some "peculiar property or characteristic giving them a special value." *Zimmerman v. Brunson*, 39 Pub. Lands Dec. 310, 312 (1910).[8] Interior applied this understanding of the status of such common materials in a wide variety of settings. *See, e.g., Hughes v. State of Florida*, 42 Pub. Lands Dec. 401 (1913) (coquina – a shell rock – not a mineral

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[8] In *Zimmerman*, Interior rejected the contention that sand and gravel generally were "minerals" or that they should be regarded as mineral if their proximity to market rendered them commercially valuable. 39 Pub. Lands Dec. at 312-13. The value contended for the sand and gravel at issue in *Zimmerman* arose from their "proximity to the town of Conrad." *Id.* at 312.

under the general mining laws).[9] As shown below, Interior later (in 1929, long after passage of the Pittman Act) shifted its position to allow even ordinary sand and gravel to be classed as "mineral" under the mining laws. *See Layman v. Ellis*, 52 Pub. Lands Dec. 467 (1929). *But even then, such common materials were deemed to be "minerals" only when the deposit in question had existing commercial value arising from its proximity to market. See infra* at 23-25.

In general mining law parlance, "value" is central to determining which minerals are locatable (*i.e.*, subject to the establishment of a mining claim) and indeed to determining which materials are "mineral" at all. "Mineral" for purposes of mining law refers generally to those mineralogical substances that can be extracted from the earth and that have

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[9] *See also Stanislaus Electric Power Co.*, 41 Pub. Lands Dec. 655 (1912) (granitic rocks suitable only for "rough work" were not locatable because such material was "widely distributed in eastern and northern California, comprising three-fifths of the area of the Sierra Nevadas"; distinguishing *N. Pac. Ry. v. Soderberg*, 188 U.S. 526 (1903), as involving granite building materials with special value); *Holman v. State of Utah*, 41 Pub. Lands Dec. 314 (1912) (common clay and limestone found not mineral where there were "vast deposits of each of these materials underlying great portions of the arable land in this country"; "In one sense, all land except portions of the top soil is mineral. The term, however, in the public land laws is properly confined to land containing materials such as metals, metalliferous ores, phosphates, nitrates, oils, etc., of unusual or exceptional value as compared with the great mass of the earth's substance."); *King v. Bradford*, 31 Pub. Lands Dec. 108 (1901) ("Lands containing deposits of ordinary brick clay are not mineral lands within the meaning of the mining laws."; such deposits were found in varying quantities . . . throughout the Rocky Mountain region [and] "exist[] generally throughout the whole country").

independent value distinct from the surrounding earth. As one early court explained:

> . . . having reference to its supposed etymology of anything mined, it may be defined as 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.

Hendler v. Lehigh Valley R. Co., 58 A. 486, 487 (Pa. 1904) (finding common mixed sand that had utility, but no commercial value, was not "mineral"), *overruled on other grounds by Hall v. Delaware L. & W. R. Co.*, 113 A. 669, 670-71 (Pa. 1921). According to one leading authority (speaking contemporaneously with the Pittman Act): "The real test seems to be the character of the deposit as occurring independently of the mere soil, valuable in itself for commercial purposes . . . ." 1 Curtis H. Lindley, *American Law Relating to Mines and Mineral Lands*, § 93, at 156 (3d ed. 1914).

For this reason, the ability to lay claim to common materials under the mining laws has long turned on some peculiar quality of the material at issue or, later (after Interior's 1929 decision in *Layman*, *supra*), on the existence of a commercial market giving it economic value. Either way, common materials have been regarded as "minerals" for purposes of those laws only when the particular materials at issue have economic value where found.[10] Absent

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[10] In *Western Nuclear*, the United States repeatedly pointed out that its view was that only commercially exploitable gravel fell within the scope of the reservation. Pet. Br., § II.A.2; *see also id.* at Heading

(continued....)

commercial circumstances – such as proximity to market – that lend the common material a monetary significance, the material is not regarded as "mineral" and certainly not as a *valuable* mineral.

In this respect, common non-metallic substances are fundamentally different from intrinsically valuable minerals such as gold, and even from uncommon stones such as marble or granite, that are generally regarded as valuable. Once extracted or mined, the precious metals and other valuable minerals have sufficient value to be traded and sold virtually wherever they may be located. Gold that has been mined is, quite simply, gold. It is thus easily recognized as "valuable." But gravel that has been extracted is still just common rock. Because of their relative abundance in the earth, substances like sand and gravel, clay and caliche, have no recognized intrinsic value and attain "mineral" status in law only by virtue of *site-specific circumstances* or special features that give them value.

This emphasis on the actual site-specific value of common materials, but not intrinsically valuable materials, has long been reflected in public land law. For example, in *United States v. Coleman,* 390 U.S. 599, 600-03 (1968), this Court upheld Interior's determination that mining claims for quartzite stone – "one of the most common of all solid materials" – were invalid under the 1872 Mining Law where there was a "lack of an economically feasible market for the stone . . ." and there were "immense quantities of identical

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(continued) . . .

II: "The Explicit Terms Of The SRHA Show A Congressional Intent To Reserve Commercially Exploitable Deposits Of Gravel."

stone found in the area outside the claims . . . ." Interior determined that the "quartzite deposits did not qualify as valuable mineral deposits because the stone could not be marketed at a profit . . . ." *Id.* at 602. The Court upheld this "marketability test" even though it involved "a different and more onerous standard on claims for minerals of widespread occurrence than for rarer minerals . . . ." *Id.* at 603. "While it is true that the marketability test is usually the critical factor in cases involving nonmetallic minerals of widespread occurrence, this is accounted for by the perfectly natural reason that precious metals which are in small supply and for which there is great demand sell at a price so high as to leave little room for doubt that they can be extracted and marketed at a profit." *Id.*

In *Western Nuclear*, the Court addressed whether the reservation of "all . . . minerals" under the Stock-Raising Homestead Act of 1916 ("SRHA") reached ordinary gravel. This Court found guidance in the circumstances under which Interior had (*after* 1929) begun to consider gravel locatable under the mining laws. Gravel would be locatable by virtue of its having a commercial value in light of "existence of present demand" and "proximity to market":

> The treatment of *valuable deposits of gravel as mineral deposits locatable under the mining laws reflect [sic] an application of the "prudent-man test"* . . . . Under this test, which has been repeatedly approved by this Court, a deposit is locatable if it is "of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine." . . . *In the case of nonmetalliferous substances such as gravel, the Secretary* [of the

> Interior] *has required proof that "by reason of accessibility, bona fides in development, proximity to market, existence of present demand, and other factors, the deposit is of such value that it can be mined, removed and disposed of at a profit.*"

462 U.S. at 58 n.18 (citations omitted) (emphasis added). Thus, this Court affirmed that gravel would be deemed a mineral under the mining laws where it had commercial utility in light of proximity to market and present demand.

C. Assuming That Sand And Gravel Ever Fall Within The Class of "Valuable Minerals," They Must At Least Have Commercial Value As Of The Time Of The Patent.

The value of common materials at any given site may change over time. Yet it is a fundamental tenet of property law that the scope of a conveyance must be determined in accordance with the intent of the parties at the time of the grant. *See City of Kellogg v. Mission Mountain Interests Ltd., Co.*, 16 P.3d 915, 919 (Idaho 2000); *Red Hill Outing Club v. Hammond*, 722 A.2d 501, 504 (N.H. 1998); *Hare v. McClellan*, 662 A.2d 1242, 1249-50 (Conn. 1995), *Crockett v. McKenzie*, 867 P.2d 463, 465 (Okla. 1994); 4 Herbert T. Tiffany, *Real Property* § 977 (3d ed. 1975). *See also Poverty Flats Land & Cattle Co. v. United States*, 788 F.2d 676, 683 (10th Cir. 1986) ("New BLM views as to mineral reservations arrived at long after a patent issued, or revealed long after a patent issued, cannot change the title the patentee received under the then-prevailing practice and decisions."); *Miller Land & Mineral Co. v. State Highway Comm'n of Wyoming*, 757 P.2d 1001, 1007 (Wyo. 1988) ("Gravel will satisfy this definition [of mineral] *if it has the requisite value*. And there may be instances wherein a reservation of

minerals has been made in past years and wherein the requisite value was present and recognized to be so in the minds of the parties.") (concurring opinion).

Certainly Congress and patentees did not envision that ownership interests in the patented land might shift over time if worthless materials were later to become marketable. Such an approach would violate another fundamental principle of property law: an interest in property should be at all times both determinate and determinable. *See Leo Sheep Co. v. United States*, 440 U.S. 668, 687 (1979) ("This Court has traditionally recognized the special need for certainty and predictability where land titles are concerned . . . ."). To hold that ownership of sand and gravel – which make up much of the land itself – should *not* be fixed at the time of the initial grant is to create a situation in which private property rights rise and fall with the local commodities markets.

Indeed, under this approach, the owner of the sand and gravel might lay the gravel on his or her own land or a nearby road bed, or provide it for the use of his or her neighbors, only to find, years later, that the gravel once freely extracted and generously distributed now belongs to the United States. The same might be true of other common materials on the site, including stones and clay – should a commercial market develop for such materials. There is no precedent in property law for such mutable ownership interests. Patentees of the Government are entitled, as are other grantees of real property, to determine what is theirs at the time of the conveyance.

Thus, it has long been the position of Interior itself that the status of common materials for purposes of a mineral reservation depends on the existence of a market for those

materials at the time of the conveyance. In a formal opinion issued in 1956, Interior's Solicitor declared that whether sand and gravel are subject to a mineral reservation in favor of the United States must be determined based on marketability at the time of the patent, not at some later date.[11] In interpreting a broadly-worded 1926 statutory mineral reservation of "timber, coal or other minerals including oil and gas or other natural deposits," the Solicitor concluded that common materials would be deemed reserved only if they had commercial marketability *at the time of the patent*:

> Deposits of sand and gravel in lands allotted or patented under the act of June 3, 1926 (44 Stat. 690), which can be shown *as of the date of the allotment or patent* to have a definite economic value by reason of the existence and nearness of a market in which they can be sold at a profit, are reserved.

Op. Solic. Interior Dep't M-36379, at Summary (1956) (emphasis added).

Consistent with the fact that common materials have long been treated differently than intrinsically valuable materials, the Solicitor was careful to point out that this rule linking the scope of a patent to nearness of a market at the time of the patent does *not* apply to the reservation of "other minerals having known *intrinsic mineral qualities and values*" such as gold or silver. *Id.* at 4 (emphasis added).

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[11] Interior confronted this issue only after reversing its earlier position (set forth in *Zimmerman*, 39 Pub. Lands Dec. at 312-13) that common sand and gravel were not "mineral" in character at all.

Rather, it governs the treatment only of "low-value non-metallic mineralized substances such as sand and gravel which are normally found in quantity over widely distributed areas." *Id.* Interior thus recognized that materials such as sand and gravel are fundamentally different from intrinsically valuable minerals in that they are deemed reserved "minerals" only if they have economic value at the time of conveyance. *Accord Miller Land*, 757 P.2d at 1007 (holding that "requisite value" of gravel must be determined as of the time of the reservation).

It is therefore fully consistent with common understandings, logic, and long-standing Interior policy – as well as fundamental principles of mineral and property law – to recognize that only economic value can elevate common materials to the status of "valuable minerals" under the reservation of a patent. Moreover, it is equally consistent with those common understandings, logic, and long-standing Interior precedent – as well as principles of mineral and property law – to recognize that unless such economic value exists at the time a patent is granted, these ordinary materials pass along with the remainder of the land to the grantee.

II. The Statutory Purpose And Legislative History Of The Pittman Act Support The Understanding That Sand And Gravel Without Commercial Value At The Time Of The Patent Were Not Reserved To The United States.

The Ninth Circuit based its interpretation of the reservation of "valuable minerals" under the Pittman Act squarely on the legislative history and perceived statutory purpose of that Act. The Ninth Circuit's analysis fails on many (and all) levels.

First, the Ninth Circuit's enthusiastic reliance on a perceived congressional purpose *not* apparent in the statutory text is contrary to this Court's precedents holding that persons induced to act by congressional promise ought to receive the benefit of the bargain. The Pittman Act was designed to induce private citizens to explore and develop the underground water resources of Nevada for the public good.[12] To those who succeeded, Congress promised substantial lands "as a reward for [their] labors and expenditures." H.R. Rep. No. 66-286, at 1 (1919). Congress deliberately sought to induce reliance on the promise articulated in the statute. It cannot be presumed to have intended to deliver less than those words promised – as reasonably construed by the citizens being induced to act. As this Court has held, where Congress:

> . . . offers to individuals or to corporations as an inducement to undertake and accomplish . . . works of a *quasi* public character in or through an immense and undeveloped public domain, such legislation stands upon a somewhat different footing from merely a private grant, and should receive at the hands of the court a more liberal construction in favor of the purposes for which it was enacted.

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[12] Congress declared that "if the vast areas of arid lands in the State are to be developed, it must be done through the individual and with private capital." S. Rep. No. 64-4, at 2 (1915). *See also* H.R. Rep. No. 63-1418, at 3 (1915) (quoting Interior Secretary Lane's report that the "large surface areas, small population, and comparatively small amount of assessable property at present in the State, together with the limited number of wagon roads, railroads, and other transportation facilities, indicate strongly the need of further development in this direction . . . .").

Leo Sheep, 440 U.S. at 683. Therefore, the guiding principle in interpreting the reservation ought not be an *unexpressed* congressional purpose. Rather, as this Court has explained, in "interpreting statutory mineral reservations like the one at issue here . . . the terms of the reservation [are] to be understood in 'their ordinary and popular sense.'" *Amoco Production*, 526 U.S. at 873.

Even the Ninth Circuit appeared to concede that the better reading of "valuable minerals" would eliminate sand and gravel from the reach of the Pittman Act reservation. 314 F.3d at 1084. The court declined to acknowledge, however, that the *words* of the statute should govern where those words have prompted citizens to act.

Second, the Ninth Circuit's effort to equate this Court's *Western Nuclear* analysis of the purpose of the SRHA with the purpose of the Pittman Act reflects an imperfect match. As the Ninth Circuit recognized, the Pittman Act was designed "to encourage the exploration for and development of artesian and subsurface waters in the State of Nevada" by "creat[ing] an incentive for private individuals to risk time, labor, and money in prospecting for water." *Id.* at 1085. Thus, the patent was granted to successful water prospectors, in consideration of their investment of labor and capital in the discovery and development of underground water supplies. The patent was not granted for, as in the SRHA, improving the land by agriculture or ranching.

There is no doubt that Congress anticipated that agriculture would be the primary force for initial population entry into the Nevada desert. But the broader goal was to promote settlement and economic development generally, not a system of share-cropping, where the "owner" – who has devoted time, effort, and money to finding and

developing water – can be said to have received the entirety of his or her due if allowed merely to pursue an agricultural or ranching enterprise on the land. The Act does not grant a mere agricultural easement, but rather private ownership of property, with the aim of creating a citizenry invested in and responsible for the land and the community. The Pittman Act grants intrepid water prospectors a broad right of private ownership in all aspects of the land, subject only to a defined reservation in favor of the United States for "valuable minerals."[13]

Third, the Ninth Circuit reasoned that Congress divided the surface lands from the mineral estate so as to "facilitate development of both." *Id.* at 1086. The mechanism by which the mineral estate could be developed was through exploration and location of mining claims by private prospectors on the reserved mineral estate within the patented land. Pittman Act §8. At the time of the Pittman Act, however, sand and gravel were *not* – under Interior's view – locatable under the mining laws. *See Zimmerman*, 39 Pub. Lands Dec. at 312-13. Moreover, even after Interior revised its views in 1929 to allow sand and gravel to be located and acquired by mining claims, sand and gravel were *not* locatable unless the deposit at issue was commercially

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[13] Significantly, there were those in Congress – including Senator Pittman himself – who believed that a person who successfully developed the water resources should be entitled to all the benefits of ownership, including *all* mineral rights. *See infra* at 29-30. Given this sentiment, any interpretation of the bargain struck within Congress ought at least allow for private ownership of the common materials that comprise much of the earth on the patented lands.

valuable. *See supra* at 23-25.[14] Thus, the sand and gravel on the Butlers' newly patented land were *not* subject to development via location under the mining laws, even under the most liberal interpretation of those laws. Construing the reservation to encompass common sand and gravel does *not*, therefore, encourage the public development of sand and gravel. Rather, as interpreted by the Government, it would only thwart such development by burdening the right of the *private* landowner to develop the resource.

Fourth, regardless of the purpose of the *grant*, the purpose of the *reservation* – to prevent fraudulent acquisition of valuable minerals – is not served by applying the reservation to common materials that were either apparent on the land or *not* valuable at the time of the patent.

In discerning the "intent" of the reservation, both the district court and the Ninth Circuit relied heavily on a colloquy between Senator Pittman of Nevada and Senator Thomas of Colorado. 314 F.3d at 1086-87 (citing 53 Cong. Rec. 705, 707 (1916)); 50 F. Supp. 2d at 1005-07 (same). Neither Senator favored any mineral reservation. Senator Thomas asked whether the reservation was "broad enough to include veins of gold, silver, lead, and other metalliferous deposits." 53 Cong. Rec. 707. Nothing in Senator Thomas' question suggests that he understood the reservation would reach common sand and gravel. Indeed, if the reservation

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[14] In 1955, Congress removed "common varieties of sand, stone, gravel, pumice, pumicite or cinders" from the purview of the general mining laws. 30 U.S.C. § 611. This restored by legislation Interior's pre-1929 interpretation of the Mining Laws, as declared in *Zimmerman* and related cases.

included metalliferous deposits, Senator Thomas wished to amend the bill to eliminate it. *Id.*

Senator Pittman responded that he had prepared the bill without a mineral reservation because he opposed one, but that he had added the reservation to get the bill through the House of Representatives. *Id.* Under Sections 1 and 2 of the Pittman Act, the Secretary had to certify that the lands were nonmineral, meaning that their primary value was not as mineral land. But the House remained concerned that the Act could still "be used for the purpose of acquiring mineral lands under the guise of obtaining agricultural lands." *Id.* Senator Pittman explained:

> If [minerals] are not disclosed on the surface of the ground, still the Government desires to prevent any fraud on the Government in the acquisition of this land under the guise of entering it for agricultural purposes, while at the same time it may be to acquire large bodies of *coal or other valuable minerals* that are apparently *concealed under the surface*, but are known to the entryman.

Id. (emphasis added). The district court summarized these proceedings as a reflection of "Congressional hostility to fraudulent acquisitions of any mineral resources under the guise of agricultural land patents." 50 F. Supp. 2d at 1007.

There is absolutely no indication in the legislative history that such concern about fraudulent acquisition extended beyond intrinsically valuable substances (like gold) usually associated with such nefarious intent. But even if the concern about fraud might extend to common materials in some circumstances, the notion of "fraudulent intent" could not rationally reach sand and gravel that either (a) were

apparent on the surface of the land; or (b) were worthless at the time of the patent.

Fifth, the Ninth Circuit attributed much significance to what it saw as Senator Pittman's broad statement that it was the "policy of Congress, as I see it, not to permit the acquisition of any character of minerals through any agricultural entry." 314 F.3d at 1087 (citing 53 Cong. Rec. 707). Yet that statement, and others like it, simply does not answer the questions presented here. As this Court pointed out in *Andrus v. Charlestone Stone Products Co.*, 436 U.S. 604, 610-11 (1978), "mineral" (whether as used by a Senator, or as used in a statute) is an elastic word that potentially encompasses various meanings. In the sense that anything that is not animal or vegetable is mineral, the word has exceptional breadth; it is broad enough to cover a "high proportion of the substances of the earth" and to reach even "common dirt." *Id.* at 611 (citations omitted). But such broad definitions would be absurd if applied to grants of land under federal statute. *See N. Pac. Ry. Co. v. Soderberg*, 188 U.S. 526, 530 (1903).

There is simply no way to discern what was in the mind of Senator Pittman when he used the word "minerals" or the phrase "any character of minerals" in a single floor statement. If anything, Senator Thomas' reference to metalliferous deposits being reserved to the United States, *combined with the absence of any suggestion in this legislative history that common materials were encompassed by the reservation*, suggests a narrow reach for the phrase. In the end, nothing in the debates suggests that any Member

intended to reserve common materials like ordinary sand and gravel to the United States. [15]

III. *Watt v. Western Nuclear* Is Consistent With The Understanding That Deposits of Sand And Gravel Without Commercial Value At The Time Of The Patent Are Not Reserved To The United States As "Valuable Minerals."

As support for its decision in this case, the Ninth Circuit relied heavily on this Court's decision in *Western Nuclear* applying the mineral reservation in the SRHA to gravel. For at least three reasons, *Western Nuclear* does not undermine the conclusion that to qualify as "valuable minerals" reserved by the Pittman Act, sand and gravel must have had economic value at the time of the patent.

First, the language of the reservation construed in *Western Nuclear* was different and broader. The reservation in *Western Nuclear* extended to "all the coal and other minerals." 462 U.S. at 37. A reservation of "all . . . minerals" allows for a far broader interpretation than a reservation limited to "valuable minerals." It is, of course, a basic rule of statutory construction that each word must be

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[15] The Ninth Circuit also asserted that the significance of the adjective "valuable" as used in the provisions of the Act defining the reservation was "diminished" because the Act in other places refers to "minerals" without that adjective. 314 F.3d at 1084. That argument makes no sense: the *reservation* refers to "valuable minerals." Other references to minerals in the Act without the adjective make sense in context and do not undermine the significance of the modifier *in connection with the reservation*. Similarly, the patent conveyance instrument from the United States Government to the Butlers on March 12, 1940, reserved only coal and other "valuable minerals." JA 21.

given significance. *See Duncan v. Walker*, 533 U.S. 167, 174 (2001). "Valuable" can only be a word of limitation.

Second, the structure and immediate purpose of the SRHA was somewhat different from the Pittman Act. The theory that the patentee has gotten the benefit of his bargain under the SRHA if he can use the land (including sand and gravel) for agricultural purposes, irrespective of the breadth of the mineral reservation, at least squares with the stated *immediate* purpose of the SRHA to encourage agricultural uses. It does not fit so comfortably, however, with the explicit purpose of the Pittman Act: to motivate citizens to prospect for underground sources of water and reward them for successfully doing so.

Third, in *Western Nuclear*, this Court simply did not consider the question presented here with respect to the time at which gravel must be valuable to fall within the reservation, *i.e.*, whether a statutory reservation of "minerals" encompasses *all* gravel, even if the gravel had no commercial value at the time of the patent. In *Western Nuclear*, the United States conceded that "the mineral reservation embraces only deposits of gravel and other mineral materials which are commercially exploitable and would justify a mineral entry." Pet. Br. § II.A.2. The landowner did *not*, however, contend that its gravel lacked commercial value at the time of the patent. Nothing in the Court's opinion or the briefing suggests a factual basis to make such an argument. The land at issue was patented in 1926 and was acquired by the respondent in 1975 for the purpose of extracting gravel from an "old gravel pit." 475 F. Supp. 654, 655 (D. Wyo. 1979). This Court quoted a BLM appraisal finding that gravel production was "the highest and best use of the property" and the IBLA's ruling that "gravel

in a valuable deposit is a mineral reserved to the United States . . . ." 462 U.S. at 40-41 (emphasis added).

In any event, the issue presented by the first question in the petition in this case was never raised in *Western Nuclear* and there is nothing in the opinion of the Court to suggest that the Court ever considered it. Because no one in the case raised the issue of *when* such common materials must be commercially exploitable – and because this Court did not address that issue – nothing in *Western Nuclear* dictates the answer to that question here.

At bottom, the Ninth Circuit misapprehended the scope of the *Western Nuclear* decision. *Western Nuclear* found "no indication that Congress intended the mineral reservation in the SRHA to be *narrower in scope than the mining laws*." *Id.* at 59 (emphasis added). *Western Nuclear* did *not* hold, however, that Congress intended the reservation to be *broader in scope* than those laws – which, even at their post-1929 broadest, would not have reached the sand and gravel on BedRoc's land. To the contrary, the Court's analysis links the scope of "minerals" subject to the mining laws *directly* to the scope of the mineral reservation.[16] Therefore,

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[16] The Court ruled that "minerals" reserved under the SRHA should include:

> . . . substances that are mineral in character (*i.e.*, that are inorganic), that can be removed from the soil, that can be used for commercial purposes, and that there is no reason to suppose were intended to be included in the surface estate.

462 U.S. at 53. The Court did not elaborate on the phrase "can be used for commercial purposes," except by reference to the general

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while certain of the Court's statements in *Western Nuclear* were expressed in rather broad terms, neither the Court's holding nor its reasoning supports the blanket reservation of *all* gravel to the Government – even gravel that has *never* been subject to the mining laws because it had *no market value* at any time prior to the 1955 complete withdrawal of such materials from the purview of those laws. *See supra* n.14.

IV. Common Sand And Gravel Were Never Reserved Under The Pittman Act Because They Were Not Regarded As "Minerals" At The Time Of The 1919 Pittman Act.

For the reasons described above, common, ubiquitous sand and gravel do not fall within any plausible construction of the phrase "valuable minerals." And even if they might be so classed when a particular deposit is, in fact, commercially marketable, they cannot be so classed for purposes of this case, when they had no economic value at the time of the patent. Even the broadest reach of the mineral laws would hold such common materials to be "mineral" only when, by reason of demand and proximity to market, those materials are commercially exploitable.

But there is a further impediment to the Government's argument that sand and gravel (as well as "silt and other common borrow," ER 25 (¶73 & Prayer)) were reserved to the United States under the Pittman Act. That impediment

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mining law concepts that link the location of common materials to an existing market for those materials.

lies in the fact that, *at the time of the Pittman Act*, it was firmly established that ordinary sand and gravel were not "minerals" at all under the general mineral laws – even if they had commercial value. *See, e.g., Zimmerman*, 39 Pub. Lands Dec. at 312-13; *Litch v. Scott*, 40 Pub. Lands Dec. 467 (1912); *Holman v. State of Utah*, 41 Pub. Lands Dec. 314 (1912); *Bettancourt v. Fitzgerald*, 40 Pub. Lands Dec. 620 (1912); *Gray Trust Co.*, 47 Pub. Lands Dec. 18 (1919). Indeed, under the well-settled, published decisions of Interior, such common materials were *not* subject to location and development under the general mining laws until Interior changed its interpretation of the term "mineral" in 1929, *after* the wave of Western land grant statutes, including the Pittman Act and the SRHA.[17]

This Court's decision in *Western Nuclear*, of course, suggested a possible contrary view of the early 20th Century American understanding of the term "mineral" as it relates to sand and gravel. That decision held that the term "minerals," as applied in connection with the mining laws circa 1916, could have encompassed common gravel and that this was Congress' intent in passing the 1916 SRHA. 462 U.S. at 60.

Western Nuclear has *not* proven to be a source of guidance to state and federal courts considering similar issues. Indeed, the decision stands in sharp contrast to the views of the majority of courts, before and since, addressing

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[17] *Compare Zimmerman*, 39 Pub. Lands Dec. at 312 ("search of the standard American authorities . . . failed to disclose a single one which classifies a deposit such as claimed in this case as mineral"), *with Layman v. Ellis*, 52 Pub. Lands Dec. 714 (1929) (abandoning *per se* rule against mineral status for ordinary sand and gravel, in favor of case-by-case approach dependent on commercial utility).

the application of mineral reservations to sand and gravel in other contexts. The "vast majority of courts have held for various reasons that gravel is not a mineral estate in general private grants or reservations of minerals." *Miller Land,* 757 P.2d at 1003 (rejecting request to "follow the emerging law that gravel is a mineral posited in the United States Supreme Court case of *Watt v. Western Nuclear, Inc.*"). *See also Heinatz v. Allen*, 217 S.W.2d 994, 997 (Tex. 1949); *Burkey v. United States*, 25 Cl. Ct. 566, 575-76 (U.S. Cl. Ct. 1992) (discussing Colorado's general rule excluding sand and gravel from mineral reservation and citing decisions of other jurisdictions "overwhelmingly to the same effect"); *Farrell v. Sayre*, 270 P.2d 190 (Colo. 1954);[18] *Rysavy v. Novotny*, 401 N.W.2d 540, 542 (S.D. 1987) (quartzite rock not reserved); *Downstate Stone Co. v. United States*, 712 F.2d 1215, 1219 (7th Cir. 1983) (common limestone not reserved where government acquired surface estate from private party). Courts since *Western Nuclear* have generally distinguished its reasoning and declined to follow it in the context of private conveyances.

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[18] *See also Roe v. State*, 710 P.2d 84 (N.M. 1985); *Hovden v. Lind*, 301 N.W.2d 374 (N.D. 1981); *W.S. Newell, Inc. v. Randall*, 373 So.2d 1068 (Ala. 1979); *West Virginia Dept. of Highways v. Farmer*, 226 S.E.2d 717 (W. Va. 1976); *Holland v. Dolese Co.*, 540 P.2d 549 (Okla. 1975); *Elkhorn City Land Co. v. Elkhorn City*, 459 S.W.2d 762 (Ky. 1970); *Bambauer v. Menjoulet*, 214 Cal. App. 2d 871 (1963); *Fisher v. Keweenaw Land Ass'n*, 124 N.W.2d 784 (Mich. 1963); *Witherspoon v. Campbell*, 69 So.2d 384 (Miss. 1954); *Hendler, supra*; see *generally McDonald v. Snyder Constr. Co.*, 744 S.W.2d 550 (Mo. Ct. App. 1988) (collecting cases); 54 Am. Jur. 2d Mines & Minerals, § 8 (1971).

Courts have also distinguished *Western Nuclear* in cases involving lands patented under other *federal statutes*. The court in *Poverty Flats Land & Cattle Co. v. United States*, 788 F.2d 676 (10th Cir. 1986), rejected, for example, Interior's argument that common caliche was a reserved mineral in land conveyed under the Taylor Grazing Act. The Tenth Circuit noted that "it cannot be assumed, as the Government does herein, that the surface use was preordained [by Congress]." 788 F.2d at 681. *See also United States v. Hess*, 194 F.3d 1164, 1172 (10th Cir. 1999) (distinguishing owner that acquired lands pursuant to Indian Reorganization Act exchange patent, finding "Congress did not preordain Mr. Brown's surface or subsurface use of [IRA] lands").

Western Nuclear's finding that common gravel was reserved to the Government under the SRHA is thus aberrational, promoting uncertainty and inequity in an area since dubbed the "tar baby" of natural resource law. *See* John S. Lowe, *What Substances Are Minerals?*, 30 Rocky Mtn. Min. L. Inst. 2-1 (1984). *See also Miller Land*, 757 P.2d at 1003-04 ("If there is any confusion, we suspect that the [*Western Nuclear*] case is the culprit . . . ."). Even courts that have followed *Western Nuclear* (because SRHA lands were at issue) have expressed reluctance to impose such second-class status on surface owners of these lands. *See Champlin Petroleum Co. v. Lyman*, 708 P.2d 319, 321 (N.M. 1985) ("We, of course, must adopt the classification that the majority of the Supreme Court has accorded to the meaning of a federal act, even though we may share the reservations

of the dissenters that the majority's definition of a reserved mineral may be overly broad.").[19]

That *Western Nuclear* has not been followed by many courts dealing with similar issues is cause for question. Real property ownership is the stuff of common law, largely state law. Unless Congress has clearly ordained a different result, this Court may responsibly seek to harmonize the interpretation of federal statutes affecting property ownership with the construction of similar terms by the majority of state and federal courts. *See, e.g., Amoco Production*, 526 U.S. at 877 (citing Pennsylvania common law in interpretation of federal statutory mineral reservation).

The reluctance of many courts to follow *Western Nuclear* is understandable: that case rests on a clearly discernible error in its determination that at the time of passage of the SRHA it was not clear whether minerals, as understood under the mining laws, encompassed gravel. That error – regarding the contemporaneous understanding of the term "minerals" – significantly undermines the persuasive authority of the Court's conclusion and ought not be extended to this case, notwithstanding that the SRHA and

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[19] *But see Rosette Inc. v. United States*, 277 F.3d 1222 (10th Cir. 2002) (finding geothermal steam within SRHA reservation); *see also Hughes v. MWCA, Inc.*, 2001 U.S. App. LEXIS 13298 (10th Cir. June 14, 2001) (finding scoria within SRHA reservation). The rock type known as "scoria," at issue in *Hughes*, is a common cinder-like "crust on the surface of lava flows . . . ." Am. Geol. Inst., *Dictionary of Geological Terms* 450 (1983).

Pittman Act were passed in the same era.[20] Indeed, this Court should correct that error.

The Court recently confirmed the importance of fidelity to the prevailing understanding at the time a statute was passed. In *Amoco Production*, the Court overturned a Tenth Circuit ruling that the reservation of "all coal" under the Coal Lands Acts of 1909 and 1910 included coalbed methane gas ("CBM gas") within coal formations. The Tenth Circuit had found the word "coal" to be ambiguous. *See* 526 U.S. at 871-72. This Court reversed because "the common conception of coal at the time Congress passed the 1909 and 1910 Acts was the solid rock substance that was the country's primary energy resource." *Id.* at 874. As the Court explained:

> The question is not whether, given what scientists know today, it makes sense to regard CBM gas as a constituent of coal but whether Congress so regarded it in 1909 and 1910. In interpreting statutory mineral reservations like the one at issue here, we have emphasized that Congress "was dealing with a practical subject in a practical way" and that it intended the terms of the reservation to be understood in "their ordinary and popular sense."

Id. at 873 (citing *Burke v. Southern Pacific R. Co.*, 234 U.S. 669, 679 (1914), and *Perrin v. United States*, 444 U.S. 37, 42 (1979)).

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[20] If *Western Nuclear* had held that "all . . . minerals" under the SRHA did *not* encompass gravel, the Ninth Circuit could not plausibly have held that gravel was a "valuable mineral."

In 1910, Interior – the executive department charged with administering public lands – had clearly set forth its understanding about whether sand and gravel were minerals. According to the Department, "unless they possess a *peculiar property* or characteristic giving them a special value," common materials such as gravel "*were not to be regarded as mineral.*" *Zimmerman*, 39 Pub. Lands Dec. at 312 (emphasis added).

Zimmerman addressed whether a commercially valuable deposit of common gravel, marketable because of its proximity to a town, could constitute a "mineral" under the general mining laws. *Id.* Citing prior decisions involving common substances "valuable only for general building purposes," Interior concluded that:

> . . . the Department, *in the absence of specific legislation by Congress*, will refuse to classify as mineral land containing a deposit of material *not recognized by standard authorities as such*, whose sole use is for general building purposes, and whose chief value is its proximity to a town or city, in contradistinction to numerous other like deposits of the same character in the public domain.

Id. at 313 (emphasis added). Interior's decision in *Zimmerman* was based on a "search of the standard American authorities" that "failed to disclose a single one which classifies a deposit such as claimed in this case as mineral." *Id.* at 312. Interior was not "aware of any application to purchase such a deposit under the mining laws." *Id.*

Zimmerman was thereafter followed as *conclusive* that ordinary gravel was not "mineral" under the mining laws,

regardless of its commercial value. *See Litch v. Scott*, 40 Pub. Lands Dec. 467, 469 (1912). Its reasoning also was applied to other common materials. *E.g. Hughes v. State of Florida*, 42 Pub. Lands Dec. 401 (1913) (shell rock).[21]

This understanding of "mineral" was also reflected in *United States v. Aitken*, in which the court found that commercial gravel had "never been considered as a mineral." 25 Philippine Rep. 7, 16 (1913). According to the court:

> [If] an examination be made of the individual adjudicated cases and the decisions of the United States Land Department, upon which these general definitions of the term "mineral" are based, it will be found that *commercial gravel* was not a factor in forming them, and that it has *never been considered as a mineral.*

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[21] *See supra* note 9; *see also Victor Portland Cement v. S. Pac. Ry. Co.*, 43 Pub. Lands Dec. 325, 326 (1914) (ruling that "widely distributed" shale with clay "suitable for use in the manufacture of Portland cement" is not a "valuable mineral deposit" because it "does not materially differ ... from ordinary clay which is largely used for the same purpose...."); *Gray Trust Co.*, 47 Pub. Lands Dec. 18, 20 (1919) (ruling that the limestone deposits in question "have not been shown to be of such quality as to give them any substantial value over and above other limestone deposits of that region which are shown to exist in immense quantities and more favorably situated with relation to transportation facilities, or otherwise to bring them within the category of mineral deposits subject to location under the mining laws," and that "the mere fact that a deposit is or may be used in the construction or surfacing of roads [does not] render land upon which it occurs mineral land..."). The same official who rendered this decision later reported favorably to the Senate on the bill that became the Pittman Act that year. *See* 58 Cong. Rec. 2268-69 (1919) (reprinting Acting Secretary Vogelsang's report with full text of bill). *See also* S. Rep. No. 66-66, at 2 (1919) (same).

Id. (emphasis added).[22]

In 1929, a decade after passage of the Pittman Act, Interior overruled *Zimmerman*, opting for a case-by-case approach recognizing sand and gravel deposits as "mineral" *if* they possessed value sufficient to justify mineral status under the traditional "prudent-man" test. *See Layman v. Ellis*, 52 Pub. Lands Dec. 714 (1929). In terms of common meaning in 1919, however, the decisions discussed above leave no doubt that "minerals" did not include sand and gravel, even if commercially valuable.

The majority's conclusion in *Western Nuclear* that *Zimmerman* ought not be regarded as decisive on the issue of Congress' contemporaneous understanding of "minerals" was misguided in several respects.

First, while acknowledging that "the legal understanding of a word prevailing at the time it is included in a statute is a *relevant* factor to consider in determining the meaning that the legislature ascribed to a word," 462 U.S. at 45-46 (emphasis added), the Court believed it "unlikely that many Members of Congress were aware of the ruling in *Zimmerman*." *Id.* But that analysis misstates the significance of a contemporaneous decision of the

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[22] This history is traced in *Western Nuclear's* dissent. After reviewing that history, the dissent found it "beyond question, when the SRHA was adopted in 1916 [and until 1929], that the Department had ruled consistently that gravel was not a mineral under the general mining laws." 462 U.S. at 65 (Powell, J., dissenting). Accordingly, "one must conclude that Congress intended the term 'minerals' in the new statute to have the meaning so recently and consistently given it by the Department in construing and applying the general mining laws." *Id.* at 66.

responsible federal department and the reasons why it is important, as reflected in cases before and since. The fact that *Zimmerman* was a decision of Interior, the department authorized by Congress to administer the statute (and which contributed directly to its drafting)[23] should have made the decision decisive – or nearly so. Because the decision represents the definitive, publicly stated view of the responsible government body, Congress' knowledge of the decision must be *presumed.* After all, *Zimmerman* was not an isolated Interior decision as noted; it was part of a long line of consistent rulings.

Traynor v. Turnage, 485 U.S. 535 (1988), decided five years after *Western Nuclear*, reflects the proper weight to be attributed to the governing agency's directives. The question in *Traynor* was whether the Rehabilitation Act barred

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[23] Interior was active in developing the Pittman Act legislation with the House and Senate Committees on Public Lands from 1915 through 1919. *See* H.R. Rep. No. 63-1418, at 2 (1915) ("The bill is approved and its passage strongly supported by the Secretary of the Interior . . . "; referencing a report from Interior Secretary Franklin Lane); S. Rep. No. 64-4, at 1 (1915) (referencing that the "bill is approved and its passage strongly supported by the Secretary of the Interior"). When Senator Pittman described the bill to the Senate, he explained that the Senate Committee on Public Lands "took the matter up with the Department of the Interior, and . . . the Department of the Interior favored this bill strongly with regard to the State of Nevada . . . ." 53 Cong. Rec. 705. *See also* S. Rep. No. 66-66, at 2 (1919) (noting that Interior "recommends that the bill be passed"); 58 Cong. Rec. 2268 (1919) (Senator Pittman explaining that the "Department of the Interior recommends the passage of the bill," which by then included a reservation of the "coal and other valuable mineral deposits in such lands"). *Accord* H.R. Rep. No. 66-286 (1919) (reprinting report from the Acting Interior Secretary to the Senate Committee on Public Lands).

characterization of alcoholism as "willful misconduct." Congress had amended 38 U.S.C. § 1662(a)(1) to allow veterans to take advantage of the G.I. Bill after the usual ten-year delimiting period if they could show they delayed going to school because of "a physical or mental disability which was not the result of [their] own willful misconduct." 485 U.S. at 545 (alteration in original). The Veterans' Administration ("VA") classified alcoholism as "willful misconduct" under § 1662, and this rule was challenged.

The Court sided with the VA. Because "[t]he same term had long been used in other veterans' benefits statutes," Congress was presumed to be aware that "[t]he [VA] had long construed the term 'willful misconduct' for purposes of these statutes as encompassing primary alcoholism...." *Id.* The Court explained:

> It is always appropriate to assume that our elected representatives, like other citizens, know the law. Hence, we must assume that Congress was aware of the [VA's] interpretation of "willful misconduct" at the time that it enacted §1662(a)(1), and that Congress intended that the term receive the same meaning for purposes of that statute as it had received for purposes of other veterans' benefits statutes.

Id. at 546 (citations omitted). *See also South Dakota v. Yankton Sioux*, 522 U.S. 329, 351 (1998) ("we assume that Congress is aware of existing law when it passes legislation" (quoting *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990)). The same strong deference to contemporaneous pronouncements of the responsible federal agency is reflected in decisions preceding *Western Nuclear*. *E.g.*, *Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978); *N.L.R.B. v.*

Gullet Gin Co., 340 U.S. 361, 365 (1951); *Edwards' Lessee v. Darby*, 25 U.S. (12 Wheat.) 206, 210-11 (1827).

In sum, Congress is presumed to know the law set forth by the responsible agency. In declining to give *Zimmerman* its appropriate weight because *Members* of Congress might not have *actually* been aware of the decision, *Western Nuclear*'s analysis was inconsistent with both prior and subsequent cases.

Second, in addition to stating the *official* position of the responsible federal department, *Zimmerman* reflects the prevailing *American* legal usage on the issue. Interior's survey showed that "minerals" did not encompass gravel and that there was no contrary American authority. *Western Nuclear* erred in disregarding that contemporaneous prevailing American usage.

Third, the *Western Nuclear* majority suggested that Congress could have been aware of the Court's decision in *N. Pac. Ry. Co. v. Soderberg*, 188 U.S. 526 (1903), which had adopted "a broad definition of the term 'mineral' and quoted with approval a statement that gravel is a mineral." *Western Nuclear*, 462 U.S. at 46. But even assuming that it was appropriate to surmise about what Members of Congress *actually* knew (as a basis for disregarding statements by the responsible federal department), *Soderberg* provides an unlikely basis for raising doubts about the American understanding of the treatment of sand and gravel.

Soderberg involved a valuable granite formation, *not* sand and gravel. It considered whether a valuable *granite* deposit would render a particular property "mineral lands." In seeking guidance on the treatment of granite, the Court *first* looked to the way that the Lands Department (*i.e.*,

Interior) treated granite and like materials. Thus, *Soderberg* was, in its own analytical approach, consistent with giving great weight to the contemporaneous opinion of the executive department responsible for overseeing the grant. The Court looked for further confirmation in state court opinions holding that materials like iron, petroleum, and granite were regarded as minerals.

By way of final confirmation, the Court looked at English decisions, finding that English courts also regarded certain valuable building stones to be minerals in some circumstances. One of the quotations drawn from the English cases included gravel among a listing of building materials. Thus, even as quoted, the reference to "gravel" was merely passing dictum.[24]

The *Western Nuclear* majority found that the quotation of this English dictum in *Soderberg* could have been known

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[24] The question in *Midland Ry. Co. v. Checkley*, L.R. 4 Eq. 19 (1867), was whether certain stone was within a mineral reservation. The Master of Rolls held that it was and, in passing, commented that any useful subsurface material, including gravel, is mineral. As a reflection of English law, this dictum was never accepted as authoritative. In *Waring v. Foden*, 1 Ch. 276 (reprinted in 86 A.L.R. 969, 970 (1933)), the conveyance reserved "all mines, minerals and mineral substances . . . ." Considering this broad reservation in light of cases addressing both private and public conveyances (including *Checkley*), three judges agreed that sand and gravel were not reserved. *Id.* at 978, 981, 983. All three concluded that "minerals" connotes substances that are "exceptional," not "ordinary" or "common." *Id.* at 978, 979-80, 983. As one judge explained, "the sand and gravel are not substances which are exceptional in use or value; they are used mainly if not wholly for building and road-making purposes, and their commercial value depends entirely on local requirements and facilities for transport." *Id.* at 980.

to Congress, and that it neutralized the clear, contrary, and more recent ruling of the responsible United States Government department. But in addressing a peculiarly American issue of contemporary legal usage, an English dictum, even if quoted in a 1903 case of this Court, cannot bear the weight that the majority of this Court placed upon it in 1983.

Given these difficulties with *Western Nuclear*'s analysis, the simple justice of the situation militates against *extending Western Nuclear*'s erroneous conclusion about Congress' understanding of the term mineral to this case. But consideration of the need for consistency in the law also suggests that the aims of *stare decisis* will not be disturbed if *Western Nuclear* is not merely limited to its facts, but disapproved or overruled. Although it is usually "more important that the applicable rule of law be settled than that it be settled right," *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting), this is only true to the extent the "settled" law helps protect rights and expectations of citizens, *see Hubbard v. United States*, 514 U.S. 695, 714 (1995), fosters a cohesive body of jurisprudence, *see id.* at 711, and preserves the will of Congress, s*ee Square D Co. v. Niagra Frontier Tariff Bureau, Inc.*, 476 U.S. 409, 424 (1986). Preserving *Western Nuclear's* misunderstanding of the word "mineral" would serve none of these aims.

Here, there will be no manifest injustice to private parties if *Western Nuclear* is overruled. Quite the opposite: private landowners will benefit from that ruling for it will restore the original intent and reflect the reasonable expectation of landowners to ownership of gravel on their fee simple estate. It will assuredly facilitate the exploitation

of common materials on such land. Furthermore, overruling *Western Nuclear* would not confuse mineral land law jurisprudence; such confusion was sowed by *Western Nuclear* itself. Finally, this is not an area in which overruling erroneous precedent would upset "careful, intense, and sustained congressional attention." *See id.* at 420, 424. Because the Pittman Act and the SRHA have been repealed, and because it is the Court's own decision that has created the existing confusion, the responsibility to take corrective action properly lies with the Court.

Although *stare decisis* "is of fundamental importance to the rule of law," *Welch v. Texas Dept. of Highways and Public Transp.*, 483 U.S. 468, 494 (1987), this Court has not applied the doctrine mechanically, *id.*; *Monell v. New York City Dept. of Soc. Servs.*, 436 U.S. 658, 695 (1978); *Boys Market, Inc. v. Retail Clerks Union, Local 770* 398 U.S. 235, 241 (1970); *Helvering v. Hallock*, 309 U.S. 106, 119 (1940). Instead, the Court stresses that its precedents, even those involving statutory questions, are not sacrosanct. *See Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989).

The Court has found "special justification" to reconsider and overrule a prior interpretation of a statute: (1) where such "stands as a significant departure" from prior cases, *see Boys Market*, 398 U.S. at 241; *Patsy v. Florida Bd. of Regents*, 457 U.S. 496, 501 n.3 (1982), (2) where such was based on a clear misunderstanding of the meaning of the statute, *see Patsy*, 457 U.S. at 501; *Monell*, 436 U.S. at 700, or (3) where the otherwise controlling precedent is "a positive detriment to coherence and consistency in the law." *See Patterson*, 491 U.S. at 173. *See also Rodriguez De Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477,

484-85 (1989) (overruling precedent based on "seriously erroneous interpretation of statutory language"); *Monell*, 436 U.S. at 700-01 (misunderstanding of "Congress' view of the law" at the time of enactment constitutes another reason to overrule the precedent); *cf. Patsy*, 457 U.S. at 502-07. Moreover, this Court has considered the workability of a prior precedent as reflected in subsequent cases. *Continental T.V. Inc. v. GTE Sylvania, Inc..*, 433 U.S. 36, 47 (1977).

Although for the reasons described in this brief, *Western Nuclear* is not controlling in the construction of this different statute, coherence and consistency in the law would be well-served if this Court were specifically to disapprove or overrule that decision.

CONCLUSION

The decision of the Ninth Circuit should be reversed.

Respectfully submitted,

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