No.

IN THE
Supreme Court of the United States

BEDROC LIMITED, LLC; WESTERN ELITE, INC.,

Petitioners,

v.

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

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

Of Counsel:
L. Eric Lundgren
Lundgren Law Offices, PC
623 West 20th Street
P.O. Box 746
Cheyenne, WY 82003
(307) 632-0132

R. Timothy McCrum
Counsel of Record
Ellen B. Steen
CROWELL & MORING LLP
1001 Pennsylvania Ave., NW
Washington, DC 20004-2595
(202) 624-2500

Counsel for Petitioners

QUESTIONS PRESENTED

The Pittman Underground Water Act of 1919 (the "Pittman Act") authorized patents of up to 640 acres of land in Nevada to applicants who successfully developed subterranean water sources, provided that such patents reserved to the United States "all the coal and other valuable minerals." Citing *Watt v. Western Nuclear*, 462 U.S. 36 (1983), the Ninth Circuit ruled that the Pittman Act reserved *all* sand and gravel as "valuable minerals," regardless of whether the materials at any given property had economic value at the time the land was patented.

The questions presented are:

(1) Whether the reservation of "valuable minerals" includes all common materials (such as sand and gravel), without regard to whether the materials located on particular lands were "valuable minerals" at the time of the patent; and

(2) If *Watt v. Western Nuclear* calls for the application of a *per se* rule regarding the reservation (or non-reservation) of common materials, whether congressional intent would be better served by a rule that common materials are *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.

TABLE OF CONTENTS

QUESTIONS PRESENTED i
RULE 29.6 STATEMENT ii
TABLE OF CONTENTS iii
TABLE OF AUTHORITIES v
OPINIONS BELOW 1
JURISDICTION 1
STATUTORY PROVISIONS INVOLVED 1
STATEMENT 1
REASONS FOR GRANTING THE PETITION 4
I. The Ninth Circuit Has Misconstrued This Court's Decision in *Western Nuclear*. 6
II. Review Is Warranted to Clarify This Court's Ruling in *Western Nuclear* 13
A. *Western Nuclear* Does Not Support the Ninth Circuit's Rule that All Gravel Is Reserved Under a Statutory Mineral Reservation, Irrespective of Its Lack of Economic Value at the Time of the Grant. 13
B. Only Materials Defined as "Minerals" at the Time of the Patent Were Reserved. 13
III. Review Is Warranted to Consider Whether "Valuable Minerals" Includes Common Materials Like Sand and Gravel. 18
A. *Western Nuclear* Was Itself Out of Step with Long-Standing and Still Prevailing Views on the Treatment of Common Materials 18

TABLE OF CONTENTS—Continued

B. The Ordinary Meaning of "Minerals" Did Not Include Common Materials Such as Sand and Gravel at the Time of Enactment. 21

C. Congress's Purpose of Encouraging the Settlement of the Arid West Does Not Support a Rule that Sand and Gravel Were Reserved to the Government. 25

CONCLUSION 28

TABLE OF AUTHORITIES

CASES

Amoco Production Co. v. Southern Ute Indian Tribe, 526 U.S. 865 (1999) 21, 22

Bambauer v. Menjoulet, 214 Cal. App. 2d 871 (1963) 18

Burke v. Southern Pacific R. Co., 234 U.S. 669 (1914) 22

Burkey v. United States, 25 Cl. Ct. 566 (U.S. Cl. Ct. 1992) 18, 19

Champlin Petroleum Co. v. Allstate Construction, Inc., 708 P.2d 319 (N.M. 1985) 20

Downstate Stone Co. v. United States, 712 F.2d 1215 (7th Cir. 1983) 19

Earl Williams, 140 IBLA 295 (1997) 3

Farrell v. Sayre, 270 P.2d 190 (Colo. 1954) 18

Fisher v. Kewenaw Land Ass'n, 124 N.W.2d 784 (Mich. 1963) 18

Heinatz v. Allen, 217 S.W.2d 994 (Tex. 1949) 18

Hendler v. Lehigh Valley R. Co., 58 A. 486 (Pa. 1904) 14, 16

Holland v. Dolese Co., 540 P.2d 549 (Okla. 1975) 18

Hovden v. Lind, 301 N.W.2d 374 (N.D. 1981) 18

Hughes v. State of Florida, 42 Pub. Lands Dec. 401 (1913) 23

Layman v. Ellis, 52 Pub. Lands Dec. 71 (1929) 24, 25

Leo Sheep Co. v. United States, 440 U.S. 668 (1979) 27

Litch v. Scott, 40 Pub. Lands Dec. 467 (1912) 23

Miller Land & Mineral Co. v. State Highway Comm'n of Wyoming, 757 P.2d 1001 (Wyo. 1988) 17, 18, 19, 20

Perrin v. United States, 444 U.S. 37 (1979) 22

Poverty Flats Land & Cattle Co. v. United States, 788 F.2d 676 (10th Cir. 1986) 17, 19, 20

Rysavy v. Novotny, 401 N.W.2d 540 (S.D. 1987) 19

United States v. Aitken, 25 Philippine Rep. 7 (1913) 24

United States v. Hess, 194 F.3d 1164 (10th Cir. 1999) 19, 20

United States v. Union Oil Co. of California, 549 F.2d 1271 (9th Cir.), *cert. denied*, 434 U.S. 930 (1977) 4

W.S. Newell, Inc. v. Randall, 373 So.2d 1068 (Ala. 1979) 18

Watt v. Western Nuclear, Inc., 462 U.S. 36 (1983) ..... passim

Western Nuclear, Inc., 35 IBLA 146 (1978) 7

Western Nuclear, Inc. v. Andrus, 475 F. Supp. 654 (D. Wyo. 1979) 7

Western Nuclear, Inc. v. Andrus, 664 F.2d 234 (10th Cir. 1981) 7

Zimmerman v. Brunson, 39 Pub. Lands Dec. 310 (1910) ..... passim

STATUTES

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1331 3

Mining Act of 1872, as amended, 30 U.S.C. § 22 *et seq* 7

Pittman Underground Water Act of 1919, 41 Stat. 293-95 (1919) ..... passim

Stock-Raising Homestead Act of 1916, 39 Stat. 862 (1916) ..... passim

Surface Resources Act of 1955, 30 U.S.C. § 611 ..... 1, 12, 15

OTHER AUTHORITIES

Am. Jur. 2d Mines & Minerals (1971) 18

Curtis H. Lindley, AMERICAN LAW RELATING TO MINES AND MINERAL LANDS (3d ed. 1914) 14, 16

H.R. Rep. No. 63-626 (1914) 26, 27

H.R. Rep. No. 66-286 (1919) 27

John S. Lowe, *What Substances Are Minerals?*, 30 Rocky Mtn. Min. L. Inst. 2-1 (1984) 20

Rocky Mtn. Min. Law Found., AMERICAN LAW OF MINING (2d ed. 2002) 6

TABLE OF AUTHORITIES—Continued

United States Department of the Interior,
Solicitor Op., M-36379 (Oct. 3, 1956).....14, 15, 24

PETITION FOR A WRIT OF CERTIORIARI

BedRoc Limited, LLC, and Western Elite, Inc., respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, 1a–21a) is reported at 314 F.3d 1080. The opinion of the United States District Court for the District of Nevada (App. B, 22a–38a) is reported at 50 F. Supp. 2d 1001. The opinion of the Interior Board of Land Appeals (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 this petition to April 30, 2003. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

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

STATEMENT

Factual Background. Enacted in 1919, the Pittman Underground Water Act (the "Pittman Act") was part of Congress's decades-long effort to encourage settlement of the American West through land grants to those who would

lead the way. *See* 41 Stat. 293-95 (1919). Focusing on the State where the various Homestead Acts had been least successful due to inadequate surface water resources, the Pittman Act authorized permits for individuals to explore for subterranean waters on "unreserved, unappropriated, non-mineral, nontimbered public lands . . . in the State of Nevada." *Id.* Prospectors who discovered and successfully developed an underground water source could obtain patents for up to 640 acres of land. Such patents 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, App. 67a.

Very few prospectors rose to the formidable challenge, and the Pittman Act was generally viewed as a failure when it was repealed in 1964. *See* 78 Stat. 389 (1964). Newton and Mabel Butler (the "Butlers"), however, had succeeded in developing underground water and, as a result, had secured a patent for 560 acres in Lincoln County, Nevada. *See* Ninth Circuit Excerpts of Record ("ER") at 33-36. The United States Department of the Interior ("DOI") certified the Butler property as non-mineral and available for disposition under the Pittman Act in 1938, and the Butler's patent issued on March 12, 1940. *See* ER 33-34, 36-41.

Common sand and gravel were abundant on the 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. *See* ER 34-35. Ultimately, expansion of the city of Las Vegas in the 1990s created a market for gravel in the area, and the lessee of a successor owner began a sand and gravel operation. *See* ER 34-35, 37. In February 1993, Earl Williams purchased the property and continued

the extraction of sand and gravel. Petitioner BedRoc Limited, LLC, ("BedRoc") acquired the property on July 27, 1995, and has continued the sand and gravel operation since that time.[1]

Procedural History. On March 26, 1993, the Bureau of Land Management ("BLM") issued a trespass notice to then-owner Earl Williams, claiming that sand and gravel on the property was reserved to the United States. *See* Ninth Circuit Supplemental Excerpts of Record ("SER") 96-97. BLM issued a decision in April 1993, citing this Court's decision in *Watt v. Western Nuclear, Inc.*, 462 U.S. 36 (1983) and finding Williams in trespass. SER 98. The Interior Board of Land Appeals ("IBLA") affirmed the BLM decision in October 1997. *Earl Williams*, 140 IBLA 295 (1997).

Jurisdiction in the district court was based on 28 U.S.C. § 1331. BedRoc and Williams filed a combined action on July 2, 1998, seeking review of the IBLA decision and to quiet title to the sand and gravel. ER 1. Western Elite, Inc., which had acquired a portion of the property from BedRoc, also joined the suit to quiet title. On cross-motions for summary judgment, the district court ruled that sand and gravel are "other valuable minerals" reserved to the United States under the Pittman Act as a matter of law. App. 23a. The Ninth Circuit affirmed.

The Ninth Circuit's Opinion. The Ninth Circuit ruled that the phrase "valuable minerals" in the Pittman Act is

---

[1] In order to continue operations pending final determination of ownership of the sand and gravel, BedRoc entered into an agreement pursuant to which it has paid BLM's claimed royalties into an escrow account. ER 48.

ambiguous as to whether it includes sand and gravel. App. 8a. Turning to the statutory purpose and legislative history, the court 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 ("SRHA")]" addressed by this Court in *Western Nuclear*. App. 12a. 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's equally clear purpose to retain subsurface resources . . . for separate disposition and development." App. 12a (quoting *United States v. Union Oil Co. of California*, 549 F.2d 1271, 1279 (9th Cir.), *cert. denied*, 434 U.S. 930 (1977) which also concerned an SRHA reservation).

The court rejected BedRoc's contention that ordinary sand and gravel could only be reserved as "valuable minerals" if it had economic value at the time of the patent. App. 18a. Instead, citing *Western Nuclear*, the Ninth Circuit ruled that *all* sand and gravel was reserved to the United States. App. 19a.

REASONS FOR GRANTING THE PETITION

This petition addresses the Ninth Circuit's over-broad construction of this Court's 1983 ruling in *Watt v. Western Nuclear* that a gravel deposit in Wyoming was reserved to the United States under the Stock-Raising Homestead Act of 1916 ("SRHA"). Although this case and *Western Nuclear* involve two different land grant statutes, both now defunct, the Ninth Circuit concluded that their mineral reservations are coextensive. The Ninth Circuit misconstrued *Western Nuclear*, however, to establish an expansive and improvident rule for construing the rights of Western property owners who hold title subject to statutory mineral reservations in

favor of the United States. As described below, even when the term is afforded its broadest potential interpretation consistent with basic mineral law, common materials such as sand and gravel are regarded as "minerals" only when they have economic value at the time of the patent.

The decision below holds that general statutory mineral reservations (*e.g.*, statutory reservations of "coal and all other minerals" or "coal and all other valuable minerals") encompass any common mineralogical materials that may have "utility." Moreover, according to the Ninth Circuit, *all* such materials are reserved, regardless of whether the particular substances at issue in any given land patent met the definition of "minerals" (let alone "valuable minerals") at the time of the conveyance. The proper rule, however, was acknowledged in *Western Nuclear*: Common materials can be identified as "minerals" only if they have economic value. Unless economic value exists at the time of the conveyance, common materials thus are not within the scope of "minerals" reserved.

The court's interpretation of *Western Nuclear* offends long-standing and fundamental principles of mining and property law. In addition, it renders the Butlers and each of their successors in title the functional equivalent of tenant farmers, granted little more than the privilege of tending lands actually owned by the government. Their land and the land of other similarly situated "surface owners" is not theirs to use as they see fit (except for ranching and farming) and is subject to entry in futuro by anyone the United States might authorize to dig up and remove the very materials that make up most of the land. Thus, the current "owners" of tens of millions of acres of Western lands will be something

considerably less than owners in any traditional sense unless the decision below is reversed.[2]

With respect to issues such as those presented in this case, involving the scope of federal land patents that affect millions of acres of Western lands, this Court is the primary source of governing law. The Court's role is as central on this matter of basic property rights as is that of the state courts dealing with basic state law property issues. This is not an area properly left to Congress, as the Acts in question have been repealed. Particularly where this Court's prior decision is the source of confusion, the Court should exercise its certiorari jurisdiction to ensure that the essential rights of so many land owners are not improperly narrowed.

I. The Ninth Circuit Has Misconstrued This Court's Decision in *Western Nuclear*.

In *Watt v. Western Nuclear*, this Court addressed the mineral reservation in Section 9 of the SRHA, which reserved "all the coal and other minerals" in SRHA-patented lands.[3] The land at issue was patented in 1926 and was

[2] Roughly 33 million acres of patented lands were directly affected by the *Western Nuclear* decision. *See* 462 U.S. at 42. The ruling below demonstrates that the Ninth Circuit's erroneous interpretation of *Western Nuclear* will govern property rights not just on those lands, but on all lands patented under similar general statutory mineral reservations. One leading treatise identifies *thirteen* such federal statutes requiring the reservation of all minerals in certain conveyances by the United States. *See* 3 Rocky Mtn. Min. Law Found., AMERICAN LAW OF MINING § 9.05[2] (2d ed. 2002).

[3] SRHA Section 9, 39 Stat. 862 (repealed 1976), is produced at App. E, 69a-70a. The mineral reservation provisions of the SRHA and the Pittman Act are identical, except for the Pittman Act's use of the phrase "other valuable minerals" instead of "other minerals." *See* App. 67a.

acquired by Western Nuclear, Inc., in 1975 for the purpose of extracting gravel from an "old gravel pit." 475 F. Supp. 654, 655 (D. Wyo. 1979). BLM challenged the gravel extraction, and the IBLA ruled that "*gravel in a valuable deposit* is a mineral reserved to the United States in patents issued under the [SRHA]." 35 IBLA 146, 165 (1978) (emphasis added). The district court agreed, but the Tenth Circuit reversed.

The Tenth Circuit found that gravel was not a "mineral" under the SRHA largely because, at the time of enactment, DOI had ruled that such common substances were not "minerals" under the general mining laws. *See* 664 F.2d 234, 239-40 (10th Cir. 1981) (citing *Zimmerman v. Brunson*, 39 Pub. Lands Dec. 310 (1910)). Thus, the Tenth Circuit found that Congress in 1916 likely did not understand "minerals" to include common gravel. *Id.* at 240. In addition, the court reasoned that reserving common substances such as rocks, stones, and gravel to the government would make SRHA patentees the owners of "only the dirt, and little or nothing more," thus defeating the purpose of the grant. *Id.* at 242.

This Court granted the United States' petition for certiorari "[i]n view of the importance of the case to the administration of the more than 33 million acres of land patented under the SRHA." 462 U.S. at 42. In briefing, the United States argued that the SRHA mineral reservation was "coextensive with the class of minerals subject to location under the general mining law,[4] which restricts development

[4] The phrase "general mining laws" refers primarily to the Mining Act of 1872, as amended, currently codified at 30 U.S.C. § 22 *et seq.* These laws govern the disposal of "all valuable mineral deposits in lands belonging to the United States." 30 U.S.C. § 22.

to 'valuable mineral deposits.'"[5] The United States explained that "what this test means is 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. (emphasis added). The government argued that DOI's *exclusion* of common materials from treatment as "minerals" from 1910 to 1929 was an aberration and that the customary "marketability" test instead should be the benchmark for identifying reserved gravel deposits. *Id.* § III.A.2. Western Nuclear, on the other hand, contended that the government had never argued or introduced evidence on marketability in the lower courts. Western Nuclear thus asked that the Court *not consider* the issue, but only affirm that gravel was not a "mineral" at all within the meaning of the SHRA. Res. Br. § I-II.

The Court reversed the Tenth Circuit in a 5 to 4 ruling, finding that Congress's intended meaning of "minerals" in 1916 was not clear. 462 U.S. at 46-47; *id.* at 65-66 (dissenting opinion by Justices Powell, Rehnquist, Stevens, and O'Connor).[6] Turning to the purpose of the SRHA, the Court found that "Congress' [sic] underlying purpose in severing the surface estate from the mineral estate was to facilitate the concurrent development of both surface and

[5] *Western Nuclear*, Pet. Br., Summary § II.A.2. Thus, according to the government, "not every deposit of gravel will warrant interference with the homesteader's surface estate; only those which – in light of the abundance of the resource, the quality of the gravel, the condition of the market, and the distance from buyers – can be extracted at a profit will do so." *Id.*

[6] The dissenters found that the common and legal understanding of "minerals" at the time of enactment was clear and did *not* include gravel.

subsurface resources." *Id.* at 47. Thus, "[w]hile Congress expected that homesteaders would use the surface of SRHA lands for stock-raising and raising crops, it sought to ensure that *valuable subsurface resources* would remain subject to disposition by the United States. . . ." *Id.* (emphasis added).

Based on this statutory purpose, 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. Applying this definition, the Court ruled that "gravel is a mineral reserved to the United States in lands patented under the SRHA." *Id.* at 60.

Substantial portions of the Court's decision analyze how the general mining laws bear on the identification of reserved gravel deposits. In particular, the Court devoted considerable attention to the treatment of gravel deposits as "valuable mineral deposits" under the mining laws. *See* 462 U.S. at 50-51, 55-59. The Court explained, for example, that economic value is a prerequisite to the treatment of gravel deposits as "minerals" subject to location under the mining laws. According to the Court:

> 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 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.*"

Id. at 58 n.18 (citations omitted) (emphasis added). The Court reasoned that "[t]he treatment of gravel as a mineral under the general mining laws suggests that gravel should be similarly treated under the SRHA, for *Congress clearly contemplated that mineral deposits in SRHA lands would be subject to location under the mining laws* . . . ." *Id.* at 59 (emphasis added).[7]

In the case presented here, BedRoc introduced undisputed evidence that the sand and gravel at the Butler property had *no economic value* until the 1990s and thus was *never* a "valuable mineral" subject to location under the mining laws. The Ninth Circuit, however, rejected the notion that the mineral reservation was coextensive with the mining laws. App. 19a. Moreover, the court interpreted *Western Nuclear* to call for the application of statutory mineral reservations (*i.e.*, reservations mandated by statute) as a "straightforward legal [question] regarding congressional intent." App. 20a. On this basis, the court deemed the value (or worthlessness) of the materials at any

[7] *See also* 462 U.S. at 62 n.4 (dissent agreeing that "mineral exploitation of SRHA lands was made subject to the same restrictions that characterize development of lands under the general mining laws, and thus the interpretation of those laws is directly pertinent to determining congressional intent in 1916").

given property irrelevant. Based on DOI statistical reports from the 1910s that included dollar values for gravel production nationwide, the court reasoned that sand and gravel *generally* were recognized as "valuable" and ruled as a matter of law that *all* sand and gravel was reserved under the Pittman Act.

The Ninth Circuit thus misapprehended the basis for, and the breadth of, the *Western Nuclear* decision. The Court in *Western Nuclear* found "no indication that Congress intended the mineral reservation in the SRHA to be *narrower in scope than the mining laws*." 462 U.S. at 59 (emphasis added). The Court did *not* rule, however, that Congress intended the reservation to be *broader in scope* than those laws. Instead, the Court's analysis makes plain that the scope of "minerals" subject to the mining laws *directly* corresponds to the scope of the mineral reservation.

Given the importance of "marketability" and the "prudent-man test" to identifying gravel deemed "mineral" under the mining laws, *Western Nuclear* cannot reasonably be construed to support the notion that those concepts are immaterial to determining whether gravel at any particular property was intended to be reserved. Indeed, the decision turned entirely on Congress's purpose of reserving "*valuable* subsurface resources," and the Court spoke repeatedly of "valuable gravel deposits," deposits "subject to location" under the mining laws, and the "prudent-man test." *See supra.* While some of the Court's statements were expressed in rather broad terms, the Court's reasoning in no way supports the arbitrary reservation of *all* gravel to the government – even gravel that was *not* subject to the mining

laws because it had *no market value* during any relevant time period.[8]

To the consternation of many lower courts and commentators, *see infra* III.A., the *Western Nuclear* decision opened the door to claims that common gravel was reserved to the United States as a "mineral." It did not, however, address the important question presented here: whether a statutory reservation of "minerals" encompasses *all* gravel, regardless of value at the time of the patent. The *Western Nuclear* case was presented on a limited factual record, and the surface owner itself never argued that the gravel's value post-dated the reservation (*i.e.*, the 1926 patent). Significantly, however, the Court quoted a BLM appraisal finding that gravel production was "the highest and best use of the property," in addition to 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). Read as a whole, the decision strongly suggests that the Court assumed the requisite commercial value had been established on the basis of these findings.

[8] Because the sand and gravel at issue here had no market value until the 1990s, it could not have been identified as "mineral" under the mining laws when the statute was enacted, when the land was patented in 1940, or at any other time until decades after Congress removed common materials from the purview of the mining laws under Section 3 of the Surface Resources Act of 1955 (the Common Varieties Act), 30 U.S.C. § 611 (App. 71a).

II. Review Is Warranted to Clarify This Court's Ruling in *Western Nuclear*.

A. *Western Nuclear* Does Not Support the Ninth Circuit's Rule that All Gravel Is Reserved Under a Statutory Mineral Reservation, Irrespective of Its Lack of Economic Value at the Time of the Grant.

Given the Ninth Circuit's reliance on *Western Nuclear* with respect to an issue that was *not* addressed in that case, the Court's ruling should be clarified and limited. Aside from the importance of the issue to Pittman Act patentees and their successors, review is critical to clarify ownership of tens of millions of acres patented pursuant to the SRHA or any other federal statute mandating a general mineral reservation.

B. Only Materials Defined as "Minerals" at the Time of the Patent Were Reserved.

The Ninth Circuit ruled that sand and gravel need not be present in a "valuable mineral deposit" at the time of the patent in order to be reserved as "valuable minerals." App. 18a-19a. The court reasoned that the term "valuable minerals" (in the mineral reservation) is broader than "valuable mineral deposits" (locatable under the mining laws) because certain substances like gold are undeniably "valuable minerals" even if they are present in deposits too small or inaccessible to profitably extract. *Id.*

The court's rationale disregards the central role that "value" plays in identifying "minerals" under the mining laws. "Minerals" for purposes of mining law can be virtually any mineralogical substance that can be extracted from the earth and that has *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. That is the sense in which it is most commonly used in conveyances and leases of land . . . .

Hendler v. Lehigh Valley R. Co., 58 A. 486, 487 (Pa. 1904) (emphasis added) (finding common mixed sand that had utility but no commercial market value was not "mineral"). According to one leading authority: "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) (emphasis added).

"Value" is integral to identifying "minerals" under the mining laws by design, as it allows the concept of what is "mineral" to evolve over time. As the DOI Solicitor explained in 1956:

> The reasons for the emphasis given in the mining laws to "value" rather than to defining the term "minerals" is apparent when consideration is given to the fact that *what is or what is not a "mineral" is not a static matter of scientific certainty, but is subject to change as new uses are discovered for the many varied mineralized substances found in the earth.*

United States Department of the Interior, Solicitor Op. M-36379, at 2 (Oct. 3, 1956) (emphasis added). Explaining how the concept applies to the common, non-metallic

substances that make up much of the land itself, "value" would be found – and the substances would be recognized as "mineral" – "*only if they were valuable for commercial purposes and located near enough to a market to provide an economic return.*" *Id.* (emphasis added).

Thus, common non-metallic substances are different from intrinsically valuable minerals (such as gold) under the mining laws in that *site-specific circumstances* (*e.g.*, accessibility, quantity, proximity to market, etc.) alone account for their value. Because of their relative abundance in the earth, such substances have no recognized intrinsic value and therefore attain "mineral" status only by virtue of special features or circumstances that give them value. Common materials have *always* been fundamentally different from intrinsically valuable minerals in this respect, even though their treatment under the mining laws has otherwise varied over the years.

Prior to 1929, for example, common materials like gravel were deemed not "mineral" unless they possessed some "peculiar" characteristic establishing "distinct and special value." *See infra* III.B.[9] Even after DOI reversed that general rule in 1929, however, such common materials were deemed mineral only "if they were *valuable for commercial purposes and located near enough to a market* to provide an economic return." Solicitor Op. M-36379, at 3 (emphasis added). Finally, under the Surface Resources Act of 1955, 30 U.S.C. § 611, Congress again removed common

---

[9] The "peculiar" characteristic might be, for example, the presence of small quantities of an intrinsically valuable mineral like gold appearing within a deposit of a more common deposit like gravel. *See Zimmerman v. Brunson*, 39 Pub. Lands Dec. 310, 313 (1910).

materials from the purview of the mining laws unless they met the "distinct and special value" test that was in place prior to 1929.

Even applying the most expansive view that was in vogue from 1929 to 1955, only common materials of *economic value* could be deemed "minerals" subject to reservation. The 1956 Solicitor's Opinion mentioned above applied precisely this test in the interpretation of a 1926 *statutory mineral reservation*,[10] concluding that:

> 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.

Id. (cover summary).[11] The Solicitor was careful to point out that this rule does *not* limit the reservation of "other minerals having known *intrinsic mineral qualities and values*," but governs only reservations of "low-value non-metallic mineralized substances such as sand and gravel which are normally found in quantity over widely distributed areas." *Id.* at 4 (emphasis added).

---

[10] The statutory reservation at issue was more broadly worded than the Pittman Act, calling for the reservation of "timber, coal or *other minerals* including oil and gas *or other natural deposits*."

[11] *See also id.* at 3 ("These concepts of 'value' and 'existence of a market' have also been long applied by the authorities in construing mineral reservations in grants of private lands.") (citing *Lindley, supra*, § 93, and *Hendler v. Lehigh Valley R. Co.*, 209 Pa. 256, 58 A. 486 (Pa. 1904).

It is thus entirely consistent with long-standing DOI policy – as well as fundamental principles of mining and property law – to apply statutory mineral reservations in light of *economic value at the time of the reservation* where common substances are at issue. For common materials, site-specific economic value literally dictates whether the materials are "mineral." If patentees are entitled, in theory, to know what has been granted at the time of the conveyance, then only common materials of the requisite value *at the time of the conveyance* can be reserved.

This is in accord with the interpretation of reservations in other contexts as well, where the courts seek to discern and enforce the intent of the parties at the time of the transaction. *See, e.g.*, *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). The substances to be reserved must be determinable (at least in theory) as of the date of the patent, or else the grant is meaningless and the patentee's title is constantly shifting in response to changing economic conditions.

III. Review Is Warranted to Consider Whether "Valuable Minerals" Includes Common Materials Like Sand and Gravel.

A. *Western Nuclear* Was Itself Out of Step with Long-Standing and Still Prevailing Views on the Treatment of Common Materials.

The Ninth Circuit's expansion of *Western Nuclear* is erroneous and distressing. Yet it merely compounds the confusion and inequity that has already arisen in the wake of that decision. This Court's interpretation of the SRHA mineral reservation to encompass common substances such as gravel was itself a sharp departure from traditional understandings. *Western Nuclear* stands in stark contradiction to long-standing view of the overwhelming majority of courts addressing mineral reservations in other contexts. Indeed, "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 & Mineral,* 757 P.2d at 1003. *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).[12]

---

[12] *See also Bambauer v. Menjoulet*, 214 Cal. App. 2d 871 (1963); *W.S. Newell, Inc. v. Randall*, 373 So.2d 1068 (Ala. 1979); *Fisher v. Kewenaw Land Ass'n*, 124 N.W.2d 784 (Mich. 1963); *Hovden v. Lind*, 301 N.W.2d 374 (N.D. 1981); *Holland v. Dolese Co.*, 540 P.2d 549 (Okla. 1975). *See generally* 54 Am. Jur. 2d Mines & Minerals, § 8 (1971).

Western Nuclear's determination that a valuable gravel deposit was reserved under the SRHA mineral reservation typically has been distinguished by lower federal courts and state courts, which decline to construe general reservations to include such materials in other contexts. *E.g.*, *Miller Land & Mineral*, 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.*"); *Burkey*, 25 Ct. Cl. at 577 (sand and gravel not reserved); *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) (limestone not reserved where government acquired surface estate from private party). Thus, courts since *Western Nuclear* have been in general agreement that its reasoning is inapplicable in the context of private conveyances, where the courts look (as they traditionally have) to the intent of the parties at the time of the conveyance. Because the overwhelming understanding of the term "minerals" has traditionally *excluded* common materials such as gravel, these courts have generally concluded that such substances were not reserved.

Significantly, *Western Nuclear* has also been distinguished from cases involving lands patented pursuant to other *federal statutes* in which the scope of the reservation was not mandated in the statute itself. *See 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"); *Poverty Flats Land & Cattle*, 788 F.2d at 681 (distinguishing *Western Nuclear* and observing "it cannot be assumed, as the Government does herein, that the surface use was preordained [by Congress]"). In these cases, because

Congress's intent is not controlling as to the scope of the reservation, the intent of the parties at the time of the conveyance controls, consistent with the approach to private conveyances. *See Hess*, 194 F.3d at 1174 (to ascertain meaning of "minerals," court "must, as in *Poverty Flats*, look at the intent of the parties ... as used in the exchange patent at issue").

The reservation of common materials to the government under *Western Nuclear* thus has created a distinct, and more limited, surface estate where the land at issue can be traced back to a patent under the SRHA, the Pittman Act, or presumably any other statute with a mandatory mineral reservation. The distinction creates uncertainty and inequity in an area already 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 & Mineral*, 757 P.2d at 1003-04 (addressing whether gravel was reserved and commenting "[i]f there is an confusion, we suspect that the [*Western Nuclear*] case is the culprit . . . ."). Even courts that have followed *Western Nuclear* (because, for example, SRHA lands were at issue) have expressed reluctance to impose such second-class status on the surface owners of these lands. *See Champlin Petroleum Co. v. Allstate Construction, Inc.*, 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.").

The Ninth Circuit's approach represents a significant expansion of *Western Nuclear* based on the court's apparent desire to adopt a uniform, simplified rule that would not turn on proof of "economic value" at the time of the patent.

Petitioners respectfully submit, however, that if a uniform rule is to be followed – that all sand and gravel is reserved, or all sand and gravel is not reserved – then the latter is the better rule and *Western Nuclear* should be reconsidered.

B. The Ordinary Meaning of "Minerals" Did Not Include Common Materials Such as Sand and Gravel at the Time of Enactment.

The Ninth Circuit acknowledged that "the *ordinary meaning of the phrase 'valuable minerals' does not evoke images of sand and gravel.*" The court nevertheless deemed the statutory text ambiguous because the reservation of "valuable minerals" did not "*conclusively convey* Congress' [sic] intent as to whether sand and gravel are included." App. 8a (emphasis added).

The Ninth Circuit's standards for textual specificity contradict this Court's recent admonition that statutory mineral reservations should be construed according to their *ordinary meaning* at the time of enactment. *Amoco Production Co. v. Southern Ute Indian Tribe*, 526 U.S. 865 (1999), provides that statutory mineral reservations are not ambiguous merely because they fail to *conclusively* include or exclude particular substances. There, the Court addressed whether the reservation of "all coal" under the Coal Lands Acts of 1909 and 1910 included coalbed methane gas ("CBM gas") located within coal formations. The Tenth Circuit found the term "coal" ambiguous as to the inclusion of CBM gas and invoked the canon of construction of ambiguities in favor of the sovereign. *See* 526 U.S. at 871-72.

This Court reversed based on its finding that "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 (emphasis added). According to the Court:

> 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 (emphasis added) (citing *Burke v. Southern Pacific R. Co.*, 234 U.S. 669, 679 (1914), and *Perrin v. United States*, 444 U.S. 37, 42 (1979)). Because the "most natural interpretation" of "coal" in the relevant statutes did not encompass CBM gas, the Court found no ambiguity and no need for resort to canons of construction. *Id.* at 880.

The Ninth Circuit's decision that "valuable minerals" is ambiguous as to sand and gravel disregards the "*general understanding*" explained by DOI in 1910. According to DOI then, "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 v. Brunson*, 39 Pub. Lands Dec. 310, 312 (1910) (emphasis added). The *Zimmerman* decision 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.*[13] Citing prior decisions involving common substances that were "valuable only for general building purposes," DOI 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. (emphasis added). DOI's decision concerning gravel 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.* Moreover, DOI was not "aware of any application to purchase such a deposit under the mining laws." *Id.*

The *Zimmerman* decision 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 in determinations concerning other common materials, such as commercially valuable shell rock. *See Hughes v. State of Florida*, 42 Pub. Lands Dec. 401, 403-04 (1913) ("In harmony with [the *Zimmerman* decision], the deposit of shell rock here involved cannot be held a mineral under the general mining laws.").

---

[13] DOI noted that "[t]he question of what constitutes a 'mineral' within the meaning of the above statutes is not free from doubt, and has frequently been before the Department for adjudication." *Id.*

This common understanding of "mineral" was also identified 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*.

Id. (emphasis added).

In 1929 and for the next 25 years, DOI abandoned the *Zimmerman* rule in favor of a case-by-case approach recognizing particular 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); Solicitor Op. M-36379. Nevertheless, in terms of the common meaning *prior to* 1929, the decisions discussed above leave little room for doubt that "minerals" did not include materials such as ordinary sand and gravel, even if they *were* commercially valuable.[14] The potential "mineral" status of those materials was established only after

[14] After reviewing the body of law discussed above, the dissent in *Western Nuclear* concluded that "it was beyond question, when SHRA 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. 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.*

the *Layman* decision in 1929 – and even then only for particular deposits with characteristics (quantity, accessibility, proximity to market, etc.) sufficient to give them marketability and *economic value*.

C. Congress's Purpose of Encouraging the Settlement of the Arid West Does Not Support a Rule that Sand and Gravel Were Reserved to the Government.

Congress's intent to reserve only "valuable minerals" – and to convey *something* of value to patentees – would be thwarted by a rule reserving to the government the ubiquitous substances that comprise the patented lands themselves. If statutory mineral reservations are to be construed through a pure legal analysis of congressional intent at the time of enactment, that intent will surely be better fulfilled by a rule that such common substances were not reserved. Although the nation has presumably obtained the benefit of *its* bargain under the SRHA and the Pittman Act, review is necessary to ensure that patentees retain what was promised to them.

The Ninth Circuit recognized that the explicit purpose of the Pittman Act was "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." App. 9a. Because Congress hoped that the discovery of water would spur agricultural development, however, the court reasoned that the land grants to prospectors "furthered the larger goal of irrigating arid lands for farming." App. 9a. The court thus found persuasive its own prior decision in *Union Oil* and this Court's decision in *Western Nuclear* concerning the SRHA, which served the same "larger goal." Finding that this Court had "agreed with our sentiment in

Union Oil," the Ninth Circuit invoked its prior rule that "the mineral reservation is to be read broadly in light of the *agricultural purpose* of the grant itself, and in light of Congress's equally clear purpose to retain subsurface resources . . . for separate disposition and development." App. 12a (emphasis added).

Reserving to the government the very substances that comprise the land, however, has no rational relationship to Congress's ultimate objective in the Western land grant statutes. While Congress undeniably identified farming and ranching as the most promising occupations with which to attract settlers, the *goal* was the long-term settlement and economic development of the West, not a system of sharecropping. As the House Public Lands Committee reported on one of the predecessor bills to the SRHA:

> Of course, the homestead plan is best for the individual States of the semiarid West. It takes homes to insure permanent settlers and taxpayers; it takes homes to bring schools and churches; it takes homes to *build cities and towns that attract and support laborers and mechanics; population invites railroads, which in turn bring more immigration and capital to develop the barely touched resources of this great semiarid West.*

H.R. Rep. No. 63-626, at 10-11 (1914) (emphasis added).

Agriculture thus was a means to an end – not an end in itself – with the true aim being a citizenry invested in and responsible for the land and the community. The *purpose* of granting lands to people willing in good faith to make a home there was the promotion of:

> . . . more States like, for instance, Kansas and Iowa, *where each citizen is the sovereign of a portion of the soil*, the owner of his home and not a tenant of some (perhaps) distant landlord, a builder of schools and churches, a voluntary payer of taxes for the support of his local government.

Id. at 11 (emphasis added).

The *Western Nuclear* dissenters reasoned that "[i]n recommending 'citizen sovereignty' of the soil, Congress surely did not intend to destroy that sovereignty by reserving the commonplace substances that actually constitute much of that soil." 462 U.S. at 71-72. That intent is even more improbable here, where Congress explicitly set out to induce private citizens to explore and develop the underground water resources of Nevada for the public good and to grant substantial lands "as a reward for [their] labors and expenditures." H.R. Rep. No. 66-286, at 1 (1919). 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.*

Leo Sheep Co. v. United States, 440 U.S. 668, 683 (1979) (emphasis added). The decision below does violence to this principle and effectively retracts ownership of the land from those who earned it and their lawful successors. The decision should not be allowed to stand.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Of Counsel:
L. Eric Lundgren
Lundgren Law Offices, PC
623 West 20th Street
P.O. Box 746
Cheyenne, WY 82003
(307) 632-0132

R. Timothy McCrum
Counsel of Record
Ellen B. Steen
CROWELL & MORING
1001 Pennsylvania Ave., NW
Washington, DC 20004-2595
(202) 624-2500

April 2003