No. 02-1593

In the Supreme Court of the United States

BEDROC LIMITED, LLC, AND WESTERN ELITE, INC.,
PETITIONERS

v.

UNITED STATES OF AMERICA, ET. AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS

THEODORE B. OLSON
Solicitor General
Counsel of Record
THOMAS L. SANSONETTI
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
DAN HIMMELFARB
Assistant to the Solicitor General
WILLIAM B. LAZARUS
ELIZABETH ANN PETERSON
BLAINE T. WELSH
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

The Pittman Underground Water Act (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, Inc.*, 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.

2. Whether, if *Watt* v. *Western Nuclear* calls for the application of a *per se* rule regarding the reservation (or non-reservation) of common materials, congressional intent would be better served by a rule that common materials are *not* reserved to the government as "valuable minerals."

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 314 F.3d 1080. The order of the district court (Pet. App. 22a-38a) is reported at 50 F. Supp. 2d 1001. The decision of the Interior Board of Land Appeals (Pet. App. 39a-63a) is reported at 140 I.B.L.A. 295.

JURISDICTION

The judgment of the court of appeals was entered on December 30, 2002. On March 21, 2003, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including April 30, 2003, and the petition was filed on that date. The petition was granted on September 30, 2003. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTE INVOLVED

The Pittman Underground Water Act, ch. 77, 41 Stat. 293 (repealed by the Act of Aug. 11, 1964, Pub. L. No.

88-417, § 1, 78 Stat. 389) is reproduced at Pet. App. 64a-68a.

STATEMENT

1. a. During the nineteenth century, the federal government generally classified public land as either mineral or non-mineral, depending on whether it was more valuable for its mineral deposits or for agricultural use. The government then permitted acquisition of an entire tract under either the mining laws (in the case of mineral land) or the applicable land-grant statute (in the case of non-mineral land). See *Watt* v. *Western Nuclear, Inc.*, 462 U.S. 36, 47-48 (1983); *United States v. Sweet*, 245 U.S. 563, 567-572 (1918). This system had significant disadvantages. As a result of fraudulent affidavits by entrymen—and because of the difficulty, even in the absence of fraud, of determining whether land was more valuable for its minerals than for agricultural use—land was frequently misclassified as non-mineral and conveyed under a land-grant statute, in which case the patentee received title to any subsequently discovered minerals. See *Amoco Prod. Co.* v. *Southern Ute Indian Tribe*, 526 U.S. 865, 868-869 (1999); *Western Nuclear*, 462 U.S. at 48 n.9; *Diamond Coal & Coke Co.* v. *United States*, 233 U.S. 236, 239-40 (1914). Even when land was properly classified as more valuable for agricultural use, only the grantee was in a position to discover and exploit whatever minerals lay beneath the surface, and the minerals would remain undeveloped if he did not do so. See *Western Nuclear*, 462 U.S. at 48 n.9. Concerns about improper or improvident disposal of public lands and the recognition that different incentives were required to promote the concurrent development of mineral and surface resources ultimately led to a change in congressional policy. See *id.* at 48-50.

The first Act of Congress severing mineral rights from the surface estate and allowing the separate development of each was proposed after President Theodore Roosevelt, concerned about the fraudulent acquisition of coal lands under the agricultural land laws, withdrew 64 million acres of coal lands from all forms of entry. See *Western Nuclear*, 462 U.S. at 48-49 (citing 41 Cong. Rec. 2615 (1907)). That was in 1906. The next year, President Roosevelt proposed that Congress create a system that would "encourage the separate and independent development of the surface lands for agricultural purposes and the extraction of the mineral fuels." 41 Cong. Rec. at 2806. The first step in that direction was the Act of March 3, 1909, 30 U.S.C. 81, which authorized the issuance of patents to settlers who had made good-faith agricultural entries onto tracts later identified as coal lands, subject to "a reservation to the United States of all coal in said lands, and the right to prospect for, mine, and remove the same." *Ibid.* The Act of June 22, 1910, §§ 1-3, 30 U.S.C. 83-85, opened the remaining coal lands to settlement, subject to the same reservation of the coal to the United States. *Ibid.*

Congress followed the approach of reserving specific minerals for a few more years. See Act of Apr. 30, 1912, 30 U.S.C. 90 (coal); Agricultural Entry Act, 30 U.S.C. 121 *et seq.* (enacted in 1914) (phosphate, nitrate potash, oil, gas, and asphaltic minerals). But that regime was soon abandoned in favor of a general reservation of all minerals. The first law containing a general mineral reservation was enacted in 1916. It was the Stock-Raising Homestead Act, ch. 9, 39 Stat. 862, which this Court comprehensively considered in *Watt* v. *Western Nuclear, Inc.* See 43 U.S.C. 299(a) ("all the coal and other minerals"). A number of other such laws were

enacted in the 1920s and 1930s. See Recreation and Public Purposes Act, 43 U.S.C. 869 (1952) (enacted in 1926) ("all mineral deposits"); Color of Title Act, 43 U.S.C. 1068 (enacted in 1928) ("coal and all other minerals"); Taylor Grazing Act, ch. 865, § 8, 48 Stat. 1272 (enacted in 1934) ("mineral deposits") (repealed 1976); Bankhead-Jones Farm Tenant Act, ch. 517, § 44, 50 Stat. 530 (enacted in 1937) ("three-fourths of the interest of the United States in all coal, oil, gas, and other minerals") (repealed 1961). See also Federal Land Policy and Management Act of 1976, 43 U.S.C. 1719(a) ("all minerals").

b. Enacted in 1919, the Pittman Underground Water Act (Pittman Act or Act), ch. 77, 41 Stat. 293 (Pet. App. 64a-68a) (repealed by the Act of Aug. 11. 1964, Pub. L. No. 88-417, § 1, 78 Stat. 389) was one of the laws that included a general reservation of minerals to the government. The Pittman Act was passed because previous land-grant laws had not succeeded in drawing settlers to Nevada, due to "a lack of water with which to irrigate the land." 53 Cong. Rec. 706 (1916) (statement of Sen. Pittman). See also 58 Cong. Rec. 6468 (1919) (statement of Rep. Evans). The primary purpose of the Act, sponsored by Nevada Senator Key Pittman, was "to encourage the discovery of artesian water on the public domain in the State of Nevada without appropriation or expense on the part of the Government," in order to promote "[t]he future development of the agricultural land of the State." S. Rep. No. 4, 64th Cong., 1st Sess. 1-2 (1915).

The Act authorized the Secretary of the Interior to issue permits to United States citizens for tracts of "unreserved, unappropriated, nonmineral, nontimbered public lands" that were not known to be irrigable and did not exceed 2560 acres. Pittman Act § 1, 41 Stat.

293. Each permit provided the permittee with the exclusive right to drill for subsurface water within the permittee's tract for a period of two years. *Ibid.* If, within two years of receiving a permit, the permittee was able to demonstrate the discovery and development of sufficient water resources to raise crops on at least 20 acres, the permittee became eligible for a patent to one quarter of the tract. *Id.* § 5, 41 Stat. 294. The remaining three quarters of the property would thereafter be opened for settlement by others on 160-acre tracts under the Homestead Act, ch. 75, 12 Stat. 392. Pittman Act § 6, 41 Stat. 294.

As originally introduced, the bill later enacted as the Pittman Act did not include a reservation of minerals. That version "met with serious opposition on the very ground that it might be used for the purpose of grabbing mineral lands." 53 Cong. Rec. at 707 (statement of Sen. Pittman). The version that was enacted did include a mineral reservation. Section 8 of the Act provided, in pertinent part, as follows:

> That all entries made and patents issued under the provisions of this Act shall be subject to and contain a reservation to the United States of all the coal and other valuable minerals in the lands so entered and patented, together with the right to prospect for, mine, and remove the same. The coal and other valuable mineral deposits in such lands shall 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.

41 Stat. 295 (Pet. App. 67a).

Commenting on an identical provision in an earlier version of the bill, Senator Pittman observed that the mineral reservation was "usual" and reflected "the policy of Congress" of prohibiting "the acquisition of any

character of minerals through any agricultural entry." 53 Cong. Rec. at 707. In his view, "the inclusion of any such right in this grant would mean the destruction of the bill." *Ibid.* See also 58 Cong. Rec. at 6469 (statement of Rep. Blanton) ("If the mineral rights are properly reserved, I have no objection.").

After 40 years, "only three economic farm units ha[d] been developed" under the Act, and Congress determined that the legislation had "failed to accomplish its objective." S. Rep. No. 1282, 88th Cong., 2d Sess. 1 (1964).[1] The Act was accordingly repealed in 1964, "subject to any valid rights and obligations existing on the date of [repeal]." Act of Aug. 11, 1964, Pub. L. No. 88-417, § 1, 78 Stat. 389.

2. On March 12, 1940, Newton and Mabel Butler obtained a patent under the Pittman Act for 560 acres of land in Lincoln County, Nevada. Pet. App. 4a; J.A. 20-21. Citing Section 8 of the Act, 41 Stat. 295, the patent reserved to the United States "all the coal and other valuable minerals in the lands so granted, together with the right to prospect for, mine, and remove the same." J.A. 21. In the early 1990s, a lessee began extracting sand and gravel from the property. Pet. App. 4a. In 1993, Earl Williams bought the property and continued to remove those materials. *Id.* at 4a-5a. The sand and gravel on the property was not exposed, so it was necessary to remove overburden before mining the deposit. *Id.* at 54a n.8.

On March 26 and April 1, 1993, the BLM issued trespass notices to Williams. J.A. 22-28. On April 23, 1993,

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[1] Based on a review of records maintained by its Bureau of Land Management (BLM), the Department of the Interior has determined that only 54 patents were issued under the Pittman Act. See U.S. Br. in Supp. of Mineral Ownership & in Opp. to Pls.' Mot. for Summ. J. 15 n.2.

the BLM issued a decision (J.A. 29-33) finding Williams in violation of 43 C.F.R. 9239.0-7, which provides, in relevant part, that the unauthorized "extraction, severance, injury, or removal" of "mineral materials" from public lands is "an act of trespass." See *Western Nuclear*, 462 U.S. at 40 (BLM issuance of trespass notice based on same regulation). Williams appealed the BLM's decision to the Interior Board of Land Appeals (IBLA). Pet. App. 5a.

In 1995, while the administrative appeal was pending, petitioner BedRoc Limited, LLC (BedRoc) bought the property from Williams and continued to remove sand and gravel. Pet. App. 5a. Over the next four years, BedRoc removed sand and gravel from approximately 16.2 acres of the property, and removed an average of approximately two feet of topsoil to reach the deposits. J.A. 35-36. Pursuant to an agreement with the Department of the Interior, BedRoc placed a portion of the proceeds from the sale of the sand and gravel in escrow, pending the resolution of the dispute over ownership. Pet. App. 5a. In 1996, BedRoc transferred 40 of its 560 acres to petitioner Western Elite, Inc. (Western Elite). *Id.* at 2a n.2. On October 6, 1997, the IBLA affirmed the BLM's decision, finding that the sand and gravel were "valuable minerals" reserved to the United States under the Pittman Act. *Id.* at 39a-63a.

3. On July 13, 1998, BedRoc and Williams filed this action, which Western Elite later joined as a plaintiff (Pet. App. 2a n.2), in the United States District Court for the District of Nevada. Pet. C.A. E.R. 1-12. The plaintiffs asked the court to quiet title to the sand and gravel and to set aside the IBLA's decision. *Id.* at 7-11. The government counterclaimed and sought damages for trespass. *Id.* at 13-26. On May 24, 1999, the district court ruled for the government. Pet. App. 22a-38a.

Like the IBLA, it held that sand and gravel fall within the Pittman Act's reservation of minerals to the United States. *Id.* at 27a-37a.

4. The court of appeals affirmed. Pet. App. 1a-21a.

a. Observing that "full reservation of mineral rights was the policy in place at the time of the [Pittman] Act's passage" (Pet. App. 10a), and relying in part (*id.* at 11a-12a) on this Court's decision in *Watt* v. *Western Nuclear, Inc.*, 462 U.S. 36, the court of appeals concluded that "the mineral reservation in the Pittman Act is to be construed broadly." Pet. App. 12a. *Western Nuclear* holds that gravel is a mineral reserved to the United States in patents issued pursuant to the Stock-Raising Homestead Act. *Id.* at 11a. In that case, the court of appeals observed, this Court determined that Congress's intention was "to facilitate development of both surface and subsurface resources"; that whether a resource should be deemed part of the surface or the mineral estate therefore depends on "the use of the surface estate that Congress contemplated"; that the statute at issue contemplated that the surface estate would be used for stock-raising and raising crops; and that interpreting the statute "to convey gravel deposits to the farmers and stockmen who made entries under the Act" would "in effect be saying that Congress intended to make the exploitation of such deposits dependent solely upon the initiative of persons whose interests were known to lie elsewhere." *Id.* at 11a-12a (quoting 462 U.S. at 52, 56). The court of appeals concluded that the same reasoning applies to the Pittman Act. *Id.* at 12a.

b. The court acknowledged that the statute at issue in *Western Nuclear* reserved "all the coal and other minerals," without using the modifier "valuable." Pet. App. 16a. It concluded, however, that, "even if Con-

gress intended the word 'valuable' to limit the kinds of minerals reserved to the United States" under the Pittman Act, sand and gravel were reserved. *Ibid.* As support for that conclusion, the court relied on contemporaneous government reports on mineral resources reflecting that sand and gravel were produced in large quantities in the years leading up to the passage of the Pittman Act, and had substantial value. *Id.* at 16a-17a.

c. The court of appeals rejected petitioners' argument that, even if sand and gravel were "valuable in some areas at the time of enactment," there could have been no viable market for the sand and gravel "in *this* parcel at the time of *this* patent." Pet. App. 17a-18a. The court declined petitioners' invitation to apply a "site-specific analysis" to the question whether a resource is a "valuable mineral." *Id.* at 18a. In particular, the court rejected petitioners' contention that the term "valuable minerals" in the Pittman Act has the same meaning as the term "valuable mineral deposits" in the General Mining Act of 1872, 30 U.S.C. 22, under which a particular mineral deposit is locatable if it "would lead a prudent person to believe that a commercially viable mine could be operated with respect to that deposit." Pet. App. 18a. The court reasoned that the word "valuable" in the General Mining Act modifies "deposits," not "mineral," and noted that "[n]ot every deposit of minerals—no matter how 'valuable' the mineral itself may be—is sufficient to constitute a 'valuable mineral deposit' under the General Mining [Act]." *Id.* at 18a-19a.

SUMMARY OF ARGUMENT

I. In *Watt* v. *Western Nuclear, Inc.*, 462 U.S. 36 (1983), this Court interpreted the Stock-Raising Homestead Act (SRHA), ch. 9, 39 Stat. 862, which authorized the issuance of patents to entrymen who increased the value of stock-raising land, subject to a reservation to

the United States of "all the coal and other minerals" in the land. Pet. App. 69a. The issue in *Western Nuclear* was whether gravel found on patented lands fell within the mineral reservation. For three principal reasons, the Court held that it did. First, the Court relied on the statutory purpose: encouraging the concurrent development of both the surface and subsurface of patented lands. Since Congress intended that SRHA lands would be used for stock-raising and raising crops, and since those uses do not ordinarily entail the extraction of gravel, the Court concluded that gravel was a "mineral" reserved to the government. Second, the Court relied on the fact that Congress contemplated that mineral deposits on SRHA lands would be subject to location under the general mining laws, and the fact that administrative and judicial decisions had recognized that gravel is locatable. Third, the Court relied on the interpretive principle requiring that land grants be construed in favor of the government. Each of these grounds is equally applicable to the Pittman Act, which, like the SRHA, was an early-20th-century law that granted land to patentees for agricultural purposes and severed the surface estate from the mineral estate to encourage the concurrent development of surface and subsurface lands.

II. Petitioners are mistaken in their contention that, because the SRHA reserved "all the coal and other minerals" (Pet. App. 69a) while the Pittman Act reserved "all the coal and other *valuable* minerals" (*id.* at 67a), *Western Nuclear* is distinguishable. As that decision makes clear, and as petitioners acknowledge, a "mineral" is by definition a valuable substance, so it is not likely that Congress intended "valuable" to be a word of limitation. That view is confirmed by the Pittman Act's text and legislative history. The word "min-

eral" appears eight times in Section 8 of the Act but is modified by "valuable" only twice, and the context makes clear that the noun has the same meaning regardless of whether the adjective precedes it. The House Report on the bill that became the Pittman Act, moreover, explicitly states that "Section 8 of the bill contains the same reservation[] of minerals * * * as was provided in the [SRHA]." H.R. Rep. No. 286, 66th Cong., 1st Sess. 1 (1919). Nor is there any reason to suppose that, in enacting the Pittman Act, Congress intended to depart from the two established categories of mineral reservations in land-grant statutes: those that reserved specific minerals and those that reserved all minerals. Even if there is a difference between "minerals" and "valuable minerals," however, the editions of the Department of the Interior's annual publication *Mineral Resources of the United States* that were published in the late 1910s demonstrate that sand and gravel were valuable at the time the Act was passed.

III. Petitioners are also mistaken in their contention that *Western Nuclear* does not foreclose the view that gravel and sand are reserved "minerals" only if they could have been profitably extracted from the patentee's land at the time the patent was issued. *Western Nuclear* does foreclose that view, in two different ways. First, the Court's holding that the definition of mineral "includes gravel," because, among other things, gravel "can be * * * used for commercial purposes," 462 U.S. at 55, reflects a categorical rather than a "site-specific" approach to the issue. Second, the principal basis for the Court's holding that gravel is a mineral reserved to the government is that it was not needed for stock-raising or farming and thus might have gone unexploited if included in the surface estate granted to the

patentee. That is true regardless of when it became profitable to extract the gravel.

Adoption of petitioners' retrospective, "site-specific" approach would also have a number of consequences that Congress should be presumed not to have intended. First, because the Pittman Act required a determination that the land was "nonmineral" before a permit could be issued, adopting petitioners' approach would mean that the mineral reservation would apply only if, during the usually short period between the determination of the land's nonmineral character and the issuance of the patent, a valueless resource somehow became valuable. Second, because it will not always be obvious whether a substance could have been profitably extracted at the time of the patent, petitioners' approach would require the decisionmaker in many cases to undertake the difficult task of determining, retrospectively and hypothetically, whether it would have been profitable, years or decades ago, to extract resources from land from which they were not in fact extracted. Third, because the profitability of extracting sand and gravel could vary over time and depend on economic or political circumstances beyond the patentee's control, similarly situated patentees could be granted dissimilar property rights based on the happenstance of when the land was patented. If there is any remaining doubt about whether Congress intended a "site-specific" approach, however, that doubt should be resolved in the government's favor, based on the interpretive canon requiring a narrow construction of land grants by the United States.

IV. Petitioners' invitation to overrule *Western Nuclear* should be declined. *Stare decisis* considerations are at their peak in a case, like this one, where the precedent in question involved both a question of statutory

interpretation and the allocation of property rights. Congress could have taken corrective action in the intervening 20 years if it had disagreed with the decision in *Western Nuclear*, but it has not chosen to do so. In the meantime, hundreds of contracts in which the government granted the right to extract sand or gravel (or a similar substance) from lands patented under the SRHA (or a similar law) have been executed in reliance on *Western Nuclear*. Those contracts are worth tens of millions of dollars. Petitioners are mistaken in their contention that the Court clearly erred in *Western Nuclear* by not relying on the Secretary of the Interior's decision in *Zimmerman* v. *Brunson*, 39 Pub. Lands Dec. 310 (1910), overruled by *Layman* v. *Ellis*, 52 Pub. Lands Dec. 714 (1929), which held that lands valuable because of sand and gravel deposits were not "mineral lands" under the applicable homestead law. The Court correctly recognized that *Zimmerman* was not the only evidence of the meaning of "minerals" at the time of the SRHA's enactment, and that much of the other evidence pointed in the opposite direction.

ARGUMENT

THE SAND AND GRAVEL EXTRACTED FROM PETITIONERS' LAND WERE RESERVED TO THE UNITED STATES UNDER THE PITTMAN ACT

This case involves the Pittman Underground Water Act. In *Watt* v. *Western Nuclear, Inc.*, 462 U.S. 36 (1983), this Court interpreted the Stock-Raising Homestead Act, a similar land-grant statute from the same era with a nearly identical mineral reservation, and found that gravel was reserved to the United States under the statute. The Court's reasoning in *Western Nuclear* is equally applicable to the Pittman Act, and

that decision explicitly rejected one of the principal theories on which petitioners rely in this case.

Confronted with the obstacle of *Western Nuclear*, petitioners attempt to surmount it in three different ways. First, they contend that *Western Nuclear* is distinguishable, because the statute at issue there reserved "all the coal and other minerals," while the statute at issue here reserved "all the coal and other *valuable* minerals." Second they contend that, even if *Western Nuclear* is not distinguishable, it did not address one of the arguments they raise here, which is whether a mineral (or valuable mineral) like gravel or sand falls within the statute's reservation if it could not have been profitably extracted from the patentee's land at the time the patent was issued. Third, they contend that, if *Western Nuclear* is not distinguishable and a "site-specific" analysis is not appropriate, then *Western Nuclear* should be overruled.

Each of these contentions is without merit. As to the first: The phrase "coal and other valuable minerals" in the Pittman Act has the same meaning as the phrase "coal and other minerals" in the SRHA, and even if it has a narrower meaning, sand and gravel were valuable minerals when the Pittman Act was passed. As to the second: A "site-specific" approach is foreclosed by *Western Nuclear*, cannot be reconciled with the Pittman Act's text and structure, would increase litigation and uncertainty, could lead to differential treatment of similarly situated patentees, and in any event must be rejected because of the rule requiring a narrow construction of land grants by the United States. As to the third: Petitioners' invitation to overrule *Western Nuclear* should be declined, because petitioners cannot overcome the presumption in favor of *stare decisis*, which is at its strongest when, as in this case, the

precedent involved a question of statutory construction and affected property and contract rights.

I. *WESTERN NUCLEAR* RESOLVED THE QUESTION WHETHER GRAVEL AND SAND ARE RESERVED TO THE UNITED STATES UNDER A PATENT ISSUED PURSUANT TO A STATUTE OF THE KIND AT ISSUE HERE

The SRHA authorized the issuance of patents for "stock-raising lands." *Western Nuclear*, 462 U.S. at 38 (quoting 43 U.S.C. 291 (1970) (repealed 1976)). To obtain such a patent, the entryman was required to live on the land for three years and make improvements "tending to increase the value of the [land] for stock-raising purposes." *Ibid.* (quoting 43 U.S.C. 293 (1970) (repealed 1976)). Section 9 of the SRHA provided that all patents "shall be subject to and contain a reservation to the United States of all the coal and other minerals in the lands so entered and patented, together with the right to prospect for, mine, and remove the same." 39 Stat. 864 (Pet. App. 69a). The language of this reservation is identical to that in Section 8 of the Pittman Act, except for one word: the latter reservation uses the phrase "all the coal and other valuable minerals," 41 Stat. 295 (Pet. App. 67a), rather than "all the coal and other minerals." The SRHA also provided, in language identical to that in the Pittman Act, *ibid.*, that the mineral deposits in the patented lands shall 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." 39 Stat. 864 (Pet. App. 69a).

The question presented in *Western Nuclear* was "whether gravel found on lands patented under the [SRHA] is a mineral reserved to the United States." 462 U.S. at 38. The Court held that it was. Noting that the meaning of the word "minerals" depends on the

context in which it is used, *id.* at 42-43, the Court first concluded that there were conflicting indications concerning "[t]he legal understanding of the term * * * prevailing in 1916," *id.* at 44, and that the contemporaneous understanding of the term thus did not "shed[] much light" on the question whether Congress intended the mineral reservation in the SRHA to encompass gravel, *id.* at 46-47. In reaching that conclusion, the Court rejected the argument that a 1910 administrative decision by the Secretary of the Interior, *Zimmerman* v. *Brunson*, 39 Pub. Lands Dec. 310, demonstrated that Congress did not intend the term "minerals" to encompass gravel. 462 U.S. at 45-46. The Court went on to explain that the purposes of the SRHA (*id.* at 46-56), the treatment of gravel under the general mining laws (*id.* at 56-59), and the canon requiring that land grants be construed in the government's favor (*id.* at 59-60) all supported its conclusion that gravel was reserved by the SRHA. As explained below, each of the grounds for the Court's decision in *Western Nuclear* is applicable to the Pittman Act, including the Court's rejection of the argument, also made by petitioners here, that the Secretary of the Interior's decision in *Zimmerman* requires the conclusion that gravel was not a reserved mineral.

A. The Reasoning Of *Western Nuclear* Is Equally Applicable To The Pittman Act

1. In *Western Nuclear*, the Court found that "the purposes of the SRHA" provided "strong[] support" for the view that gravel is a "mineral" reserved to the United States. 462 U.S. at 47. The SRHA, the Court observed, was "the most important of several federal land-grant statutes enacted in the early 1900s that reserved minerals to the United States," rather than

classifying a tract of land as "mineral or nonmineral" and disposing of title to the entire tract on the basis of the classification, as had been the practice under "the old system." *Ibid.* Congress's purpose in "severing the surface estate from the mineral estate," the Court said, was "to encourage the concurrent development of both the surface and subsurface of SRHA lands." *Id.* at 50. The Court thus concluded that "whether a particular substance is included in the surface estate or the mineral estate" depends on "the use of the surface estate that Congress contemplated." *Id.* at 52. Since Congress expected that "the surface of SRHA lands would be used for ranching and farming," *id.* at 53, and since those uses "do not ordinarily involve the extraction of gravel," *id.* at 56, the Court interpreted the reservation of "minerals" in the SRHA to include gravel, *id.* at 55-56. Interpreting the SRHA "to convey gravel deposits to the farmers and stockmen who made entries under the Act," the Court explained, would be tantamount to saying that "Congress intended to make the exploitation of such deposits dependent solely upon the initiative of persons whose interests were known to lie elsewhere." *Id.* at 56.

The same reasoning applies here. First, like the SRHA, the Pittman Act was an early-20th-century land-grant statute that departed from the old classification system by severing the surface estate from the mineral estate to encourage concurrent development of surface and subsurface lands. The language of the mineral reservation in Section 8 of the Act is identical, but for a single word, to that in Section 9 of the SRHA, and the House Report on the bill that became the Pittman Act described the reservation in Section 8 as "the same reservation[] of minerals, with the facility for prospecting for and developing and mining such miner-

als," that was provided in the SRHA. H.R. Rep. No. 286, 66th Cong., 1st Sess. 1 (1919).

Second, as with SRHA lands, Congress expected that the surface of Pittman Act lands would be used by patentees for farming, an activity, as this Court made clear in *Western Nuclear*, 462 U.S. at 52-56, that does not ordinarily entail the extraction of sand and gravel. That Pittman Act lands were to be used for agricultural purposes is clear from both the text and the legislative history of the Act. Section 3 of the Act obligated an applicant for a permit to submit an affidavit that the application was made "for the purpose of reclamation and cultivation" (41 Stat. 294); Section 5 entitled a permittee to a patent for a portion of the land if the permittee discovered underground waters in sufficient quantity to produce at a profit "agricultural crops other than native grasses" on at least 20 acres (41 Stat. 294); and Section 6 provided for the distribution of the remaining portion of the land pursuant to the Homestead Act, ch. 75, 12 Stat. 392, which in turn required the entryman to use the land "for the purpose of actual settlement and cultivation" (*id.* § 2, 12 Stat. 392). The House Report on an earlier bill (which included the same mineral reservation that appeared in Section 8 of the Act, see 53 Cong. Rec. at 705) stated that the "primary object of the bill" was "to encourage the development of the agricultural portions of the public domain in the State of Nevada" that could not be irrigated from any known water source, H.R. Rep. No. 731, 64th Cong., 1st Sess. 1 (1916), and the House Report on the bill that became the Pittman Act noted that the government's failure to provide a law like the one proposed had resulted in "the retarding of agricultural development in Nevada," H.R. Rep. No. 286, *supra*, at 2.

Petitioners contend that the Pittman Act is unlike the SRHA, because patents under the latter law were granted for improving the land by farming or ranching, while patents under the former law were granted for successful prospecting for water. Pet. Br. 27, 33. That characterization is inaccurate. As its first sentence demonstrates, the Pittman Act was "[a]n Act to encourage the reclamation of certain arid lands in the State of Nevada," § 1, 41 Stat. 293 (Pet. App. 64a), not to encourage prospecting for water for its own sake. In any event, the distinction proffered by petitioners is irrelevant to the analysis employed in *Western Nuclear*, which makes clear that the determination of whether a particular substance is included in the surface estate or the mineral estate is to be made in light of "the use of the surface estate that Congress contemplated." 462 U.S. at 52. Both the SRHA and the Pittman Act contemplated that the surface estate would be used for agricultural purposes, a use that does not ordinarily entail the extraction of sand or gravel.

2. In holding that gravel is a "mineral" under the SRHA, the Court in *Western Nuclear* also found it "highly pertinent" that administrative and judicial decisions "recognized that gravel deposits could be located under the general mining laws" before enactment of the Act of July 23, 1955, 30 U.S.C. 611, which prospectively excluded common varieties of gravel (as well as sand) from the purview of those laws and provided for disposal of deposits of those substances by other means under the Materials Act of 1947, 61 Stat. 681, 30 U.S.C. 601. 462 U.S. at 57 & n.15. The Court concluded that the mining laws' treatment of gravel as a mineral "suggests that gravel should be similarly treated under the SRHA," because Congress "clearly contemplated that mineral deposits in SRHA lands would be subject to

location under the mining laws." *Id.* at 59. The same reasoning applies to the Pittman Act, which likewise contemplated that mineral deposits would be subject to location under the mining laws. Compare SRHA § 9, 39 Stat. 864, with Pittman Act § 8, 41 Stat. 295.

3. In *Western Nuclear*, the Court found its conclusion that gravel is a "mineral" reserved by the SRHA to be "buttressed" by an important rule of interpretation: "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." 462 U.S. at 59 (quoting *United States* v. *Union Pac. R.R.*, 353 U.S. 112, 116 (1957)). Indeed, the Court reasoned, that rule applied "with particular force" in the case before it, because the SRHA's legislative history, which included a statement by the bill's manager in the House of Representatives that the reservation covered "every kind of mineral," *id.* at 59-60 (quoting 53 Cong. Rec. at 1171 (statement of Rep. Ferris)), reflected Congress's understanding that the mineral reservation would "limit the operation of this bill *strictly to the surface of the lands*," *id.* at 60 (quoting H.R. Rep. No. 35, 64th Cong., 1st Sess. 18 (1916)) (emphasis added by the Court). The same canon of construction applies to the Pittman Act, which is a similar land-grant statute. And as with the SRHA, that canon applies with "particular force," *id.* at 59-60, because an intention to enact a broad mineral reservation is also reflected in the Pittman Act's legislative history, which includes a statement by the law's sponsor that the reservation reflected the policy of Congress to prohibit the acquisition of "any character of minerals" under an

agricultural patent, 53 Cong. Rec. at 707 (statement of Sen. Pittman).[2]

B. *Western Nuclear* Explicitly Rejected The Argument That The Secretary Of The Interior's Decision In *Zimmerman* v. *Brunson* Requires The Conclusion That Gravel And Sand Are Not Reserved Minerals

In support of their claim that sand and gravel are not minerals reserved to the United States under the Pittman Act, petitioners and their amici rely heavily on *Zimmerman* v. *Brunson*, 39 Pub. Lands Dec. 310, a 1910 decision by the Secretary of the Interior. *Zimmerman* involved a challenge to a homestead entry on the ground that the land was valuable due to the presence of gravel and sand and was therefore "mineral land" that could not be settled under the applicable homestead law. *Id.* at 311-312. The Secretary rejected the challenge. He concluded that lands containing deposits of gravel and sand useful for general building purposes were not "mineral lands" under the homestead laws, except when the deposits "possess a peculiar property or characteristic giving them a special value." *Id.* at 312-313. In 1929, *Zimmerman* was overruled by the Secretary in *Layman* v. *Ellis*, 52 Pub. Lands Dec. 714.

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[2] Petitioners cite *Leo Sheep Co.* v. *United States*, 440 U.S. 668 (1979), for the proposition that the Pittman Act should receive a "liberal construction" in favor of the patentee. Pet. Br. 26-27 (quoting 440 U.S. at 683). But the Court's refusal to apply the principle of narrow construction in that case depended on the fact that the grant at issue was made under the railroad Acts, to which the principle does not apply "in its full vigor." 440 U.S. at 682. In any event, *Leo Sheep* was decided before *Western Nuclear*, which applied the principle of narrow construction to a statute that is similar to the Pittman Act.

Invoking the principle that "the *contemporaneous* understanding of a statutory term is the touchstone in determining what Congress intended by that term," and quoting *Zimmerman*, petitioners contend that, "[a]t the time of enactment of the Pittman Act," the Department of the Interior "had explicitly determined that sand, gravel, and other common materials were *not* to be regarded as 'minerals' for purposes of the mining laws" unless there was "some 'peculiar property or characteristic giving them a special value.'" Pet. Br. 17 (quoting 39 Pub. Lands Dec. at 312). Accord *id.* at 28, 35-36, 41-42; Nat'l Stone, Sand & Gravel Ass'n (NSSGA) Br. 10, 12-16. This very argument was made, and decisively rejected, in *Western Nuclear*. In support of *its* claim that gravel is not a mineral reserved to the government under the *SRHA*, the owner of the surface estate in *Western Nuclear* argued that *Zimmerman* was "evidence that Congress could not have intended the term 'minerals' [in the SRHA] to encompass gravel." 462 U.S. at 45. 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 the word," the Court categorically rejected the suggestion that *Zimmerman* showed that "Congress understood the term 'minerals' to exclude gravel." *Id.* at 45-46.

The Court reached that conclusion for four different reasons. First, the Court thought it "unlikely that many Members of Congress were aware of the ruling in *Zimmerman*, which was never tested in the courts and was not mentioned in the Reports or debates on the SRHA." *Id.* at 46. Second, even if Congress had been aware of *Zimmerman*, the Court saw "no reason to conclude that it approved of the Secretary's ruling in that

case" rather than the Court's own decision in *Northern Pacific Railway Co.* v. *Soderberg*, 188 U.S. 526 (1903), "which adopted a broad definition of the term 'mineral' and quoted with approval a statement that gravel is a mineral." 462 U.S. at 46.[3] Third, even if Congress intended to follow the approach of the Department of the Interior, the Court saw "little basis for inferring that it intended to follow the specific ruling in [*Zimmerman*] rather than the Interior Department's general approach in classifying land," under which land containing deposits of "common substances" was "mineral land" if the deposits made the land "more valuable on account thereof than for agricultural purposes." *Id.* at 46 n.7 (quoting *Pacific Coast Marble Co.* v. *Northern Pac. R.R.*, 25 Pub. Lands Dec. 233, 245 (1897)). Fourth, the Court noted that, in 1913, three years before the SRHA's enactment, "the Interior Department itself listed gravel as a mineral in a comprehensive study of the public lands." *Ibid.* (citing United States Geological Survey, Department of the Interior, *Bulletin 537*, *The Classification of the Public Lands* 138-139 (1913)).

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[3] The issue in *Soderberg* was whether lands valuable for granite quarries were "mineral lands" excepted from a grant of land to a railroad company. 188 U.S. at 529. The Court held that they were. *Id.* at 529-537. It defined "minerals lands" to include "not merely metalliferous lands, but all such as are chiefly valuable for their deposits of a mineral character, which are useful in the arts or valuable for purposes of manufacture." *Id.* at 536-537. The Court noted that English cases had generally "adopted the construction that valuable stone passed under the definition of minerals," *id.* at 535, and quoted an English court's statement that the term "mineral" in a reservation from a grant of land includes anything, other than "the mere surface," that is "useful for any purpose whatever," such as "gravel, marble, fire-clay, or the like," *id.* at 536 (quoting *Midland Ry.* v. *Checkley*, 4 L.R.-Eq. 19, 25 (1867)).

If *Zimmerman* did not require the conclusion that the SRHA failed to reserve gravel, it cannot require the conclusion that the Pittman Act failed to reserve gravel or sand.[4] Indeed, although petitioners claim that the SRHA and Pittman Act should be interpreted differently because the former uses the term "minerals" while the latter uses the term "valuable minerals," a contention addressed in Point II, *infra*, they present no serious argument that the *Zimmerman* definition of "minerals" could apply in one law but not the other.

II. *WESTERN NUCLEAR* IS NOT DISTINGUISHABLE ON THE GROUND THAT THE STATUTE AT ISSUE THERE RESERVED "MINERALS" RATHER THAN "VALUABLE MINERALS"

Petitioners contend that *Western Nuclear* is distinguishable, because the SRHA reserved "all the coal and other minerals" in the patented lands, while the Pittman Act reserved "all the coal and other *valuable* minerals." Pet. Br. 14-17, 32-33 & n.15. See also Assoc. Gen. Contractors of America (AGCA) Br. 13-14; NSSGA Br. 7-8. This contention is without merit. The settled definition of "minerals," the text and legislative history of the Pittman Act, and the improbability that Congress intended to create a new and unique type of mineral reservation demonstrate that "valuable minerals" has the same meaning as "minerals." And even if it does not, sand and gravel still fall within the Pittman Act's reservation, because they are valuable now and were valuable when the Act was passed.

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[4] Petitioners do not argue that there is any legally relevant distinction for present purposes between gravel and sand.

A. The Term "Coal And Other Minerals" In The Stock-Raising Homestead Act Is No Broader Than The Term "Coal And Other Valuable Minerals" In The Pittman Act

1. The issue in *Western Nuclear* was the meaning of the term "minerals" in the SRHA's reservation to the United States of "all the coal and other minerals" in lands patented under that law. Pet. App. 69a. Interpreting the word "in light of the use of the surface estate that Congress contemplated" when it enacted the SRHA, namely, "stockraising and raising crops," 462 U.S. at 52-53, the Court defined "minerals" as "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." *Id.* at 53 (emphasis added). As support for that definition, which gravel was held to satisfy, *id.* at 55-56, the Court quoted a treatise on mining law, its decision in *Soderberg*, and a decision by the Secretary of the Interior, each of which stated that a "mineral" is something that has "value" or is "valuable." *Id.* at 53.[5] The Court went on to say that its interpretation "best serves the congressional purpose of encouraging the concurrent development of both surface and subsurface

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[5] See 1 *American Law of Mining* § 326 (1982) ("A reservation of minerals should be considered to sever from the surface all mineral substances which can be taken from the soil and *which have a separate value*.") (emphasis added); *Soderberg*, 188 U.S. at 536-537 ("mineral lands include * * * all [lands] as are chiefly *valuable* for their deposits of a mineral character, which are useful in the arts or for purposes of manufacture") (emphasis added); *United States* v. *Isbell Constr. Co.*, 78 Interior Dec. 385, 390 (1971) ("the reservation of minerals should be considered to sever from the surface all mineral substances which can be taken from the soil and *have a separate value*") (emphasis omitted in part).

resources," because "ranching and farming do not ordinarily entail the extraction of mineral substances that can be taken from the soil and *that have separate value*." *Id.* at 53-54 (emphasis added).

Western Nuclear thus makes clear that, by its very nature, a "mineral" reserved to the government under the SRHA is a substance that has "value." See also *Amoco Prod. Co.* v. *Southern Ute Indian Tribe*, 526 U.S. 865, 878 (1999) (describing SRHA's mineral reservation as one that contained "a general reservation of valuable minerals in the lands"). Indeed, petitioners themselves contend that "value" is central "to determining which materials are 'mineral,'" and provide a definition of "minerals" that is essentially identical to the one in *Western Nuclear*: "mineralogical substances that can be extracted from the earth and that have independent value distinct from the surrounding earth." Pet. Br. 18-19. In light of this accepted definition, Congress did not intend the Pittman Act's reservation of "valuable minerals" to be any narrower than the SRHA's reservation of "minerals," which are necessarily valuable. Instead of using the unadorned term "minerals" in the Pittman Act, Congress expressed the same idea by including what can fairly be regarded as the two essential elements of the term's settled definition. See 1 *American Law of Mining* § 8.01[2] (2001) ("Two general criteria are used to determine whether a particular inorganic substance is a mineral: (1) the substance must be recognized by the standard authorities as a mineral, and (2) it must have commercial value.").

2. That Congress considered "valuable minerals" to be synonymous with "minerals" is confirmed by the text of Section 8 of the Pittman Act. The word "mineral" or "minerals" appears eight times there, but is modified by the word "valuable" on only the first two

occasions. 41 Stat. 295 (Pet. App. 67a-68a). If Congress had intended "valuable minerals" to be a narrower term than "minerals," such that the latter included non-valuable minerals that were within the grant, it would be difficult to make sense of Section 8, which reserved to the United States "all the coal and other valuable minerals" in patented lands, but also granted qualified persons the right to enter those lands to prospect for "coal or other mineral therein." 41 Stat. 295 (Pet. App. 67a). Under petitioners' theory, those persons would be able to prospect for minerals that did not belong to the United States.

According to petitioners, all that matters is that "the *reservation* refers to 'valuable minerals.'" Pet. Br. 32 n.15. But petitioners do not explain why Congress would have used the modifier in one additional instance but not in the other six. The apparently arbitrary use of the adjective is not consistent with the view that Congress consciously used it as "a word of limitation." *Id.* at 33. In *Western Nuclear*, the Court held that the "express listing" of "coal" in the SRHA's mineral reservation "was not intended to limit" the phrase "other minerals," and relied, as support for that holding, on "the alternate use of the phrases 'coal and other minerals' and 'all minerals' in the House Report on the bill that became the SRHA." 462 U.S. at 44 n.5 (citing H.R. Rep. No. 35, *supra*, at 18). The same principle applies to the adjective "valuable" in the Pittman Act.

Nor does petitioners' theory find any support in the Pittman Act's legislative history. If Congress had intended the word "valuable" to narrow the reservation in the manner petitioners urge, one would expect to find at least some indication of that intention in the congressional debates or reports. But there is not the slightest suggestion in either that "valuable minerals"

are different from "minerals." On the contrary: In the one instance in the recorded legislative history where the mineral reservation in the bill that became the Pittman Act was compared with the mineral reservation in the SRHA, the view expressed was that the reservations were identical. See H.R. Rep. No. 286, *supra*, at 1 ("Section 8 of the bill contains the same reservations of minerals, with the facility for prospecting for and developing and mining such minerals as was provided in the [SRHA] which was passed by Congress."). And the sponsor's description of the reservation as one that broadly prohibits the acquisition of "any character of minerals," 53 Cong. Rec. at 707 (statement of Sen. Pittman), reinforces the conclusion that the reservations are identical.

Petitioners' theory should also be rejected because, under their interpretation, Section 8 of the Pittman Act would constitute a departure from the two well-established categories of mineral reservations in land-grant statutes. The first (and earlier) type reserved only certain specified minerals,[6] while the second (and later) type contained a general reservation of all minerals.[7] Under petitioners' view, the Pittman Act—and, as far

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[6] See Act of Mar. 3, 1909, 30 U.S.C. 81 (coal); Act of June 22, 1910, 30 U.S.C. 83-85 (same); Act of Apr. 30, 1912, 30 U.S.C. 90 (same); Agricultural Entry Act, 30 U.S.C. 121 *et seq.* (phosphate, nitrate potash, oil, gas, and asphaltic minerals).

[7] See Stock-Raising Homestead Act, 43 U.S.C. 299(a) ("all the coal and other minerals"); Recreation and Public Purposes Act, 43 U.S.C. 869 (1952) ("all mineral deposits"); Color of Title Act, 43 U.S.C. 1068 ("coal and all other minerals"); Taylor Grazing Act, ch. 865, § 8, 48 Stat. 1272 ("mineral deposits"); Bankhead-Jones Farm Tenant Act, ch. 517, § 44, 50 Stat. 530 ("three-fourths of the interest of the United States in all coal, oil, gas, and other minerals"); Federal Land Policy and Management Act of 1976, 43 U.S.C. 1719(a) ("all minerals").

as we are aware, the Pittman Act alone—would be a third, intermediate, type of statute, which reserved a limited class of minerals without specifying what those minerals were. Since petitioners identify no reason why Congress might have departed from its uniform practice of including either a specific or a general mineral reservation in land-grant statutes, it should be presumed that, in enacting the Pittman Act, Congress was not creating a novel and unique type of reservation. Such a presumption is particularly warranted because the reservation as petitioners interpret it would create substantially more uncertainty than the two established types, and because the law's sponsor described the reservation as "usual" under the policy of Congress of reserving "any character of minerals." 53 Cong. Rec. at 707 (statement of Sen. Pittman).

3. Citing this Court's decision in *Duncan* v. *Walker*, 533 U.S. 167 (2001), petitioners contend that the Pittman Act's reservation of "valuable minerals" should be construed more narrowly than the SRHA's reservation of "minerals" because it is "a basic rule of statutory construction that each word must be given significance." Pet. Br. 32-33. Treating the term "valuable minerals" as synonymous with "minerals" does not violate that rule. "It is no superfluity for Congress to clarify what had been * * * unclear," *BFP* v. *Resolution Trust Corp.*, 511 U.S. 531, 544 n.7 (1994), and this Court had observed 16 years before the Pittman Act was passed that the word "minerals" is "used in so many senses, dependent upon the context, that the ordinary definitions of the dictionary throw but little light upon its signification in a given case," *Soderberg*, 188 U.S. at 530, quoted in *Western Nuclear*, 462 U.S. at 42-43. And as this Court's decision in *Western Nuclear* shows, a "mineral" can be an inorganic substance, or it can be an inorganic

substance that is capable of being removed from the soil and used for commercial purposes. 462 U.S. at 42-44, 53. The adjective "valuable" may have been added to make clear that the latter sense was intended.

In any event, as the Court has subsequently made clear, "other circumstances evidencing congressional intent can overcome the[] force" of the interpretive principle on which petitioners rely. *Chickasaw Nation* v. *United States*, 534 U.S. 84, 94 (2001). That is true here. Because a "mineral" is by definition "valuable," because Congress appears to have used "minerals" and "valuable minerals" interchangeably in the Pittman Act, because the legislative history explicitly states that the mineral reservation in the Pittman Act is the same as that in the SRHA, and because there is no reason to believe that Congress intended to create a new and imprecise type of mineral reservation, reliance on the canon invoked by petitioners "would conflict with the intent embodied in the statute Congress wrote." *Ibid.* In sum, if gravel is a "mineral" reserved by the SRHA, as *Western Nuclear* holds, then gravel and sand are necessarily "valuable minerals" reserved by the Pittman Act.

B. Even If There Is A Difference Between "Minerals" And "Valuable Minerals," Sand And Gravel Were "Valuable Minerals" When The Pittman Act Was Enacted

Between 1914 and 1919, in an annual publication called *Mineral Resources of the United States*, in a section entitled "Sand and Gravel," the Department of the Interior provided data and other information concerning the production of sand and gravel in the United States. See J.A. 37-118. That information demonstrates that sand and gravel were valuable at the time of the Pittman Act's enactment.

In the 1914 publication, the Department described the increase in the production of sand and gravel over the previous decade, and noted that nearly 80 million short tons of those substances, with a value of nearly $24 million, were produced in the United States in 1914. J.A. 38-39. Two years later, the Department observed that the production of sand and gravel in 1916 was "unprecedentedly large"; that "[a]ll kinds of sands increased in total value, and most of them increased in quantity"; and that "[f]rom many parts of the country it was reported by producers that they could not get enough men to operate at the desired capacity or enough cars to meet their requirements." J.A. 60.

In 1917, the year in which the United States entered the First World War, the Department had this to say in its annual publication:

> It is well known that sand and gravel are widely distributed, abundant, and much used in the United States, but their vital importance in the economy of the Nation was scarcely appreciated until war made unusual conditions and demands. The demand has been so great in recent months that in some places on the Atlantic coast sand and gravel have almost attained the status of war minerals. At certain shipbuilding and camp sites there is no gravel readily available and sand suitable for building is scarce. * * * So great has been the demand for sand and gravel in large Government construction work that this common and cheap building material has been shipped considerable distances. It is understood that for some of the building recently done near Norfolk, VA., where the supply is inadequate, the sand and gravel were brought from New York, a distance of 300 miles * * * .

J.A. 72. The Department went on to report that the sand and gravel produced in 1917 had a value of more than $35 million, and that only four non-metallic minerals produced in the United States—petroleum, natural gas, coal, and stone—had a greater annual value. J.A. 72-73.

The next year's publication reported that the value of sand and gravel produced had increased to nearly $38 million in 1918, J.A. 88, when, because of the "exigencies of war," the "entire output of some sand and gravel concerns was commandeered by the Government," J.A. 89. And the next year's publication reported that the value of sand and gravel was nearly $46 million in 1919, the year in which the Pittman Act was enacted. J.A. 104.

In view of the fact that sand and gravel had one of the highest values of all non-metallic minerals produced in the United States in 1917, and that there was a shortage of those minerals in 1917 and 1918, when the War Department had an urgent need for them and received shipments from remote locations, it is highly unlikely, to say the least, that Congress would not have considered sand and gravel to be "valuable" minerals in 1919. Thus, even if "valuable minerals" are a narrower class than "minerals," sand and gravel are "valuable minerals" reserved by the Pittman Act.

III. TO BE A RESERVED MINERAL, A SUBSTANCE NEED NOT HAVE BEEN CAPABLE OF BEING PROFITABLY EXTRACTED FROM THE PATENTEE'S LAND AT THE TIME THE PATENT WAS ISSUED

Petitioners contend that, even if *Western Nuclear* is not distinguishable, it did not decide one of the arguments they raise here: whether gravel (or sand) is a "mineral" (or a "valuable mineral") reserved to the United States if it could not have been profitably ex-

tracted from the patentee's land at the time of the patent. Pet. Br. 33-34. Petitioners contend that this remains an open question, the answer to which is no. *Id.* at 17-25. Petitioners are mistaken. Their theory is foreclosed by *Western Nuclear*; is inconsistent with the text and structure of the Pittman Act; would require retrospective and hypothetical profitability analyses; could result in differential treatment of similarly situated patentees; and cannot be squared with the interpretive principle requiring that land grants be construed in favor of the government.

A. Petitioners' "Site-Specific" Theory Is Foreclosed By *Western Nuclear*

The holding of *Western Nuclear* is that "gravel is a mineral reserved to the United States in lands patented under the SRHA." 462 U.S. at 60. There is no suggestion in the Court's opinion that that holding depends on whether that gravel could have been profitably extracted from the particular tract of land in question at the time the patent was issued.[8] And there is more than a suggestion that it does not. In holding as it did, the Court employed a four-part definition of "minerals." They are substances, the Court said, "[1] that are mineral in character (*i.e.*, that are inorganic), [2] that can be removed from the soil, [3] that can be used for

[8] Indeed, there is nothing in the Court's opinion to suggest that gravel *could* in fact have been profitably extracted from the tract in question at the time the patent was issued. The tract, which was located in Jeffrey City, Wyoming, was purchased in 1975 by a company that extracted gravel for use in connection with the mining of uranium. But uranium had not been discovered in the area until the 1950s, which was 25 years after the patent was issued. *Western Nuclear, Inc.* v. *Andrus*, 475 F. Supp. 654, 655-656 (D. Wyo. 1979), rev'd, 664 F.2d 234 (10th Cir. 1981), rev'd, 462 U.S. 36 (1983).

commercial purposes, and [4] that there is no reason to suppose were intended to be included in the surface estate." 462 U.S. at 53. The Court went on to say that this definition "includes gravel," and that gravel satisfies the third element of the definition because it "can be * * * used for commercial purposes." *Id.* at 55. To say that gravel can be used for commercial purposes is to say that the mineral, as a categorical matter, is capable of being used for such purposes. That proposition is quite different from saying that the particular gravel in the case could in fact have been profitably extracted at the time of the patent.

While *Western Nuclear* employed a definition of "minerals" that is broader than the one that petitioners urge the Court to adopt, it is nevertheless true that *Western Nuclear* did not explicitly address the "site-specific" argument that petitioner makes in this case. But even if the question remains, in that sense, an open one, the Court's reasoning in *Western Nuclear* requires that the "site-specific" theory be rejected.

The Court made clear in *Western Nuclear* that "Congress' purpose in severing the surface estate from the mineral estate was to encourage the concurrent development of both the surface and subsurface of [the patented] lands." 462 U.S. at 50. One principal basis for the Court's holding that gravel is a mineral reserved to the United States was that Congress expected the surface of patented lands to be used for stock-raising and raising crops, and that interpreting the statute to include gravel in the surface estate would therefore mean that Congress intended to make the exploitation of gravel dependent on "the initiative of persons whose interests were known to lie elsewhere." *Id.* at 56. That reasoning applies regardless of *when* a subsurface resource might become commercially exploitable. Peti-

tioners posit the scenario in which the surface of a tract of land was patented for agricultural use, and then, at some point thereafter, an economic, demographic, or other development gave commercial value to gravel that would have been valueless if extracted from the subsurface at the time of the patent. But under that scenario, it would still be the case—if the gravel were deemed part of the surface estate—that its exploitation would be dependent on someone whose "interests * * * lie elsewhere." *Ibid.* The approach proposed by petitioners would thus undermine the congressional purpose of promoting concurrent development of the surface and subsurface estates for a significant category of land patented under land-grant statutes with general mineral reservations: land whose subsurface resources do not become commercially exploitable until some time after the issuance of the patent. In short, the reason that the "site-specific" theory is inconsistent with *Western Nuclear* is this: The essential basis for the holding that gravel is reserved to the United States is that it is not likely to be exploited by a farmer or stockman, and that is true regardless of whether the gravel could have been profitably extracted and sold at the time the patent was issued.

According to petitioners, the question whether a substance is reserved to the government under a land-grant statute like the SRHA or the Pittman Act should be analyzed the same way as the question whether a substance is locatable or patentable under the mining laws. Pet. Br. 18-22. But there is a fundamental difference between the two questions. In the latter situation, the issue is whether a subsurface resource (or, on public lands, an entire tract, see *United States* v. *Coleman*, 390 U.S. 599, 600, 603 (1968)) should be granted to someone who has an interest in exploiting the resource,

so that making such a grant will lead to the exploitation of the resource if it can be profitably extracted at the time of the claim, but not otherwise. In the former situation, the issue is whether a subsurface resource should be granted to someone who does *not* have an interest in exploiting it, so that making such a grant is *not* likely to lead to the exploitation of the resource, whether or not it can be profitably extracted at the time of the patent.

As support for their theory, petitioners rely (Br. 23-25) on an opinion of the Solicitor of the Department of the Interior concerning the mineral reservation to the Northern Cheyenne Indian Tribe under a special statute, the Act of June 3, 1926, 44 Stat. 690. See Dep't of Interior, Div. of Pub. Lands, Solicitor's Op., M-36379 (Oct. 3, 1956). The Solicitor's opinion offered no legal analysis in expressing the view on which petitioners rely, and because that opinion was rendered more than 25 years before *Western Nuclear* was decided, the Solicitor did not have the benefit of the decision in that case. Thus, insofar as the Solicitor's opinion could be read to suggest a retrospective, "site-specific" approach to statutes like the SRHA and the Pittman Act (which were not mentioned in the opinion), it is inconsistent with *Western Nuclear* and should not be accorded any weight. Indeed, the Court in *Western Nuclear* relied on the Solicitor's opinion, but only to the extent that the opinion concluded that "gravel is a mineral" under a "federal land-grant statute[] that * * * reserve[d] all minerals to the United States." 462 U.S. at 56. The Court did not endorse the Solicitor's suggestion of a retrospective, "site-specific" approach. Rather, as the dissenting opinion noted, in this respect the Solicitor's opinion "took a much narrower view of what was included in the mineral reservation at issue there than

the Court [did] with respect to the SRHA reservation." *Id.* at 68 n.11 (Powell, J., dissenting).[9]

B. The Text And Structure Of The Pittman Act Demonstrate That Congress Did Not Intend A "Site-Specific" Approach

The text and structure of the Pittman Act confirm that its mineral reservation extends to valuable subsurface resources regardless of whether they could have been profitably extracted from the patentee's land at the time of the patent. Section 1 of the Act authorized the issuance of permits for the exploration of water on public lands that were "unreserved, unappropriated,

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[9] Petitioners cite no instance, and we are aware of none, in which the approach suggested in the Solicitor's opinion with respect to sand and gravel under the special statute allocating mineral interests between the Northern Cheyenne Tribe and its allottees was ever followed under the SRHA, the Pittman Act, or a similar statute of general applicability. In *Western Nuclear* itself, for example, the IBLA's conclusion that the gravel at issue was reserved to the United States did not turn on any determination that the gravel deposit could have been profitably mined at the time the patent was issued (see No. 81-1856 Pet. App. 45a-67a), and nothing in this Court's decision sustaining the government's position suggests such an approach. Petitioners cite (Br. 19-20 n.10, 33) statements in the government's brief in *Western Nuclear* that sand and gravel were reserved under the SRHA only if they are commercially exploitable. But the Court did not adopt that formulation. In any event, the thrust of the government's position was to distinguish deposits that were susceptible to extraction for commercial purposes from more minimal deposits or the use of deposits to support the ranching purposes of the patent. See 81-1856 Gov't Br. 17, 22-28; Reply Br. 8-16. And under the government's view, it was sufficient that the mineral deposit was capable of commercial use at the time the gravel was actually extracted for non-ranching purposes. See 81-1856 Reply Br. 2-7. There was no suggestion that it was necessary to look at some earlier point in time. See also n. 8, *supra*. There is no question that the gravel at issue in this case is reserved to the United States under that view.

nonmineral, [and] nontimbered," 41 Stat. 293 (Pet. App. 64a) (emphasis added), and Section 2 prohibited the issuance of a permit unless the Secretary of the Interior determined that the land in question was "of the character contemplated by this act," 41 Stat. 294 (Pet. App. 65a). Under Section 5 of the Act, a permittee could be granted a patent for a portion of the land if, within two years of the permit's issuance, the permittee discovered underground water capable of producing crops, and under Section 6, the remaining land was to be distributed under an earlier homestead law. 41 Stat. 294 (Pet. App. 66a). While the Act did not define the term "nonmineral" in Section 1, the "overwhelming weight of authority" at the time was that mineral lands were those that were "chiefly valuable for their deposits of a mineral character," *Soderberg*, 188 U.S. at 536-537, or, put differently, that were more valuable for their minerals than for agricultural use, *Barden* v. *Northern Pac. R.R.*, 154 U.S. 288, 329 (1894); accord *Western Nuclear*, 462 U.S. at 46 n.7, 48 n.9.

The Pittman Act thus contemplated that, at the time a patent was issued, the Secretary of Interior would have made a formal determination that the land in question was more valuable for agricultural purposes than for the minerals it contained. And since the very reason that the Pittman Act made public lands available was that they had very little agricultural value (and would continue to have little such value until subsurface water was found), a "nonmineral" determination by the Secretary of the Interior meant, as a practical matter, that the land contained no valuable minerals. The fact that the Act nevertheless reserved to the United States all "coal and other valuable minerals" is strong evidence that the reservation encompassed subsurface resources that were unknown at the

time of the patent or were known but could not be profitably removed until later. Otherwise, the reservation would apply only in the relatively rare case in which, between the date of the Secretary's "nonmineral" determination and the date on which the patent was issued, there was some economic, demographic or other development that gave value to previously valueless subsurface resources. It is highly unlikely that Congress intended the Pittman Act's broadly worded mineral reservation to have such a severely limited reach.

C. Petitioners' "Site-Specific" Approach Would Require Retrospective And Hypothetical Profitability Analyses

Petitioners' proposed interpretation of the mineral reservation would also create practical difficulties and uncertainties that Congress would not have intended to impose. Petitioners' submission is that the sand and gravel that they have been extracting are not "minerals" (or "valuable minerals") belonging to the government because, at the time the land was patented, the materials could not have been profitably removed and sold. There may be cases in which lack of value at the time of the patent is undisputed, or in which it can be easily established, so that a dispute over ownership of subsurface resources on land patented long ago could be resolved without much difficulty. This case may even be one of them. But there would likely be many cases in which the profitability question would be hard to answer, and even harder to answer with any degree of certainty.

To locate a mining claim and obtain a patent for mineral land under the mining laws, the applicant must ordinarily prove that the mineral exists "in such quantities as to justify expenditure of money for the development of the mine and the extraction of the mineral,"

Chrisman v. *Miller*, 197 U.S. 313, 322 (1905) (quoting *Iron Silver Mining Co.* v. *Mike & Starr Gold & Silver Mining Co.*, 143 U.S. 394, 412 (1892) (Field, J., dissenting)), and that, by reason of "accessibility, *bona fides* in development, proximity to market, existence of present demand, and other factors," the deposit can be profitably mined, removed, and sold, *Western Nuclear*, 462 U.S. at 58-59 n.18 (quoting *Taking of Sand and Gravel from Public Lands for Federal Aid Highways*, 54 Interior Dec. 294, 296 (1933)). A claimant is typically able to satisfy this burden by exploring for and exposing minerals on the property and collecting verifiable geologic data about the quantity and quality of the substances that are discovered. See, *e.g.*, 43 C.F.R. 3862.1-1(a) (application for patent should contain sufficient data to enable BLM to determine whether valuable mineral deposit exists). Under the approach that petitioners urge the Court to adopt, the government would presumably have the same burden of proving its entitlement to minerals reserved under the Pittman Act, or indeed under any similar law, such as the SRHA. In such a case, however, the government would have to prove that minerals that were exploited for the first time only recently in fact existed and were known to exist years or even decades earlier, and that a profit could have been made at that time if the minerals had been removed and sold. In attempting to make these showings, moreover, the government would be unable to present any contemporaneous data concerning the minerals, since they were not being removed or sold at the relevant time, and may not even have been known to exist.

Determining profitability can be complicated even when the question is profitability at the time the determination is made and there is available information

about the removal and sale of minerals from the deposit in question, or comparable ones, that were taking place at the relevant time. It is likely to be far more complicated when the question is profitability many years in the past and the mineral in question was first extracted from the deposit many years after the patent was issued. As between an interpretation of a mineral reservation that could require such a retrospective and hypothetical profitability analysis, on the one hand, and one that requires only a determination of whether the substance in question satisfies the definition of "mineral" employed in *Western Nuclear*, see 462 U.S. at 53, on the other, Congress should be presumed to have preferred the latter.

D. Under Petitioners' "Site-Specific" Approach, The Property Rights Granted To Similarly Situated Patentees Could Vary Depending On Conditions Over Which The Patentees Have No Control

Petitioners' "site-specific" theory should also be rejected because it could have the effect of treating similarly situated patentees differently, a result that Congress is not likely to have intended. Under the Pittman Act, every permittee who was able to discover water sufficient to raise crops on at least 20 acres of the permittee's land was entitled to the same benefit: "a patent for one-fourth of the land embraced in the permit," subject to "a reservation to the United States of all the coal and other valuable minerals in the land[]." Pittman Act §§ 5, 8, 41 Stat. 294, 295. The same is true, *mutatis mutandis*, of the SRHA, which granted an entitlement to a patent, subject to a reservation of all minerals to the United States, to any entryman who made permanent improvements that increased the land's stock-raising value. See *Western Nuclear*, 462 U.S. at 38-39. Under petitioners' theory, however,

similarly situated patentees could be granted different property rights, because the amount of property granted could vary depending upon conditions existing at the time of the patent that were beyond the control of the patentees.

Suppose, for example, that A and B, after making the statutorily required improvements, were issued patents under the same statute on adjoining parcels of land, each of which contained deposits of sand and gravel. A's patent was issued in the early 1930s, during the height of the Great Depression, when there was as yet no demand in the area for sand or gravel. B's patent was issued in the early 1940s, soon after the United States' entry into the Second World War, as a result of which there was demand for sand and gravel in the area for the first time. Under petitioners' theory, B is likely to have been granted land containing "minerals" (or "valuable minerals"), because there was a demand for sand and gravel at the time of his patent, and thus the sand and gravel under his land would belong to the United States. A, in contrast, is likely to have been granted land containing no "minerals" (or "valuable minerals") under petitioners' theory, because there was no demand for sand or gravel at the time of his patent, and thus the sand and gravel under his land would belong to him. As a result, the government would have to pay A to extract the sand and gravel under his land for use in the war effort, but it could use the sand and gravel under B's land.

Or suppose that C and D were granted patents on adjoining parcels of land containing sand and gravel after making the improvements required by the statute. C's patent was issued in the late 1940s, at a time when there was no demand for sand or gravel in the remote area where the land was located. D's patent

was issued in the early 1950s, a short time after uranium was discovered in the area. As a result of the discovery, the companies that mined the uranium, like the company in *Western Nuclear*, see 475 F. Supp. at 655-656, needed the sand and gravel for use in construction, and a demand for the materials accordingly arose for the first time. Under petitioners' theory, it is likely that C would own the sand and gravel under his land, but the government would own the sand and gravel under D's land.

There is no evidence in the legislative record that Congress intended to create a scheme of this type, under which two patentees who made the same improvements could be granted different property rights based on the geological, geopolitical, or other conditions that happened to exist at the time of the patent. And there is no reason why Congress would have intended that citizens would be rewarded for their efforts in improving public land in such an arbitrary manner.

E. Any Doubts About Whether Congress Intended A "Site-Specific" Inquiry Should Be Resolved In The Government's Favor Under The Interpretive Principle Requiring Narrow Constructions Of Land Grants By The United States

It is an "established rule" that "land grants are construed favorably to the Government," and that, "if there are doubts" about the scope of the grant, "they are resolved for the Government, not against it." *Western Nuclear*, 462 U.S. at 59 (quoting *United States* v. *Union Pac. R.R.*, 353 U.S. 112, 116 (1957)). Accordingly, if there are any remaining doubts about whether the Pittman Act requires a retrospective, "site-specific" determination of whether a substance is a "valuable mineral" reserved to the United States, that doubt should be resolved against petitioners. Contrary to the

contention of petitioners' amicus that this canon "is not well suited for interpreting mineral reservations," NSSGA Br. 19, the Court has repeatedly relied on it as support for a broad interpretation of a statutory reservation of mineral rights.[10] Indeed, there is particular reason for application of this principle here, because it dictates that no land be construed to pass "except what is conveyed in clear language." *Western Nuclear*, 462 U.S. at 59 (quoting *Union Pac.*, 353 U.S. at 116). Even petitioners do not contend that there is clear language in the Pittman Act that grants, in addition to the surface estate, all subsurface resources that could not have been profitably extracted from the patentee's land at the time of the patent.[11]

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[10] See *Western Nuclear*, 462 U.S. at 59-60 (gravel is "mineral" reserved to government); *Union Pac.*, 353 U.S. at 116 (reservation of "mineral lands" in section of statute granting railroad company "public land" extends to section of statute granting it "right of way"); *Soderberg*, 188 U.S. at 534 (lands valuable mainly for extraction of granite are "mineral lands" excepted from land grant). See also *Andrus* v. *Charlestone Stone Prods. Co.*, 436 U.S. 604, 617 (1978) (water is not "valuable mineral" locatable under mining law); *Caldwell* v. *United States*, 250 U.S. 14, 20-21 (1919) (grant of "timber" for construction of railroad does not grant railroad parts of trees not used for construction purposes).

[11] Petitioners are mistaken in their contention that, unless their "site-specific" approach is adopted, ownership interests in patented land would "not be fixed at the time of the initial grant" and might "shift over time." Pet. Br. 23 (emphasis omitted). Under the approach employed by this Court in *Western Nuclear* and the court of appeals in this case, a patentee's property interests are in fact "at all times both determinate and determinable," *ibid.*: the patentee owns the surface estate and any subsurface resources that do not fall within the definition of "minerals" in *Western Nuclear*.

IV. *WESTERN NUCLEAR* SHOULD NOT BE OVERRULED

Petitioners contend that, if *Western Nuclear* is not distinguishable and a "site-specific" approach is not appropriate, then *Western Nuclear* should be overruled. Pet. Br. 48-50. See also AGCA Br. 11-13. That request should be rejected.

"[A]ny departure from the doctrine of *stare decisis* demands special justification," *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 172 (1989) (quoting *Arizona* v. *Rumsey*, 467 U.S. 203, 212 (1984)), but there are two categories of cases in which the presumption against overruling a precedent is particularly strong. As this Court has frequently observed, *stare decisis* considerations are "most compelling" in cases involving a question of statutory construction, *Hilton* v. *South Carolina Pub. Rys. Comm'n*, 502 U.S. 197, 205 (1991), because "Congress is free to change this Court's interpretation of its legislation," *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720, 736 (1977). And *stare decisis* considerations are "at their acme" in cases involving property or contract rights, *State Oil Co.* v. *Khan*, 522 U.S. 3, 20 (1997), because in such cases "reliance interests" are at stake, *Payne* v. *Tennessee*, 501 U.S. 808, 828 (1991). *Western Nuclear* falls within both categories: it interpreted a statute that allocated property rights.

Since *Western Nuclear* was decided, Congress has had 20 years "in which it could have corrected [the Court's] decision * * * if it disagreed with it," but Congress "has chosen not to do so." *Hilton*, 502 U.S. at 202. The Court "should accord weight to this continued acceptance of [its] earlier holding." *Ibid.* During this 20-year period, moreover, both the government and private parties have made decisions in reliance on *Western Nuclear*'s holding that gravel on SRHA lands belongs to the government. We are informed by the

Department of the Interior that there have been hundreds of instances during this period in which private parties entered into a contract with the government for the right to extract gravel, sand, or a similar mineral (such as stone, pumice, limestone, or clay) from the subsurface estate of land patented under the SRHA (or, in a small minority of the cases, under a similar law). At the end of Fiscal Year 2003, there were more than 300 such contracts in place, and under all the contracts issued since 1983, tens of millions of dollars were due to the government during that period.[12] Overruling *Western Nuclear* would have the effect of voiding these contracts and transferring mineral rights from one set of private parties (those to whom the government has granted a contractual right to the minerals) to another (the patentees or their successors). Overruling the decision could also have the effect of exposing private parties, including those whose contractual rights to the minerals have long since lapsed, to liability for at least a portion of the value of the minerals that were extracted in the past. Petitioners are thus mistaken when they say that "there will be no manifest injustice to private parties if *Western Nuclear* is overruled." Pet. Br. 48.

Petitioners are also mistaken in their suggestion that *Western Nuclear* "'stands as a significant departure' from prior cases." Pet. Br. 49 (quoting *Boys Mkt., Inc.* v. *Retail Clerks Union, Local 770*, 398 U.S. 235, 241 (1970)). On the contrary: At the time *Western Nuclear* was decided, the question "[w]hether gravel is a mineral for purposes of the SRHA" was "an issue of first impression in the federal courts." 462 U.S. at 42

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[12] This information comes from the BLM's LR2000 database and is publicly available. See BLM, *Land and Mineral Records—LR2000* (last modified Dec. 15, 2003) <http://www.blm.gov/lr2000/>.

n.4. Nor had this Court ever "had occasion to decide the appropriate treatment of gravel under the mining laws." *Id.* at 58.

Petitioners' contention that *Western Nuclear* has "created * * * confusion" in subsequent cases, Pet. Br. 49, is equally without basis. Petitioners do not suggest that the decision has ever engendered a conflict in the circuits. And of the ten lower-court cases cited by petitioners that have been decided since *Western Nuclear*, see *id.* at 37-39 & nn.18-19, three followed the decision in interpreting the SRHA[13]; two distinguished it in interpreting a federal statute found to be materially different from the SRHA[14]; four concluded that the decision did not apply because the case involved a question of state law[15]; and the other case did not interpret *Western Nuclear* at all.[16] That hardly amounts to a state of legal "confusion." Pet. Br. 49.

Petitioners' final contention is that *Western Nuclear* "was based on a clear misunderstanding of the meaning of the [SRHA]." Pet. Br. 49. At bottom, that contention rests on the premise that the Secretary of the

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[13] See *Rosette Inc.* v. *United States*, 277 F.3d 1222 (10th Cir.) (geothermal resources), cert. denied, 537 U.S. 878 (2002); *Hughes* v. *MWCA, Inc.*, 12 Fed. Appx. 875 (10th Cir. 2001) (scoria); *Champlin Petroleum Co.* v. *Lyman*, 708 P.2d 319 (N.M. 1985) (caliche).

[14] See *United States* v. *Hess*, 194 F.3d 1164 (10th Cir. 1999) (Indian Reorganization Act); *Poverty Flats Land & Cattle Co.* v. *United States*, 788 F.2d 676 (10th Cir. 1986) (Taylor Grazing Act).

[15] See *Burkey* v. *United States*, 25 Cl. Ct. 566 (1992); *Miller Land & Mineral Co.* v. *State Highway Comm'n*, 757 P.2d 1001 (Wyo. 1988); *Rysavy* v. *Novotny*, 401 N.W.2d 540 (S.D. 1987); *Roe* v. *State ex rel. State Highway Dept.*, 710 P.2d 84 (N.M. 1985), cert. denied, 476 U.S. 1141 (1986), overruled by *Bogle Farms, Inc.* v. *Baca*, 925 P.2d 1184 (N.M. 1996).

[16] See *Downstate Stone Co.* v. *United States*, 712 F.2d 1215 (7th Cir. 1983).

Interior's 1910 decision in *Zimmerman* v. *Brunson*—that land valuable for its sand and gravel deposits was not "mineral land" under a homestead law—should have been "regarded as decisive on the issue of Congress' contemporaneous understanding of 'minerals.'" *Id.* at 43. See also NSSGA Br. 10. That premise is erroneous, because the Court correctly recognized in *Western Nuclear* that *Zimmerman* was not the only evidence of the meaning of the term "minerals" at the time the SRHA was enacted, and that much of the other evidence pointed in the opposite direction.

First, in 1903, this Court in *Soderberg* "adopted a broad definition of the term 'mineral' and quoted with approval a statement that gravel is a mineral." 462 U.S. at 46.[17] Second, in 1907, the Supreme Court of Washington held that limestone, clay, and similar substances fell within *Soderberg*'s definition of "mineral," and in 1910, the Supreme Court of Oregon held that the definition covered building sand. *Id.* at 45 n.6 (citing *State ex rel. Atkinson* v. *Evans*, 89 P. 565 (Wash. 1907), and *Loney* v. *Scott*, 112 P. 172 (Or. 1910)). Third, de-

[17] Petitioners contend that *Soderberg* is "an unlikely basis" for the view that gravel is a "mineral," in part because the decision "looked to the way that the Lands Department (*i.e.*, Interior) treated granite and like materials." Pet. Br. 46-47. But the Court did not rely solely on decisions of the Department of the Interior in support of its "broad definition" (*Western Nuclear*, 462 U.S. at 46) of "mineral"; it also relied on the interpretive principle requiring that government land grants be narrowly construed and the treatment of the issue by state courts and English courts. See 188 U.S. at 534-536. In discussing the "rulings of the Land Department," moreover, the Court noted that those decisions had "almost uniformly" lent "strong support" to the view that "mineral lands" include "all lands chiefly valuable for other than agricultural purposes" and, in particular, that they include lands containing materials like limestone and building stone, *id.* at 534, which also could be regarded as "common minerals" like sand and gravel.

spite the Department of the Interior's "specific ruling" in *Zimmerman*, its "general approach" was that land containing "common substances" could be classified as mineral land, and between 1881 and 1912, gypsum, building stone, and pumice were so classified by the Department. *Id.* at 46 n.7. Fourth, in 1913, three years after *Zimmerman* was decided and three years before the SRHA was enacted, in a "comprehensive study of the public lands," the Department of the Interior "listed gravel as a mineral," such that lands containing gravel deposits could be withdrawn or classified as mineral lands. *Ibid.*; see *Bulletin 537*, *The Classification of the Public Lands*, *supra*, at 138-142. Fifth, the 1929 Department of the Interior decision that overruled *Zimmerman* noted that the decision had been "vigorously criticized by leading text writers on the mining law," and had "disregarded on unsubstantial grounds" the settled "test of the mineral character of land." *Layman* v. *Ellis*, 52 Pub. Lands Dec. at 718, 721. Indeed, 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* was "inconsistent with the Department's traditional treatment of the problem." 462 U.S. at 46 n.7 (citing 2 C. Lindley, *American Law Relating to Mining and Mineral Lands* § 424, at 996 & n.78 (3d ed. 1914)).

Under these circumstances, the Court in *Western Nuclear* cannot be said to have erred, and certainly cannot be said to have clearly erred, in finding no conclusive answer to the question whether gravel was generally understood to be a "mineral" in 1919. See 462 U.S. at 42-46. And petitioners raise no serious challenge to the Court's consequent reliance on the purposes of the SRHA as a principal basis for its holding

that gravel is a "mineral" reserved by that statute. See *id.* at 46-56.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General
THOMAS L. SANSONETTI
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
DAN HIMMELFARB
Assistant to the Solicitor General
WILLIAM B. LAZARUS
ELIZABETH ANN PETERSON
BLAINE T. WELSH
Attorneys

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