No. 02-1593

IN THE
**SUPREME COURT OF THE UNITED STATES**

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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.*

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

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# REPLY BRIEF FOR PETITIONERS

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## REPLY BRIEF FOR PETITIONERS

In arguing that the worthless, common sand and gravel that comprised much of Newton and Mabel Butler's former property and the surrounding environs of the Nevada desert were reserved to the Government as "valuable minerals," Respondents do not take issue with many of the central points in Petitioners' opening brief. Respondents do not dispute that:

- The common understanding of "minerals" in the early 1900s, and at all times since, encompassed only mineralogical substances with value.
- Under the mining laws, common materials such as sand and gravel have always been fundamentally different from highly esteemed materials such as metals that have recognized inherent value in *all* circumstances (*e.g.*, gold, silver, copper). Unlike inherently valuable minerals, these ubiquitous materials, which are usually worthless, are not generally regarded as "valuable" and therefore have not generally been classified as "minerals."[1] Pet. Br. 19-21.
- Congress should be presumed to be aware of the official interpretations and decisions of the Department of the Interior when courts are called upon to interpret statutory terms involving the mineral laws administered by Interior. *See* Pet. Br. 44-46.
- Until 1929, Interior interpreted the term "mineral" under the general mining laws to exclude common sand and gravel categorically. Such materials therefore were not regarded as "minerals" that could be located and exploited

[1] Respondents do *not* adopt the Ninth Circuit's theory that anything that may be *useful* is "valuable." *See* Pet. Br. 14 n.5.

under the mining laws even where they were commercially marketable. *See* Pet. Br. 17-18, 36.

- After 1929, and until common materials were excluded from the mining laws by statute in 1955, Interior interpreted "mineral" to include common materials such as sand and gravel *only if the material at the site in question had commercial utility* due to proximity to an existing market. Until its relatively recent assertion of ownership to common materials under statutory mineral reservations, the Department has never taken the position that *all* sand and gravel are "minerals" or "valuable minerals."

- What is included within the term "valuable minerals" in a Pittman Act reservation must be fixed and determinable – as with all interests in land – at the time of the patent. Materials reserved to the United States do *not* change over time after the conveyance depending upon market conditions (*i.e.*, materials that first become valuable after the conveyance do not then become reserved "valuable minerals.") *See* Pet. Br. 22-25.

- The sand and gravel on BedRoc's Nevada desert land and in the surrounding environs had no commercial value at the time of the Butlers' 1940 patent. For that reason, at the time of the patent and for decades thereafter, those materials could not have been exploited as minerals under the mining laws. *See* Pet. Br. 3.

- *Watt v. Western Nuclear*, 462 U.S. 36 (1983), did *not* decide the central question presented by this case: whether common materials that were actually worthless at the time of the patent were reserved as valuable minerals. *See* Pet. Br. 33; Resp. Br. 34.

Ultimately, Respondents simply hitch their wagon to *Western Nuclear* and insist that any requirement of site-specific value in the identification of "valuable minerals" is inconsistent with that decision. This argument should be rejected for the following reasons.

## I. Sand And Gravel Are Not Generally Valuable Minerals And Were Not Generally Valuable Minerals At The Time Of The Butler's Patent.

As set forth in Petitioners' opening brief (at 13-25), common English language usage in the early 1900s (and now) would not have allowed ordinary sand and gravel of the Nevada desert to be regarded as "valuable minerals." The adjective "valuable" is appropriate only for materials that are generally esteemed and have value, such as metals possessing well-recognized inherent value (*e.g.*, gold, silver, copper). It contradicts ordinary usage to categorize common, abundant, and typically worthless earthen materials as "valuable minerals."

Moreover, Interior has never, in its official opinions, deemed sand and gravel generally to be "minerals" under the U.S. mining laws. Interior did not regard such common materials to be minerals *at all* until 1929 and did so thereafter *only* where, by reason of proximity to market, those substances had commercial value at the site in question.

1. Respondents argue that Congress considered "minerals" and "valuable minerals" to be synonymous and used them interchangeably, positing that "valuable" (as used in the phrase "valuable minerals") adds nothing because a material must be valuable to be considered "mineral" at all.[2] Resp. Br. 26-27. This argument is correct

[2] Respondents cite a House Report to the effect that the Pittman Act reservation was intended to be of the same scope as that in the Stock-Raising Homestead Act of 1916, the statute at issue in *Western*

(Continued on following page)

in one sense: As Petitioners explained in their opening brief, Interior has consistently required that a material be recognized as valuable to be considered a mineral under the mining laws. But while Interior's definition of "minerals" incorporated the element of "value," Interior has also consistently recognized that any "value" of common materials can arise only from site-specific circumstances. Interior did *not* regard sand and gravel as mineral at all prior to 1929 and later only regarded such substances as mineral if they were commercially valuable *where located*. Respondents cannot have it both ways: if Respondents wish to adopt the accepted view under the mineral laws that minerals must be "valuable," they must also acknowledge how value has been defined for common materials under those laws.

At the very least, Congress' explicit use of the word "valuable" emphasizes that "value" is important to defining the scope of the reservation. Whereas the Stock-Raising Homestead Act of 1916 ("SRHA") did not contain the word "valuable" and thus did not expressly dictate consideration of "value" by the Court in *Western Nuclear*, the same cannot be said of the Pittman Act.

2. Respondents suggest that Congress did not care about the word "valuable," as evidenced by its purportedly arbitrary use of the adjective in Pittman Act Section 8. Resp. Br. 17, 26-27. Respondents' assertion is belied by the text. Congress defined what was reserved to the United States in the initial two sentences of that Section, using the word "valuable." Having stated the qualification, it did not need to repeat the qualifying adjective in each subsequent reference to "minerals" and "mineral deposits."

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*Nuclear*. Resp. Br. 28. Provided that the Pittman Act reservation is properly construed in accordance with its plain text, Petitioners, of course, have no objection to construing the reservations of both Acts to have similar breadth.

3. As did Petitioners, Respondents emphasize one common, traditional definition of "mineral" as "mineralogical substances that can be extracted from the earth and that have independent value distinct from the surrounding earth." Resp. Br. 26. That definition does not help Respondents here. When one extracts gold, silver, copper, and a host of other substances, the extracted material is valuable; it can be sold for a price. But when one extracts common sand and gravel and the like, one might (except in unusual circumstances) just as well toss those substances back onto the earth, for they are worth nothing. Thus, most such materials are not "minerals" because they have no "independent value distinct from the surrounding earth."

4. Respondents oppose any site-specific inquiry, insisting that "valuable minerals" must be defined categorically. Rather than endorse a categorical definition consistent with the typically worthless nature of common materials, however, Respondents argue that *any* mineralogical material is a "mineral," and therefore a "valuable mineral," if substances *of that kind* (*e.g.*, sand, gravel, clay, or common rock) *can be* – under some circumstances, somewhere – used for commercial purposes. Resp. Br. 30-32, 34, 38-39. In Respondents' view, it bears no consequence that the amount of sand or gravel that is *actually* susceptible to commercial use is infinitesimally small compared to the universe of such material that is, and always will be, completely worthless. *See id.* at 34.

Respondents' view turns common English usage upside down. Materials that are almost always *not* valuable, but that are, on rare occasion, of some value, would not be generally characterized as "valuable minerals." Any reasonable common understanding of "valuable minerals," including Interior's own, includes only materials that are generally (*i.e.*, typically) valuable. It might even be possible to squeeze within the class of "valuable minerals" specific common materials (*e.g.*, particular gravel deposits) that *actually* have value. But it is impossible to squeeze in

the entire universe of such materials when they are usually utterly worthless.

5. Respondents' position in this case is inconsistent with multiple official statements of position by Interior on the treatment of sand and gravel under the mineral laws. Respondents cite no Interior opinions in support of their position.

As demonstrated in Petitioners' opening brief, Interior had, in a series of decisions antedating enactment of the Pittman Act, categorically *excluded* sand and gravel (and similar common materials) from the definition of minerals. *See* Pet. Br. 17-18 & n.9; *id.* at 41-42 & n.21. Later, in 1929, the Department expanded the definition of minerals to include gravel, but *only* if valuable *at the site in question*. *See Layman v. Ellis*, 52 Pub. Lands Dec. 714, 721 (1929). Knowledge of such contemporaneous decisions of the federal agency charged with administering the statute at issue would ordinarily be imputed to Congress and given decisive weight in the interpretation of statutory terms. *See* Pet. Br. 44-46 (citing *Traynor v. Turnage*, 485 U.S. 535 (1988), and related cases).

Respondents cannot and do not dispute either: (1) that their current theory is inconsistent with Interior's interpretation of "minerals" at the time of the Pittman Act, and even with its later interpretation; or (2) that those interpretations ordinarily would and should, under well-accepted legal principles, be given decisive weight in resolving this dispute.

a. Respondents observe that "this Court noted in *Western Nuclear* itself that a 'leading contemporary treatise' (published in 1914, before the SRHA and Pittman Act were passed) had pointed out that *Zimmerman* [*v. Brunson*, 39 Pub. Lands Dec. 310 (1910)] [which held that sand and gravel were categorically excluded from mineral status] was 'inconsistent with the Department's traditional treatment of the problem.'" Resp. Br. 49 (citing *Western Nuclear*, 462 U.S. at 46 n.7 (citing 2 C. Lindley, *American Law Relating to* [*Mines*] *and Mineral Lands*

§ 424, at 996 & n.78 (3d ed. 1914))). Respondents are wide of the target, however, in suggesting that this Court's citation and crediting of the Lindley treatise in *Western Nuclear* helps them here. Lindley did mildly criticize *Zimmerman* as inconsistent with Interior's traditional approach for minerals, but also noted the dispositive weight of Interior's views: "[A]s the land department is the only tribunal which has the power to determine the character of land, it has the undoubted privilege of making exceptions to general rules, and the courts cannot interfere with the exercise of this prerogative." Lindley, *supra*, at 996-97. More importantly, the traditional rule favored by Lindley employed a *site-specific approach* under which materials would be deemed mineral where they were, at the site, commercially marketable. *See id.* at 996 ("marketability at a profit is the test of the mineral character of a given tract of public land"). It was this site-specific rule that Interior later adopted for sand and gravel in 1929 – and that is precisely the rule that Petitioners seek here and that Respondents now repudiate. Neither Lindley nor any other American source has endorsed the rule that Respondents advocate here: that because common earthen materials might sometimes be useful and marketable in some circumstances, such substances are *always* deemed "valuable minerals."

b. As set forth in Petitioners' Brief (at 24), Interior's Solicitor explained in 1956 in connection with a similar, but broader, mineral reservation that:

> Deposits of sand and gravel . . . which can be shown as of the date of the allotment or patent to have 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).

Respondents dismiss the Solicitor's Opinion, arguing it contains "no legal analysis" in requiring site-specific value at the time of patent. Resp. Br. 36. Yet, the site-specific approach had long been employed by Interior, as

this Court recognized in *Western Nuclear*. *See* Lindley, *supra*, at 996; *Western Nuclear*, 462 U.S. at 58 n.18 (noting "in the case of nonmetalliferous substances such as gravel, the Secretary [of 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") (citations omitted).[3]

If Respondents' objection to the Solicitor's Opinion is based on its explicit requirement that "value" be found "as of the date of the allotment or patent," then Respondents' objection is even more peculiar. That conclusion was implicit in Interior's approach from the outset and would be essential in any case because the scope of a conveyance must be determined at the time of conveyance. Indeed, Respondents concede that the time of patenting is the relevant time for determining the interests conveyed.[4] Resp. Br. 44 n.11.

Finally, Respondents say that the 1956 Solicitor's Opinion requiring a site-specific analysis of value at the time of patent "should be accorded no weight" because the Solicitor did not have the benefit of this Court's ruling in *Western Nuclear* and the Opinion is "inconsistent with

[3] This was also consistent with the position of the United States itself in *Western Nuclear*. *See* Brief for Petitioners, No. 81-1686, Argument § II.A.2.

[4] That some substances such as precious metals might not be known to exist at a site, or might not be extractable at a profit at the time of patent, presents no conceptual problem. Intrinsically valuable materials have always been treated differently than common materials and recognized as valuable wherever they are found. *See* Pet. Br. 20-21. Certainly Interior has had no difficulty drawing that distinction. The rule Petitioners advocate here, consistent with Interior's practices and historic understandings under the mineral laws, applies only to common materials.

*Western Nuclear*." Resp. Br. 36. Yet Petitioners demonstrated, and Respondents now agree, that *Western Nuclear* did *not* address these questions at all. *See* Resp. Br. 34. And inasmuch as *Western Nuclear* cited and relied upon Interior's emphasis on value, that decision is fully consistent with the Solicitor's determination that the mineral status of sand and gravel depends on the value of the sand and gravel at the site in question at the time of the patent. Moreover, *Western Nuclear* itself cited the 1956 Opinion approvingly, as did the Tenth Circuit recently in resolving a question similar to that presented here. *See United States v. Hess*, 348 F.3d 1237 (10th Cir. 2003). Not surprisingly, Interior has never overruled the 1956 Solicitor's Opinion in any subsequent Departmental ruling.

6. On the one hand, Respondents disdain, and urge the Court to disregard, official Interior decisions specifically addressing the matters at issue here. On the other hand, they seek support for their position that Congress viewed sand and gravel as categorically "valuable" in the early 1900s from reports of the U.S. Geological Survey ("U.S.G.S."), a subordinate scientific agency within the Interior Department. Resp. Br. 30-32.

That U.S.G.S. tracked sand and gravel production in monitoring mineral resources of the United States does not mean that sand and gravel were regarded as "valuable minerals" under the mining laws or statutory mineral reservations. U.S.G.S. had quite a different purpose in compiling information about mineral resources in the United States. In *Mineral Resources of the United States 1918, Part I-Metals*, 4A (1921), for example, U.S.G.S. pointed out that "investigation of the mineral resources of the United States . . . includes *every known raw mineral product and commodity of economic value* and anticipates future development by including *some rocks and minerals that are of no present economic value* but that may be valuable in the future." (Emphasis added.) In addition to covering common sand and gravel, the U.S.G.S. reports included "clay products" such as "common brick" with "low

value preventing transportation for any considerable distances." *Id.*, *Part II-Nonmetals*, 858. U.S.G.S. noted that "[c]lay available for the manufacture of clay products is one of the most widely distributed minerals. Hence there are clay-working plants in every State in the Union." *Id.* at 906. *See also* U.S.G.S., *Mineral Resources of the United States 1916, Part II-Nonmetals*, 511-12 (1919). That substances such as common clay could be classed as "mineral resources" for purposes of broad economic surveys says nothing about how such substances were classed with respect to the public land and mining laws. As with sand and gravel, most such common clay materials, in most locations, were worthless. And like sand and gravel, most such materials could not be classified as "minerals" under the mining laws under settled Interior precedent in the early 1900s and since. *See* Pet. Br. 17-18 & n.9; *id.* at 42 & n.9.

Even the 1917 *Mineral Resources* report (not published until 1920), quoted liberally by Respondents to show increased war-time use of sand and gravel, described sand and gravel as a "common and cheap building material" that was "widely distributed . . . [and] abundant . . . in the United States." Resp. Br. 31. Congress did not have in mind these "common and cheap" materials when it reserved "valuable minerals" under the Pittman Act.

Respondents also cite a 1913 U.S.G.S. bulletin (also cited in *Western Nuclear*) for the proposition that gravel was listed as a "mineral" and that "lands containing gravel deposits *could* be withdrawn or classified as mineral lands." Resp. Br. 49 (emphasis added). Yet, the scant treatment of sand and gravel in this comprehensive study confirms that such substances were *not* regarded as "valuable minerals." In a brief section on "Miscellaneous Nonmetalliferous Mineral Lands," the report listed "limestone, . . . glass sand, gravel, volcanic ash, . . . and other clays, fuller's earth, mineral waters, . . . " and other common earthen substances. U.S.G.S., *Bulletin 537, The Classification of the Public Lands*, 138 (1913). The report

stated, however, that "no withdrawals and no formal classifications of lands because of their content of any of these minerals have been made." *Id.* at 142 ("*Sand, for example, is of great use but it is so common that in most localities it has almost no market value*.") (emphasis added).

7. Because land grant statutes such as the Pittman Act sought to induce citizens to act and invest, courts should interpret their mineral reservations in accordance with the "condition of the country when the acts were passed." *Leo Sheep Co. v. United States*, 440 U.S. 668, 682 (1979). An *unexpressed* congressional purpose ought not be allowed to trump the "ordinary and popular" meaning of the words used to induce citizen action. *See* Pet. Br. 26. *Leo Sheep*, of course, provides direct support for that logical and responsible approach to the construction of mineral reservations in land grants.

Respondents purport to distinguish *Leo Sheep* on the theory that it involved grants to railroads (Resp. Br. 21 n.2), but they offer *no* explanation why railroads should be peculiarly favored over industrious citizen-settlers who found water in the desert for the benefit of all. *Leo Sheep* itself makes clear that the crucial factor requiring consideration is the *inducement* of citizens (or railroads) to sacrifice in consideration of the patent's plain terms. 440 U.S. at 683, 687. To deny the landowner the benefit of the most reasonable interpretation of the reservation is to deny the benefit of the bargain and sacrifice made in securing the patented land.

Respondents highlight that *Western Nuclear* construed the SRHA reservation broadly, ignoring the teaching of *Leo Sheep*. Resp. Br. 21 n.2. In that respect as well, then, *Western Nuclear* is deficient. Perhaps the *Western Nuclear* majority did not deem the level of sacrifice required of SRHA patent recipients, settling and improving agricultural land in return for title to the land, to be worthy of weighty consideration. Such consideration is nevertheless due to Pittman Act water prospectors. The

prospectors' investment in labor, capital, and self-sacrifice to find and develop subterranean water sources in Nevada's sand and gravel desert was great. The risk of failure and financial loss was high (if water was not found and developed – or possibly even if it was). Yet the public benefits from this sacrifice, if water was found, could be enormous. Having induced prospective patentees to invest their capital and energy, at considerable personal risk, based on the plain words of the Act and the patent, there is no just reason to deny successful prospectors the very ground and grit that they sacrificed to earn.

In any event, *Leo Sheep* lives, as evinced by this Court's recent decision in *Amoco Prod. Co. v. S. Ute Indian Tribe*, 526 U.S. 865, 873 (1999) (directing that the terms of a patent be taken in "their ordinary and popular sense"); s*ee also id.* at 875 (relying on *Leo Sheep*). Indeed, Interior Secretary Gale Norton recently approved an opinion of Interior's Solicitor relying on *Leo Sheep* in a mining law controversy that did not involve a grant to a railroad. In construing provisions of the Mining Law of 1872, as amended, in favor of mining claimants and patentees, the Solicitor relied upon *Leo Sheep* in stating that "the Supreme Court has construed certain federal land grants more broadly when the purpose is to secure public advantages by inducing individuals to engage in costly operations on public lands." Op. Solic. Interior Dep't M-37010, at 13 (2003) ("Mill Site Location and Patenting under the 1872 Mining Law").

8. Respondents cite practical concerns that they say militate against a "site-specific" approach. They worry that while this case may be an easy case for applying the site-specific approach, there may be difficulties in other cases. Resp. Br. 39. But Respondents' apprehension is unwarranted. The plain fact is that if gravel was marketable at the time of a patent, there will be evidence of the market. With respect to Pittman Act patents, of course, Interior had to certify that the lands were *not* mineral lands (*i.e.*,

not chiefly valuable for mineral purposes) even to be eligible for the grant.[5]

9. Respondents also gin up hypothetical scenarios in which one landowner owns the sand and gravel on his property (because patenting occurred when there was no market for sand and gravel), but an adjoining land owner, who acquired his plot later, when sand and gravel were marketable, would not. Resp. Br. 41-43. Different treatment of such differently situated land holders is not surprising at all, however, given Congress' desire to prevent the fraudulent acquisition of valuable minerals known to the entryman under the "guise" of agricultural entry. *See* Pet. Br. 30 (citing 53 Cong. Rec. 705, 707 (1916) (comments of Sen. Pittman)). Respondents' proposed Solomonic solution to the problem of unequal treatment of patent holders – treating all settlers equally poorly by granting none ownership of the sand and gravel that comprise their land – is a solution few landowners would find fair. If uniformity is a dominant concern, the uniform rule should be the one in force contemporaneous with the Pittman Act (and that recognizes that in the early 1900s virtually all Nevada sand and gravel were worthless): sand and gravel were not reserved at all.

## II. *Western Nuclear* Ought Not Be Extended To Reach The Issues In This Case.

As Respondents concede, *Western Nuclear* did not address the "site-specific" issue. Resp. Br. 34. Yet *Western*

[5] "Nonmineral" designation signifies lands "chiefly valuable" for uses other than mineral production, such as agriculture. *See N. Pac. Ry. Co. v. Soderberg*, 188 U.S. 526, 536-37 (1903). Because the Pittman Act required designation of the land as nonmineral before the issuance of permits to prospect for water, the land in question had no existing value for agricultural use and known "valuable minerals" would preclude nonmineral designation.

*Nuclear's* reliance on Interior's historic site-specific approach to common materials – and the Government's focus on "commercially exploitable" gravel in the briefs in that case – certainly suggest that Petitioners' position here is consistent with *Western Nuclear*.[6] Indeed, even the Court's citation to the Lindley treatise in *Western Nuclear*, which supports a site-specific marketability test for common materials, suggests that the Court's primary focus was on rejecting the assertion that *no* gravel was reserved (even admittedly valuable deposits).

Respondents nonetheless assert that the *reasoning* of *Western Nuclear* requires rejection of "the 'site-specific' theory." The centerpiece of this argument for a categorical reservation of all sand and gravel is "Congress' purpose." Resp. Br. 33-39.

The first difficulty with Respondents' argument, of course, is that, before delving into the world of legislative purpose, one must first overcome the plain language of the statute and ordinary principles of statutory construction. In particular, as explained in cases before and since *Western Nuclear*, the publicly stated views of the responsible federal agency must be given great weight and knowledge of those views imputed to Congress when discerning the meaning of the words of the statute.

Moreover, on its own terms, Respondents' argument (at 34-39) about Congress' narrow agricultural purpose does *not* support the result they seek here. Respondents postulate that Congress sought to provide patentees with the right to engage in agricultural pursuits only, while severing a broad mineral estate (including common

[6] *Western Nuclear* drew heavily from Interior decisions and mining law authorities describing which common materials could be developed as "minerals" under the mining laws. 462 U.S. at 45-59. In fact, the Court itself relied (for a different proposition) on the 1956 Solicitor's Opinion that the Government now urges the Court to dismiss as irrelevant. *Id.* at 56.

earthen materials) to be exploited by third parties under the control of the Government. *Id.* at 34-35. Yet, as we have detailed, unless common materials such as sand and gravel were *actually marketable* at the site in question, they would *not* be recognized as "mineral" and thus would *not* be exploitable under the mining laws. Pet. Br. 18, 22-25.[7] And if future marketability later rendered such common materials exploitable by third parties, such exploitation would almost certainly destroy the interest purportedly granted to the "surface owner."

Furthermore, *Western Nuclear* characterized the SRHA as a statute under which the settler received a bare surface estate in exchange for a modest investment in establishing an agricultural use. The Pittman Act required more. It required the discovery and development of subterranean water sources in Nevada's sandy desert – thus opening for *other settlers* hundreds of additional acres outside the patentees' own holdings. *See* Pet. App. 64a, 66a (Act authorizing permits to prospect for water on up to 2,560 acres, up to one fourth of which could be patented to successful prospectors, with the remaining acreage subject to disposal under the homestead laws). The goal was to develop the single natural resource – water – that was essential to *any* future population and economic use (including agricultural use) of these desert lands. Pittman Act patent holders – and, frankly, SRHA patent holders as well – were not to be agricultural serfs on the land they purchased through their labors. If they were to *own* the

[7] Given the ubiquitous nature of materials like sand, gravel, and clay – most of which are, have always been, and will likely always be, worthless – the Government must presume that Congress intended to categorically deny Western patentees ownership of what appeared to be their land – the very soil and substance on which they walked – even while anticipating that little or none of that soil and substance would *ever* be eligible for development under the mining laws.

land, they surely must own the common material comprising much if not most of the land surface itself.

Finally, the purpose of the Pittman Act's mineral reservation was not as broad as Respondents conceive. Because the Pittman Act – unlike the SRHA – was limited to lands designated "nonmineral" by the Interior Department, the primary purpose of its mineral reservation was to prevent the fraudulent acquisition of valuable minerals known to the entryman but unknown to the government. 53 Cong. Rec. 707. According to Senator Pittman:

> 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.* (cited at Pet. Br. 30) (emphasis added). Concerns about deceptive acquisition have no rational relationship to obviously present sand and gravel that were worthless at the time of patent, and Respondents make no attempt to link that purpose with the question presented here.[8]

[8] The photographs and affidavits of record show the obvious presence of these surface materials. JA 10, 13-15. Respondents now suggest in passing that the sand and gravel were not evident on the surface of the Nevada desert at the time of patenting. *See* Resp. Br. 6. Suffice it to say that there is no finding in the record on the point because the district court found "irrelevant BedRoc's and Williams' strenuous claims that the sand and gravel were exposed, rather than subsurface, deposits." 50 F. Supp. 2d 1001, 1008 n.1 (Pet. App. 35a n.1). The record bears out BedRoc's position.

## III. If *Western Nuclear* Cannot Be Reconciled With The Correct Result In This Case, *Western Nuclear* Should Be Overruled.

As set forth above, the term "valuable minerals" under Pittman Act patents does not reach common materials, such as sand and gravel, that were worthless at the time of the patent. Although Petitioners see no necessity for this Court to reach the issue here, Petitioners generally agree that a "site-specific" approach to common materials could just as well apply to SRHA reservations as to Pittman Act reservations. *See* Resp. Br. 24. *Western Nuclear* did not address the issue.

If it is true, however, as Respondents suggest, that accepting a "site-specific" approach in this case would fundamentally contradict the reasoning of *Western Nuclear*, then *Western Nuclear* should give way. There is no reason to reach the wrong result here merely to bolster and extend *Western Nuclear*.

As set forth in Petitioners' opening brief, *Western Nuclear* is an orphan in its analytic approach to the meaning of "minerals" in a mineral reservation. Many cases before and since have properly and heavily relied on the contemporaneous decisions of the responsible federal agency in interpreting a statute such as this, which *Western Nuclear* declined to do.[9] *See* Pet. Br. 36-39.

[9] Respondents rely upon two state-court decisions concerning the meaning of the term "minerals." The first, *State ex rel. Atkinson v. Evans*, 89 P. 565, 566 (Wash. 1907), concerned a state constitutional provision restricting property ownership by aliens, but providing an exception for lands containing "valuable deposits of minerals, metals, iron, coal, or fire clay. . . ." The court held that lands containing "valuable deposits of limestone, silica, silicated rock, and clay . . ." could be held by the alien resident. *Id.* at 568. The second, *Loney v. Scott*, 112 P. 172 (Or. 1910), was an ejectment action against a placer mining claimant seeking title

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Moreover, decisions like *Leo Sheep* before, and *Amoco Production* after, have taken the words of a reservation in the "popular and ordinary" sense (and have not strained for an interpretation favorable to the Government) out of deference to the sacrifice and investment of citizen-patentees.

In short, the foundations of *Western Nuclear*, shaky at the outset, may well crumble under renewed scrutiny. This case presents the Court with an opportunity to provide a sounder footing upon which to construct a broadly applicable rule for the treatment of ubiquitous, common materials under statutory general mineral reservations. If that requires overruling *Western Nuclear*, then that outcome is assuredly preferable to *extending Western Nuclear* to reserve all common materials under all such statutes.[10] In

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from Interior under the federal mining laws. Although the Oregon court said that the definition of mineral lands "*seems* broad enough to include building sand," *id.* at 175 (emphasis added), that statement was not necessary to the ruling, because the mining claimant also had alleged that the land in question contained "large deposits of building sand and *placer deposits of gold*." *Id.* at 173 (emphasis added). Interior's ruling in *Pac. Coast Marble Co. v. N. Pac. R.R. Co.*, 25 Pub. Lands Dec. 233 (1897), cited by Respondents (Resp. Br. 23), is also of no help to their cause. That decision, holding that valuable marble of "superior quality" was locatable, was eminently sound and in no way indicates that common sand and gravel were valuable.

In any event, the majority of courts considering general mineral reservations in a variety of contexts have concluded that they do not include sand and gravel. *See* Pet. Br. 37 & n.18. This remains true of *Roe v. State*, 710 P.2d 84 (N.M. 1985), *cert. denied*, 476 U.S. 1141 (1986), *overruled in part by Bogle Farms, Inc. v. Baca*, 925 P.2d 1184 (N.M. 1996) (holding merely that courts interpreting general mineral reservations may not discount the parties' *mutual intent*).

[10] Respondents suggest that private reliance interests will be upset on SRHA lands if this Court overrules *Western Nuclear*. No private parties seem to think so, as evidenced by the amicus briefs filed by many diverse private interests in this case uniformly urging that

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*State Oil Co. v. Kahn,* 522 U.S. 3, 20 (1997), for example, cited by Respondents (at 45), a unanimous Court overruled its 1968 decision in a case involving statutory interpretation, while acknowledging that *stare decisis* concerns involving "property and contract rights" arguably were relevant. The Court noted that *stare decisis* is "not an inexorable command" and observed that the Court has been willing to reconsider decisions involving statutory interpretation "when the theoretical underpinnings of those decisions are called into serious question." *Id*. at 20-21. Where the Court has confronted its prior precedent directly and found "its conceptual foundations gravely weakened . . . ," it has properly overruled that precedent. *Id.* at 22. If this Court chooses – upon Respondents' insistence that *Western Nuclear* is controlling here – to confront the theoretical underpinnings of that decision, it may properly determine that *Western Nuclear* should not stand.

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*Western Nuclear* be overruled. The Government's representations about private contracts are vague and not substantiated by the BLM website it relies upon to support its representations. Even the Government's estimate that "more than 300 such contracts" are in place raises little concern, as this would implicate *less than two-tenths of one percent* of the more than 165,712 SRHA land patents issued comprising more than 70.3 million acres of SRHA-patented lands. *See* U.S. Dep't of the Interior, BLM, *Public Land Statistics 1983*, at Table 20 (1984). Moreover, any gravel extraction contracts were almost certainly entered into with the landowners themselves (the "surface owners"), their lessees, or parties otherwise in privity with the landowners, so that eliminating the Government's burdensome royalty and regulatory role will not be disruptive to these private parties. Notably, the Government makes no claim that any contracts are in place regarding Pittman Act lands.

## CONCLUSION

The decision of the Ninth Circuit should be reversed.

Respectfully submitted,

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