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## Note

### SAND WARS: Mineral Reservation Policies Lead the Supreme Court to Determine Whether Sand Is a Valuable Mineral in the Nevada Desert

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*Even the most enterprising settler could not have sold sand in the desert.<sup>1</sup>*

#### I. INTRODUCTION

The area surrounding Las Vegas, Nevada is one of the fastest growing regions in the United States.<sup>2</sup> In fact, studies have indicated that Las Vegas has grown so quickly that the average home value rose 52.4% in 2004 alone.<sup>3</sup> Such tremendous growth indicates one undeniable fact: a great construction demand now exists around the city

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1. *BedRoc Ltd. v. United States*, 541 U.S. 176, 184 n.6 (2004).

2. U.S. CENSUS BUREAU, COUNTIES RANKED BY PERCENT CHANGE IN POPULATION: 1990 TO 2000, at 1 (2001), <http://www.census.gov/population/cen2000/phc-t4/tab04.pdf> (indicating Clark County, Nevada's most heavily populated county that includes Las Vegas and its suburbs, experienced an 85.6% increase in population between 1990 and 2000, making it the thirteenth fastest growing county in the United States). Between April 1, 2000 and July 1, 2004, the Census Bureau also estimates the county has grown an additional 20%. U.S. CENSUS BUREAU, POPULATION ESTIMATES FOR THE 100 FASTEST GROWING U.S. COUNTIES WITH 10,000 OR MORE POPULATION IN 2004: APRIL 1, 2000 TO JULY 1, 2004 (2005), <http://www.census.gov/popest/counties/CO-EST2004-09.html>.

3. Sandra Block, *Median Home Price Up 9.1%; Tight Supply Drives Sellers' Markets*, USA TODAY, Aug. 27, 2004, at B-04. Not only has Las Vegas sold an incredible number of homes in this past year, most of these homes are luxury homes; the median home price in Las Vegas is \$269,900, a figure nearly 47% higher than the national median home price. *Id.* (noting that the national median home price is \$183,800).

that prides itself as being “America’s Playground.”<sup>4</sup> Inflationary prices accompanied by new home construction are not the only negative result of rapid urbanization; the construction also brings a great need to quickly improve infrastructure in order to insure the safety of the citizens.<sup>5</sup> In a desert climate such as Nevada, one such necessity, the flow of drinkable water, takes on special concern.<sup>6</sup>

Historically, the federal government has taken an active role in the water problems of Las Vegas and Nevada.<sup>7</sup> In 1919, the United States Congress passed the Pittman Underground Water Act.<sup>8</sup> This Act authorized the Secretary of the Interior to designate certain “non-mineral” Nevada lands for water exploration.<sup>9</sup> Once these lands were designated, settlers could obtain permits and drill for water.<sup>10</sup> However, the federal government retained rights to all coal and “other valuable minerals”<sup>11</sup> and remained the owner of the vast majority of Nevada land.<sup>12</sup> In 1933, the Roosevelt Administration realized that a

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4. *Weekend Edition: Las Vegas: American Boomtown* (MSNBC television broadcast Dec. 21, 1999)[hereinafter *Las Vegas: American Boomtown*]. Las Vegas Mayor Oscar Goodman has gone on record as stating that at the present rate, a new home is completed in Las Vegas every 15 minutes. *Id.*

5. *Id.* Mayor Goodman has also stated the city’s rapid growth has required the city to build new schools at a rate greater than one per month creating a tremendous tax burden. *Id.*

6. Southern Nevada Water Authority, SNWA: Drought Information, [http://www.snwa.com/html/wr\\_drought.html](http://www.snwa.com/html/wr_drought.html) (last visited July 30, 2005). On January 1, 2004, state officials placed Clarke County and the rest of Southern Nevada into a drought alert. *Id.* In making its determination, the SNWA cited water levels surrounding Lake Mead, an artificial lake created by the building of the Hoover Dam, have dropped more than eighty five feet over the past few years, a figure that the authority does not expect to reverse direction any time soon. *Id.*

7. See David Getches, *Water Wrongs: Why Can’t We Get It Right the First Time?*, 34 ENVTL. L. 1 (2004) (discussing the history of federal water regulations in the American West); see also Bruce Clotworthy, *Parched: The Future of the Glen Canyon Dam*, 17 UTAH B.J. 8, 11 (Nov. 2004) (comparing the efforts of the Southern Nevada Water Authority and the Hoover Dam with Utah’s efforts with the Glen Canyon Dam); Rudy Verner, *Short Term Solutions, Interim Surplus Guides and the Future of the Colorado River Delta*, 14 COLO. J. INT’L ENVTL. L. & POL’Y 241 (2003) (discussing the need for federal regulations on Colorado River water rights).

8. Pittman Underground Water Act, Pub. L. No. 66-60, 41 Stat. 293-95 (1919), *repealed in part by* Pub. L. No. 88-417, 78 Stat. 389 (1964) [hereinafter Pittman Act].

9. *Id.*

10. *Id.* Under the Pittman Act, permits were conditional in that “the permittee shall begin operations for the development of underground waters within six months from the date of the permit and continue such operations with reasonable diligence until water has been discovered.” Pittman Act § 4, 41 Stat. at 294, *repealed in part by* Pub. L. 88-417, 78 Stat. 389 (1964).

11. The Pittman Act states in part:

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.

Pittman Act § 8, *repealed in part by* Pub. L. 88-417, 78 Stat. 389 (1964).

12. NATIONAL WILDERNESS INSTITUTE, STATE BY STATE GOVERNMENT LAND OWNERSHIP,

burgeoning Las Vegas would need a more constant supply of water and authorized the construction of the Hoover Dam, which not only provides Las Vegas's electrical power but is also a major source of its water.<sup>13</sup>

Newton and Mabel Butler received a Pittman Act permit in 1940 for 560 acres of land in Lincoln County, Nevada, some sixty-five miles from Las Vegas.<sup>14</sup> While the land contained a plentiful and visible amount of sand and gravel, the Butlers were unable to profit from its extraction because the City of Las Vegas was still too small and too distant to make extraction economically viable.<sup>15</sup> By the 1990s, Las Vegas had expanded sufficiently to make the extraction economically profitable, and BedRoc Ltd. (BedRoc), along with its predecessor-in-interest Earl Williams, began extracting sand and gravel from the patented lands<sup>16</sup> for use in various commercial construction projects.<sup>17</sup> The Interior Department considered this extraction a trespass<sup>18</sup> and ordered the companies to pay damages.<sup>19</sup> BedRoc and Williams filed a quiet title action in federal district court, arguing that the government reserved the rights only to "valuable minerals" under the Pittman Act and not to the sand and gravel.<sup>20</sup> The district court ruled for the government, holding that the contested sand and gravel were, as a

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<http://www.nwi.org/Maps/LandChart.html> (last visited Dec. 15, 2004) (stating the federal government owned 61,548 out of 70,275 acres of Nevada land as of 1995). This represents over 87.6% of the land in Nevada. *Id.*

13. JOSEPH E. STEVENS, *THE HOOVER DAM: AN AMERICAN ADVENTURE* 4 (1988).

14. *BedRoc Ltd. v. United States*, 541 U.S. 176, 179 (2004).

15. *Id.*

16. *Id.* The type of patent in this case is a "land patent" which is defined as "an instrument by which the government conveys a grant of public land to a private person." *BLACK'S LAW DICTIONARY* 919 (8th ed. 2004). These are of course distinct from types of patents issued by the United States Patent and Trademark Office to an inventor for "any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof." 35 U.S.C.A. § 101 (West 2005).

17. *BedRoc Ltd.*, 541 U.S. at 180-81.

18. *BedRoc Ltd. v. United States*, 50 F. Supp. 2d 1000, 1003 (D. Nev. 1999). The Code of Federal Regulations states:

The extraction, severance, injury, or removal of timber or other vegetative resources or mineral materials from public lands under the jurisdiction of the Department of the Interior, except when authorized by law and the regulations of the Department, is an act of trespass. Trespassers will be liable in damages to the United States, and will be subject to prosecution for such unlawful acts.

43 C.F.R. § 9239.0-7 (2005).

19. *See generally* Earl Williams, 140 I.B.L.A. 295 (1997) (affirming the decision of the Bureau of Land Management to consider the actions by Earl Williams and BedRoc trespass).

20. *BedRoc Ltd.*, 50 F. Supp. 2d at 1004. Since interests of both BedRoc and Earl Williams were at stake in the federal court action against the Interior Department, both entities brought suit as co-plaintiffs. *Id.* They had joint representation in the matter. *Id.* at 1002.

matter of law, “valuable minerals” reserved to the government.<sup>21</sup> The Ninth Circuit affirmed this decision after drawing heavily upon the statutory text of the Pittman Act, the legislative history of the early 1900s land grant statutes and the Supreme Court decision in *Watt v. Western Nuclear*,<sup>22</sup> a 5-4 decision issued in 1983 by a bitterly divided Court regarding another early 1900s land grant statute.<sup>23</sup>

The United States Supreme Court granted certiorari.<sup>24</sup> In a 6-3 decision, the Court overturned the Ninth Circuit by concluding sand and gravel did not constitute “valuable minerals” under the Pittman Act and that the Act did not prohibit BedRoc from extracting sand and gravel from lands designated for water exploration.<sup>25</sup> In support of its conclusion, the Court distinguished *Watt v. Western Nuclear* and ruled the statutory text’s use of “valuable minerals,” as opposed to “all other minerals” used in the *Western Nuclear* land grant statute, made the two laws distinguishable.<sup>26</sup> In other words, sand and gravel can be “minerals” but not “valuable.”<sup>27</sup>

Admittedly, the topic of property rights in sand and gravel is not glamorous; however, it is an underappreciated issue that bears enormous consequences for the nation and the legal community as a whole.<sup>28</sup> The *BedRoc Ltd.* decision not only provides a caveat to many statutes and regulations<sup>29</sup> but also has serious ramifications in the areas of construction law,<sup>30</sup> environmental law<sup>31</sup> and energy law.<sup>32</sup>

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21. *Id.* at 1008 (declaring that sand and gravel are included within the meaning of “valuable minerals”).

22. *See* 462 U.S. 36, 55 (1983) (holding that gravel is a “mineral” and is reserved for the government under the Stock-Raising Homestead Act).

23. *BedRoc Ltd. v. United States*, 314 F.3d 1080, 1090 (9th Cir. 2002), *rev’d*, 124 S. Ct. 1587 (2004).

24. *BedRoc Ltd. v. United States*, 539 U.S. 986, 986 (2003).

25. *BedRoc Ltd. v. United States*, 541 U.S. 176, 184-86 (2004).

26. *Id.* at 183 (noting “In *Western Nuclear*, we had no choice but to speculate about congressional intent with respect to the scope of the amorphous term ‘minerals.’ Here, by contrast, Congress has textually narrowed the scope of the term by using the modifier ‘valuable.’”).

27. *Id.* (stating that the term “valuable” in the Pittman Act makes it clear that sand and gravel are not included).

28. *See infra* Part V (discussing the wide application of the *BedRoc Ltd.* decision).

29. *See State ex rel. Lee v. Karnes*, 817 N.E.2d 76, 82 (Ohio 2004) (using *BedRoc Ltd.* as a basis for refusing to infer a statutory requirement because “the General Assembly did not include a requirement of descriptive facts to support a TEL applicant’s sworn statement providing evidence of imminent danger. . .”).

30. *See, e.g., FRANCIS AMENDOLA ET AL., CONSTRUCTION AND EFFECT OF STATUTORY GRANTS*, 73B C.J.S. *Public Lands* § 89 (2004) (discussing the role of statutory language in land grant statutes).

31. *See, e.g., Ashley v. U.S. Dep’t of Interior*, No. 04-2066, 2005 U.S. App. LEXIS 9957 (8th

Furthermore, given the dramatic urbanization of the western United States over the past half-century, the decision's impact becomes increasingly important.<sup>33</sup>

This Note not only explores some of these ramifications but also examines the framework behind the *BedRoc Ltd.* decision. Part II of this Note will provide background on the peculiarities of the Las Vegas situation, the land grant statutes, and the role the courts have played in the mineral rights debate.<sup>34</sup> Part III will discuss the eleven year court battle in *BedRoc Ltd.* from its beginnings in administrative court to the United States Supreme Court.<sup>35</sup> Part IV will analyze the case and show that the Supreme Court should have followed the same method of analysis employed by the four previous bodies evaluating the case and should have concluded that the sand and gravel were not reserved to the government but were the property of BedRoc.<sup>36</sup> Finally, Part V will show the broad reach of this decision, including the role the decision will play in the politically charged debate of oil exploration in the Alaskan National Wildlife Refuge.<sup>37</sup>

## II. BACKGROUND

The development of mineral rights and mineral reservations is a complicated tale steeped in the traditions of the Wild West.<sup>38</sup> Accordingly, this Part will begin with a history of the American West and will give special attention to Las Vegas, Nevada, a city with a prominent role in the *BedRoc Ltd.* case.<sup>39</sup> Then, this Part will discuss

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Cir. June 1, 2005) (challenging the financing of an Indian tribe's public improvement project on dedicated open space); Appellants' Reply Brief at 24, *S. Utah Wilderness Alliance v. Bureau of Land Mgmt.*, 2004 WL 2466043 (10th Cir. Sept. 16, 2004) (No. 04-4071) (challenging the decision of the Department of the Interior to give the Utah State Department of Transportation a right-of-way through public lands on the grounds it violated federal law).

32. See, e.g., *Rosette Inc. v. United States*, 277 F.3d 1222 (10th Cir. 2002), cert. denied, 537 U.S. 878 (2002) (determining whether geothermal steam emitted from a reservoir constituted a "mineral" for the purposes of reservation).

33. See generally James R. Rasband, *The Rise of Urban Archipelagoes in the American West: A New Reservation Policy?*, 31 ENVTL. L. 1, 1 (2001) (arguing for a reform of the Department of the Interior's reservation policy as the West becomes more populated).

34. See *infra* Part II (outlining the development of mineral rights law).

35. See *infra* Part III (providing a detailed account of the developments in *BedRoc Ltd.*).

36. See *infra* Part IV (arguing that the Supreme Court erred in its analysis and decision in *BedRoc Ltd.*).

37. See *infra* Part V (examining the possible implications that the Supreme Court's decision in *BedRoc Ltd.* raises).

38. See generally JOHN D. LESHY, *THE MINING LAW: A STUDY OF PERPETUAL MOTION (RESOURCES FOR THE FUTURE)* (1987) (tracing the history and development of the mining laws).

39. See *infra* Part II.A (illustrating the growth of the American West).

the land grant and mining laws and their policy rationale in order to illustrate how mineral reservations normally take place and the potential problems in defining what constitutes a “valuable mineral.”<sup>40</sup> Next, this Part will turn to administrative and statutory law and the methodology by which courts evaluate administrative and congressional action.<sup>41</sup> Finally, this Part will examine case law and illustrate that, while a vast majority of mineral disputes take place in the administrative arena, there have been significant decisions by the federal courts in defining mineral reservation rights.<sup>42</sup>

*A. Manifest Destiny: The Growth of Las Vegas from a Railroad Supply Stop to America’s Playground.*

The State of Nevada lies in the heart of the Great Basin, lying between the Sierra Nevada Mountains on the west and the Wasatch Mountains on the east.<sup>43</sup> These two mountain ranges form a “rain shadow” over the entire region making Nevada the state with the least precipitation in the Union.<sup>44</sup> Thus, as America expanded west, any water source found within the state would almost certainly spawn a small city.<sup>45</sup> Such a water source was found in the early 1800s, and consequently the city of Las Vegas originally developed as a stop along the Spanish Trail that ran throughout the West to Los Angeles.<sup>46</sup> John Fremont later ventured into the town in 1844 and set up one of the first permanent camps in the area.<sup>47</sup>

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40. See *infra* Part II.B–D (outlining the basics of homestead and mining laws and their rationale).

41. See *infra* Part II.E–F (exploring the methodology by which courts review administrative agency decisions and acts of Congress).

42. See *infra* Part II.G (discussing the key mineral rights cases leading up to the *BedRoc Ltd.* decision).

43. *BedRoc Ltd. v. United States*, 541 U.S. 176, 179 (2004) (citing 5 THE NEW ENCYCLOPEDIA BRITANNICA 442 (15th ed. 1985)). The Great Basin is a large and arid region of the Western United States, roughly between the Rocky Mountains and the Sierra Nevada. See Wikipedia: The Free Encyclopedia, Great Basin, [http://en.wikipedia.org/wiki/Great\\_Basin](http://en.wikipedia.org/wiki/Great_Basin) (last visited July 24, 2005).

44. *BedRoc Ltd.*, 541 U.S. at 179.

45. See Las Vegas News Bureau, The History of Las Vegas, <http://www.lvnl.com/lvleg/hist/lvhist.html> (last visited July 30, 2005) (explaining the history of Las Vegas from a water stop to its current status as a resort town).

46. *Id.* The Spanish Trail was a route used in the early 1800s through the American West to Las Vegas. *Id.*

47. *Id.* Today, Fremont Street is one of the busiest in Las Vegas. *Id.* Parts of the street form the famous Las Vegas “Strip,” a series of large casinos. *Id.* Fremont also has one of Las Vegas’s major casinos named in his honor. *Id.* John Fremont was, however, more than simply an adventurer, and also had a number of “firsts” in the political arena. Three years after discovering Las Vegas, Fremont was appointed Governor of the California Territory. Wikipedia: The Free

While Fremont was first followed by a group of Mormons migrating west from Salt Lake City, the first major expansion of Las Vegas from a “tent town” to a full city occurred in 1890 when the San Pedro, Los Angeles, and Salt Lake Railroad Company decided that Las Vegas should serve as a stop facility along its route.<sup>48</sup> The first train departed from Las Vegas Station bound for Los Angeles in October 1904, and the city began to boom.<sup>49</sup> In 1931, the state legislature responded to a wave of illegal gambling throughout the state by legalizing the activity in an effort to raise revenues for the state.<sup>50</sup> Also in the 1930s, President Roosevelt authorized the construction of the Hoover Dam, which, to this day, provides much of the electricity and water supply for the region.<sup>51</sup>

While the Great Depression crippled most of the country, Las Vegas remained insulated through its gaming, construction and rail industries.<sup>52</sup> The Second World War brought Las Vegas an enormous opportunity when the United States Air Force decided to train all of its B-29 fighter pilots at Nellis Air Force Base, located near the city.<sup>53</sup> Many of those stationed at the base enjoyed their time so much that they returned to Las Vegas after their military careers concluded.<sup>54</sup> Thus, following the war, many small casinos not surprisingly sprung up, and the Las Vegas Strip began to take shape.<sup>55</sup> A convention hall was added in 1959, and soon thereafter, Las Vegas became a full-blown gambling

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Encyclopedia, John Fremont, [http://en.wikipedia.org/wiki/John\\_Fremont](http://en.wikipedia.org/wiki/John_Fremont) (last visited July 30, 2005). In 1850, Fremont became the first Senator from the newly established State of California. *Id.* In 1856, Fremont became the first candidate from the Republican Party to run for President of the United States. *Id.*

48. See *Las Vegas: American Boomtown*, *supra* note 4 (describing this event as one of the most significant in the history of the city).

49. *Id.* In May 1905, the Union Pacific Railroad, the successor company of the San Pedro, Los Angeles, and Salt Lake Railroad, auctioned off 1,200 lots in a single day. Las Vegas News Bureau, *supra* note 45.

50. *Id.* Interestingly, the bill’s sponsor, Phil Tobin, had no interest in gambling; he was simply a rancher. *Id.* Today, gambling revenues comprise 43% of the state’s income with more than 34% of the state’s general fund used to finance public education. *Id.*

51. STEVENS, *supra* note 13, at 259 (indicating the use of the Hoover Dam as a source of electricity); UNITED STATES DEPT. OF INTERIOR, BUREAU OF RECLAMATION, *Hoover Dam Chronology*, <http://www.usbr.gov/lc/hooverdam/History/articles/chrono.html> (last visited Oct. 10, 2005) (indicating President Roosevelt dedicated the dam on September 30, 1935). Congress initially passed legislation calling for construction of the dam in 1928; however, based on engineering concerns, construction did not start until 1933. *Id.* at 4.

52. Las Vegas News Bureau, *supra* note 45.

53. *Id.*

54. *Las Vegas: American Boomtown*, *supra* note 4.

55. Las Vegas News Bureau, *supra* note 45. These casinos include the El Rancho Vegas, which burned to the ground in 1960, the Last Frontier, Club Bingo, and the Thunderbird. *Id.*

center.<sup>56</sup>

Gambling was legalized in Atlantic City, New Jersey in 1978.<sup>57</sup> This development required Las Vegas to consider diversifying its opportunities.<sup>58</sup> In 1989, Mirage, the first of Las Vegas's "mega-resorts," opened at a cost of \$630 million and featured a tiger habitat, a dolphin pool, an elaborate swimming pool, a waterfall, and a man-made volcano that belched fire and water.<sup>59</sup> Today, these "mega-resorts" make up a majority of the Las Vegas strip, which is now home to the world's largest hotel, the \$1 billion MGM Grand Hotel & Resort.<sup>60</sup> The MGM Grand sits on 112 acres of land and boasts 5,005 rooms, a 171,500-square-foot casino, a movie theater, and a 215,000-square-foot, 15,200-seat special events arena for concerts, sporting events and exhibitions.<sup>61</sup> Complexes, such as the MGM Grand and the Mirage, create both a great need for raw construction materials and the potential for suppliers to become quite wealthy.<sup>62</sup>

### *B. Land Ownership and Congressional Land Grant Statutes.*

The question of who ultimately owns land has been asked throughout the centuries.<sup>63</sup> European civil law and the British common law

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56. *Id.*

57. ROGER DUNSTAN, *A History of Gambling in the United States*, in *GAMBLING IN CALIFORNIA* (1997), <http://www.library.ca.gov/CRB/97/03/Chapt2.html> (last visited January 11, 2005).

58. Las Vegas News Bureau, *supra* note 45.

59. *Id.* See also Mirage Hotel and Casino, Las Vegas, <http://www.mirage.com/> (last visited July 30, 2005) (describing the amenities of the Mirage).

60. MGM Grand, [http://www.mgmgrand.com/pages/index\\_flash.asp](http://www.mgmgrand.com/pages/index_flash.asp) (last visited July 30, 2005).

61. See Las Vegas News Bureau, *supra* note 45 (describing the "mega-resort" phenomenon). Other "mega-resorts" include the Circus Circus Hotel, featuring an amusement park, Treasure Island, where full-size pirate ships attack a British frigate every day in the hotel's Buccaneer Bay, and the Excalibur, which boasts court jesters who perform in the castle shaped hotel. Circus Circus Las Vegas Hotel, <http://www.circuscircus.com/> (last visited July 30, 2005); Treasure Island Hotel & Casino, <http://www.treasureisland.com/> (last visited July 30, 2005); Excalibur Las Vegas Resort Hotel and Casino, <http://www.excalibur.com/index2.php> (last visited July 30, 2005).

62. Cathy Werbin, *All that Glitters*, BUILDING SUPPLY HOME CENTERS (Mar. 1994) (discussing how the enormous opportunity and intense competition has emerged between Las Vegas contractors for casino contractors). At the time these "mega-resorts" were being constructed, Earl Williams began to extract sand and gravel on his Pittman Act land for use on these projects. Earl Williams, 140 I.B.L.A. 295, 297 (1997) (indicating Williams first began extracting sand in 1993).

63. See Joshua Siefert, *The Myth of Johnson v. M'Intosh*, 52 UCLA L. REV. 289, 310-22 (2004) (discussing the philosophical justification for original land ownership). Some of the seminal works on the subject matter include: JOHN LOCKE, TWO TREATISES OF GOVERNMENT (Peter Laslett ed., Cambridge Univ. Press 1988) (1690); DAVID HUME, A TREATISE OF HUMAN NATURE (Ernest C. Mussner ed., Penguin Classics 1984) (1739-1740); ADAM SMITH, THE

eventually recognized that property rights originated in the right of conquest.<sup>64</sup> The United States Constitution also recognizes the right of the sovereign to control property.<sup>65</sup> Early Supreme Court opinions expressly permitted the federal government to issue land grants to individuals, even in cases in which others had occupied the land or held a claim for ownership based on a different land grant.<sup>66</sup>

Immediately after separating from the British Crown, the federal government began transferring vast amounts of public land into private hands.<sup>67</sup> Congress created the General Land Office in 1812 to dispose of federal lands in the American Midwest and West.<sup>68</sup> These dispositions conveyed land in fee simple absolute<sup>69</sup> and provided the grantee with exclusive rights of ownership.<sup>70</sup> Congress passed the Land Reform Act in 1891 as part of the Progressive Movement's platform and changed the federal government's policy from a *carte blanche*

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WEALTH OF NATIONS 199 (E.P. Dutton & Co. 1960) (1776).

64. See WILLIAM BLACKSTONE, 2 COMMENTARIES \*48. According to Blackstone, the rights of conquest are based upon "[a] supposition, grounded upon a mistaken sense of the word conquest; which in its feudal acceptation, signifies no more than acquisition." *Id.* He stated:

[T]he right of conquest . . . can mean nothing more, than that, in order to put an end to hostilities, a compact is either expressly or tacitly made between the conqueror and the conquered, that if they will acknowledge the victor for their master, he will treat them for the future as subjects, and not as enemies.

WILLIAM BLACKSTONE, 1 COMMENTARIES \*103.

65. U.S. CONST. art. IV, § 3, cl. 2 (noting Congress has the power to "make all needful rules and regulations respecting . . . property belonging to the United States"); U.S. CONST. amend. V (providing the government must provide individuals with just compensation if it wishes to exercise its sovereign right of eminent domain, a central component of the right of conquest).

66. Johnson & Graham's Lessee v. M'Intosh, 21 U.S. 543, 588–89 (1823) (holding that the right of conquest allowed the federal government to issue land grants for property occupied by an American citizen holding the land from a grant by the Piankeshaw Indian tribe); Martin v. Hunter's Lessee, 14 U.S. 304 (1816) (recognizing that the Treaty of Paris, which ended the American Revolutionary War, gave the United States government the right to make property conveyances like the British Crown).

67. Northwest Land Ordinance of 1785 cited in GEORGE ANASTAPLO, THE CONSTITUTION OF 1787, 258–65 (1989).

68. See BETSY A. CODY, CONGRESSIONAL RESEARCH SERVICE, CRS CODE 95-599 ENR, MAJOR FEDERAL LAND MANAGEMENT AGENCIES: MANAGEMENT OF OUR NATION'S LANDS AND RESOURCES (1995), available at <http://www.ncseonline.org/NLE/CRSreports/Natural/nrngen-3.cfm?&CFID=17773691&CFTOKEN=13897435> (discussing the history of the various government land grant agencies). The General Land Office was an agency within the Department of the Interior, which helped convey land to the pioneers who first began to settle the Western United States. *Id.* In 1946, it was merged with the United States Grazing Service to create the Bureau of Land Management. *Id.*

69. See BLACK'S LAW DICTIONARY 649 (8th ed. 2004) (defining "fee simple absolute" as an estate of potentially infinite duration). Occasionally, the term "fee simple absolute" is shortened to "fee" or "fee simple." *Id.*

70. See Amoco Prod. Co. v. S. Ute Indian Tribe, 526 U.S. 865, 868 (1999) (discussing early land grant procedures).

disbursement policy to a reservation policy in which the federal government retained interests in public lands.<sup>71</sup> In the 1910s, Congress enacted two important land grant statutes that had significant implications in the *BedRoc Ltd.* case: (1) the Stock-Raising Homestead Act of 1916 (SRHA)<sup>72</sup> and (2) the Pittman Underground Water Act of 1919.<sup>73</sup> These two acts adopted a bifurcated approach to land patents in which the government issued a patent for surface lands but retained mineral rights.<sup>74</sup> In 1945, Congress passed the Reorganization Act<sup>75</sup> and merged the General Land Office with another agency to form the Bureau of Land Management (BLM).<sup>76</sup>

The SRHA allowed settlers to receive special land permits to raise livestock on public lands.<sup>77</sup> In order to qualify for a permit, an entrant must have resided on the eligible land<sup>78</sup> for three years and made

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71. Bureau of Land Management, *The Federal Land Policy and Management Act of 1976: How the Stage Was Set for BLM's "Organic Act"*, <http://www.blm.gov/flpma/organic.htm> (last visited July 30, 2005) [hereinafter Bureau of Land Management].

72. Stock-Raising Homestead Act of 1916, Pub. L. No. 64-290 (codified at 43 U.S.C. §§ 291–302 (repealed 1976)) [hereinafter SRHA]. See also *infra* notes 77–81 and accompanying text (discussing SRHA); *infra* Parts III.A–E (discussing *BedRoc Ltd.*)

73. See *supra* note 9 and accompanying text (discussing the Pittman Act); see also *infra* notes 82–88 and accompanying text (discussing the Pittman Act); *infra* Parts III.A–E (discussing *BedRoc Ltd.*).

74. See Drake D. Hill & P. Jaye Ripley, *The Split Estate: Communication and Education Versus Legislation*, 4 WYO. L. REV. 585, 597–601 (2004) (discussing the federal approach to land grants during the early twentieth century). According to one court, the bifurcation “opened the surface for immediate agricultural use while preserving whatever mineral potential lay buried in the subsurface for later development.” *Rosette Inc. v. United States*, 64 F. Supp. 2d 1116, 1120 (D.N.M. 1999), *aff'd*, 277 F.3d 1222 (10th Cir. 2002), *cert. denied*, 537 U.S. 878 (2002). The Supreme Court stated the law served to allow the government to depart from the common law and treat minerals as the dominant interest and the surface as a servient interest. *Kinney-Coastal Oil Co. v. Kieffer*, 277 U.S. 488, 504 (1928).

75. Reorganization Act of 1945, 59 Stat. 613 (1945) (codified as amended at 5 U.S.C. §§ 133y–y16 (2000 & West Supp. 2005)).

76. Bureau of Land Management, *supra* note 71 (describing the FLMPA as a comprehensive land regulation statute). The Bureau of Land Management is responsible for managing 202 million acres of land—about one-eighth of the land in the United States—and about 300 million additional acres of subsurface mineral resources. Bureau of Land Management, BLM Facts, <http://www.blm.gov/nhp/facts/index.htm> (last visited Oct. 5, 2005).

77. 43 U.S.C. §§ 291–301 (repealed 1976). Under this Act, the government would issue a permit for up to 640 acres of unreserved, unappropriated “reasonably compact” lands. *Id.* (repealed 1976). See also Hill & Ripley, *supra* note 74, at 597–99 (discussing the permitting and reservation process in the SRHA); Stephen R. McNutt, Note, *Rosette Inc. v. United States: Is the United States Full of Hot Air When It Comes to Reservation of Geothermal Resources as a “Mineral?”*, 8 GREAT PLAINS NAT. RESOURCES J. 44, 46–47 (2003) (outlining the provisions in the SRHA).

78. 43 U.S.C. § 292 (repealed 1976). In order for land to be eligible for the SRHA, the Secretary of the Interior must determine the land is chiefly valuable for grazing and raising crops, does not contain merchantable timber, irrigation sources and constitutes no more than 640 acres of contiguous land. *Id.* (repealed 1976).

permanent improvements for the purpose of stock raising.<sup>79</sup> Once an entrant did that, he had to submit final proof to the Interior Department, which would then issue a final patent.<sup>80</sup> Once approved, the government gave the applicant title to the surface land but reserved its interest in “all the coal and other minerals in the land.”<sup>81</sup>

The Pittman Act, enacted three years after the SRHA, also dealt with a specific type of land use; however, it contained a slightly different reservation provision.<sup>82</sup> The Pittman Act focused not on encouraging the use of land for stock raising, but rather for water exploration.<sup>83</sup> The Pittman Act only included land owned by the federal government in the State of Nevada<sup>84</sup> and allowed a citizen to receive a permit to engage in exploratory water drilling.<sup>85</sup> If a speculator were to find a water supply capable of becoming a source for irrigation, he or she would receive a 640 acre reward from the government.<sup>86</sup> However, the Pittman Act included a reservation provision for “all the coal and other valuable minerals.”<sup>87</sup> At the time of its enactment, the Pittman Act was considered largely an experimental measure<sup>88</sup> and one that essentially failed.<sup>89</sup> In 1964, Congress repealed the Pittman Act but left the

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79. *Id.* § 293 (repealed 1976) (stating that “instead of cultivation as required by the homestead laws the entryman shall be required to make permanent improvements upon the land entered before final proof is submitted tending to increase the value of the same for stock-raising purposes”).

80. *Id.* § 292 (Repealed 1976).

81. SRHA, Pub. L. No. 64-290 (codified as amended at 43 U.S.C. § 299(a) (2000 & West Supp. 2005)). The specific listing of coal in the statute does not provide any guidance on what Congress means by “mineral.” See *Skeen v. Lynch*, 48 F.2d 1044, 1046-47 (10th Cir. 1931) (stating Congress’s intent was simply to clarify the reservation of the government’s interest in coal, as the mineral has received special treatment in other mining and mineral statutes). See also *Watt v. W. Nuclear*, 462 U.S. 36, 44 n.5 (1983) and accompanying text (outlining the provisions of the SRHA).

82. Pittman Act, Pub. L. No. 66-60, 41 Stat. 293-95 (1919), *repealed in part by* Pub. L. No. 88-417, 78 Stat. 389 (1964).

83. Compare Pittman Act, 41 Stat. at 293 (stating the purpose of the Act is “to encourage the reclamation of certain arid lands in the State of Nevada”) with SRHA, 39 Stat. at 862 (stating the purpose of the Act is “to provide for stock-raising homesteads”).

84. Pittman Act, 41 Stat. at 293 (1919).

85. *Id.* “[T]he Secretary of the Interior is hereby authorized to grant to any citizen . . . a permit, which shall give the exclusive right, for a period not exceeding two years, to drill or otherwise explore for water beneath the surface of not exceeding [2,560] acres.” *Id.*

86. *Id.* at 294.

87. Pittman Act, § 8, 41 Stat. at 295. Compare *id.* with *supra* note 81 and accompanying text (stating that coal and other valuable mineral deposits are subject to disposal by the United States in accordance with the coal and mineral land laws in force at the time of disposal).

88. See 58 CONG. REC. H6468, H6468 (statement of Rep. Evans) (acknowledging the experimental nature of the Pittman Act’s attempt to find irrigable water in Nevada).

89. See S. REP. NO. 88-1282 (1964), *reprinted in* 1964 U.S.C.C.A.N. 2699, 2699 (stating that in the forty year life of the Pittman Act, only three farm units were able to be irrigated as a result

reservation provision in place.<sup>90</sup>

In 1976, Congress enacted the Federal Land Policy and Management Act (FLPMA). The FLPMA narrowly tailored the charge of the BLM to include managing public lands and making disbursement of public land to private parties only in cases where the national interest is served.<sup>91</sup> This act was also significant because it repealed many of the Roosevelt land grants, including the SRHA, but left the previously issued patents unchanged.<sup>92</sup> In 1993, Interior Secretary Bruce Babbitt issued an order placing a moratorium on the issuance of patents by state BLM directors.<sup>93</sup> Since then, public land has been used primarily for the non-consumptive uses of recreation and preservation.<sup>94</sup>

### C. *The “Building Blocks” of Mineral Law*

The determination of what constitutes a “mineral” under the mineral acts has been the source of much consternation amongst judges,<sup>95</sup> Interior Department officials,<sup>96</sup> and legal scholars.<sup>97</sup> This threshold determination bears great significance because it determines whether federal mining laws apply and whether the reservation provisions of the

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of the water exploration spurred by Pittman Act patents).

90. See Pub. L. 88-417, 78 Stat. 389 (stating “[a]ny valid application for permit under that Act, on file with the Secretary of the Interior on the effective date of this Act, may be processed in the same manner as if this Act had not been enacted”).

91. Pub. L. No. 94-579, 90 Stat. 2763 (1976) (codified as amended at 43 U.S.C. §§ 1701–1782 (2000 & West Supp. 2005)). See also *supra* note 71 (discussing the SRHA patent regime).

92. See *Watt v. W. Nuclear*, 462 U.S. 36, 38 n.1 (1983) (noting the practice of issuing permits had been suspended by executive action in 1934, but the final appeal occurred forty-two years later in the FLPMA).

93. Bruce Babbitt, Secretarial Order No. 3163 (Mar. 2, 1993), cited in Randy Hubbard, *The 1872 Mining Law: Past Present & Future*, 17 NAT. RESOURCES & ENV'T J. 149, 150–51 (2003).

94. Jan G. Laitos & Thomas A. Carr, *The Transformation of Public Lands*, 26 ECOLOGY L.Q. 140, 196–98 (1999) (discussing how the need for ecosystem management and biodiversity have kept to the position that public lands should be held for non-consumptive uses).

95. See, e.g., *N. Pac. Ry. Co. v. Soderberg*, 188 U.S. 526, 530 (1903) (stating the term mineral 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”); *Ozark Chem. v. Jones*, 125 F.2d 1, 2 (10th Cir. 1941) (defining mineral as including only those inorganic substances with a definite chemical composition); *Waugh v. Thompson Land & Coal Co.*, 137 S.E. 895, 897 (W. Va. 1927) (defining mineral as a comprehensive term including every description of stone and rock deposit).

96. Compare *Zimmerman v. Brunson*, 39 Pub. Lands Dec. 310, 312 (D.O.I. 1910) (holding gravel and sand are not minerals under the mining laws), with *Layman v. Ellis*, 52 Pub. Lands Dec. 714, 718 (D.O.I. 1929) (holding gravel and sand are minerals under the mining laws).

97. Michael Braunstein, *All that Glitters: Discovering the Meaning of Mineral in the Mining Law of 1872*, 21 LAND & WATER L. REV. 297, 301–04 (1986) (discussing the significance of the determination of a substance as a mineral as critically important to the application of early 20th century land grant and mining statutes).

land grant statutes cover the substance.<sup>98</sup> Oddly, the question of whether a substance is a “mineral” is not a question of fact decided by science; instead, it is a conclusion of law decided by bureaucrats and judges.<sup>99</sup> As a result, the outcome of the question has been difficult to predict.<sup>100</sup> For example, the Supreme Court has held that subsurface groundwater is not a mineral subject to mining laws.<sup>101</sup> However, two circuits have not only concluded that subsurface geothermal steam is a mineral subject to the SRHA mineral reservation provision but also that the steam is a “valuable mineral” subject to additional regulations.<sup>102</sup>

Immediately after the passage of the General Mining Act of 1872,<sup>103</sup> the lack of a definition of “mineral” became problematic.<sup>104</sup> While the Mining Act did make specific reference to quartz, gold, cinnabar, silver, lead, tin, copper, and “other valuable minerals,”<sup>105</sup> executive officials seized on the lack of clarity in the statute and issued rulings greatly

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98. *Id.* Specifically, there are three main areas of mineral law governance that will be triggered: the Mining Act of 1872, the Federal Land Policy Management Act of 1976 and state mining laws. *Id.* at 298.

99. *See id.* (noting “the question of whether a substance is a mineral is almost entirely a question of policy and only incidentally a question of chemistry”); *see also* Cameron v. United States, 252 U.S. 450, 464 (1920) (holding that findings by the Secretary of the Interior regarding tracts of mineral land are conclusive absent fraud or imposition); Kirk v. Olson, 245 U.S. 225, 226 (1917) (holding the determination of whether land was valuable and therefore falls under mining law was a question to be determined by officers of the Land Department); Murray v. White, 113 P. 754, 758 (Mont. 1911) (finding that when land is valuable for both mineral and agricultural purposes, controversies over which purpose the land is more valuable for are settled by the Land Department); Robert L. Beery, 83 Interior Dec. 249, 252 (1976) (stating whether a substance is a mineral depends largely on context). According to Professor Braunstein, this means that the determination of whether a material is properly classified depends on the purpose of the intended classification. Braunstein, *supra* note 97, at 301. Thus, those making this classification must first decide that the transfer of the substance from public to private ownership is appropriate in light of contemporary concerns and policies. *Id.*

100. *See* Braunstein, *supra* note 97, at 301 (explaining the difficulty in defining “mineral” and potential conflicts that arise).

101. *Andrus v. Charlestone Stone Prods.*, 436 U.S. 604, 617 (1978).

102. *Rosette Inc. v. United States*, 277 F.3d 1222, 1228 (10th Cir. 2002), *cert. denied*, 537 U.S. 878 (2002) (holding that geothermal resources in land qualify as “minerals” under SRHA); *United States v. Union Oil of Cal.*, 549 F.3d 1271, 1273–74 (9th Cir. 1977) (holding that all elements of a geothermal system—magma, porous rock, strata, even water—may be classified as minerals).

103. 30 U.S.C. § 23 (2000 & West Supp. 2005).

104. Braunstein, *supra* note 97, at 303 (tracing the origin of the mineral problem as stemming from the failure to provide any meaningful guidance on the definition of “mineral.”). The General Mining Act was the first attempt at federally regulating the mining industry. *See generally* STEVEN G. BARRINGER ET AL., *THE MINING LAW OF 1872: A LEGAL AND HISTORICAL ANALYSIS* (1989) (discussing the function of the General Mining Act and placing it in historical context). Prior to its passage, most of the regulation occurred on the state level. *Id.*

105. 30 U.S.C. § 23 (2000).

expanding the definition of minerals.<sup>106</sup> In 1929, the Interior Department adopted noted legal scholar Curtis Lindley's three-pronged test to determine whether a substance was a mineral.<sup>107</sup> Under the Lindley test, a substance is a mineral for the purposes of the mining laws if: (1) it is recognized as a mineral by the standard authorities on the subject, (2) it is classified as a mineral product in trade or commerce, or (3) it is a substance that possesses an economic value.<sup>108</sup> Ultimately, the Supreme Court, in *Andrus v. Charlestone Stone Products*, rejected this test because many substances could pass the Lindley test but were not thought to be "the type of mineral that the 1872 Congress intended to make the basis of a valid claim."<sup>109</sup>

While the definition of "mineral" has been frequently litigated and the Interior Department does not appear to be any closer to promulgating a test since the Lindley test was discarded by the Supreme Court almost thirty years ago, Congress provided some guidance for commonly mined materials with the Common Varieties Act.<sup>110</sup> This Act specifically states that sand and gravel are not valuable minerals within the context of the mining laws unless they fit into the "distinct and special value" exception of the statute.<sup>111</sup> Unfortunately, the statute

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106. See, e.g., 14 Op. Att'y Gen. 115, 116 (1872) (including diamonds in the Mining Act); *Zimmerman v. Brunson*, 39 Pub. Lands Dec. 310, 312 (D.O.I. 1910) (including gravel); *Richter v. Utah*, 27 Pub. Lands Dec. 95, 98 (D.O.I. 1898) (including guano); *Commissioner's Ruling*, reprinted in HENRY N. COPP, UNITED STATES MINERAL LANDS 100 (2d ed. 1882) (including borax); *Commissioner's Ruling*, reprinted in COPP 121 (including fire clay).

107. *Layman v. Ellis*, 52 Pub. Lands Dec. 714, 719-20 (D.O.I. 1929). Curtis Lindley wrote *A Treatise on the American Law Relating to Mines & Mineral Lands* which is often cited in articles concerning mines and minerals.

108. CURTIS LINDLEY, A TREATISE ON THE AMERICAN LAW RELATING TO MINES AND MINERAL LANDS § 98 (3d ed. 1914), cited by Braunstein, *supra* note 97, at 304.

109. 436 U.S. 604, 612 n.8 (1978). *Charlestone Stone Products* held that water was not a locatable mineral under the General Mining Act. *Id.* at 610. The Court focused on the national interest in keeping lands with a water source separate from lands with a mineral source. *Id.* at 614 ("The conclusion that Congress did not intend water to be locatable under the federal mining law is reinforced by consideration of the practical consequences that could be expected to flow from a holding to the contrary."). Additionally, substances that meet the coverage in the Common Varieties Act also would meet the Lindley test but are specifically excluded from the coverage of the Mining Act. *Id.* at 617.

110. 30 U.S.C. § 611 (2000 & West Supp. 2005). The Common Varieties Act also includes vegetative materials. See Marla E. Mansfield, *A Primer on Public Land Law*, 68 WASH. L. REV. 801, 831 (1983) (describing how the public land laws treat consumable materials).

111. 30 U.S.C. § 611 (2000). The Act states:

No deposit of common varieties of sand, stone, gravel, pumice, pumicite, or cinders and no deposit of petrified wood shall be deemed a valuable mineral deposit within the meaning of the mining laws of the United States so as to give effective validity to any mining claim hereafter located under such mining laws: *Provided, however*, That . . . "Common varieties" . . . does not include deposits of such materials which are valuable because the deposit has some property giving it distinct and special value.

never defined what this phrase meant and left the Interior Department to promulgate its own definition for the phrase.<sup>112</sup> The Department took an economic approach, relating both the presence or absence of a distinct special economic value and the deposit's potential use to the typical use of the deposits in order to determine if the Common Varieties Act applied.<sup>113</sup> The Supreme Court has affirmed this interpretation and further stated that the legislative history of the bill indicated that Congress meant to exclude sand and gravel from the coverage of the mining laws.<sup>114</sup> The Common Varieties Act was meant solely to curb abuses of the General Mining Act<sup>115</sup> and was not applicable to the homestead land grant acts.<sup>116</sup> However, the Common Varieties Act is significant to homestead land grant acts given the lack of judicial precedents involving these acts.<sup>117</sup> Because of the lack of clear guidance, courts interpreting the homestead land grant acts' mineral reservation provisions have resorted to mining law jurisprudence to determine whether a substance is a mineral.<sup>118</sup>

Equally confusing, the mining laws give separate designations to mineral deposits and "valuable deposits" but do not define what makes

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*Id.* (emphasis added).

112. Braunstein, *supra* note 97, at 310.

113. *United States v. Henderson*, 68 Interior Dec. 26, 28–30 (1961) (holding appellant did not show that he had a discovery of sand and gravel which possessed a special and distinct value).

114. *United States v. Coleman*, 390 U.S. 599, 605 (1968); *see also* H.R. REP. NO. 84-730, at 6 (1939) (stating the ingenuity of American citizens has developed new and better ways to abuse public land resources by obtaining title of the land through the mining laws).

115. Congressman Engle, a sponsor to the Common Varieties Act, stated:

The reason we have done that is because sand, gravel, pumice and pumicite are really building materials and are not the type of material contemplated to be handled under the mining laws, and that is precisely where we have had so much abuse of the mining laws, because people can go out and file mining claims on sand, stone, pumice, and pumicite taking in recreational sites and even taking in valuable stands of commercial timber in the national forests and on the public domain.

101 CONG. REC. H7454 (daily ed. June 20, 1955) (statement of Rep. Engle).

116. *See infra* note 122. If an individual received land classified for homesteading purposes, the mineral claims are voided as the General Mining Act is said not to apply. *Diamond Coal & Coke Co. v. United States*, 233 U.S. 236, 239–40 (1914) (stating patentees, absent fraud, have the right to retain all interests in land characterized by the Interior Department as non-mineral even if the department made an error).

117. *Watt v. W. Nuclear*, 462 U.S. 36, 42 (1983) (noting the lack of precedents on mining act interpretation). While federal courts have often determined if a substance is a mineral under the provisions of the Mining Acts, this case was the first time one addressed the question as pertained to the homestead. *Id.* at 42 n.4.

118. *Id.* at 42–46; *State ex. rel State Highway Comm'n v. Trujillo*, 487 P.2d 122 (N.M. 1971) (holding that road building material from landowner's property had not been reserved to the government in the patents and the government was therefore required to pay the landowner for the material taken).

a mineral deposit “valuable.”<sup>119</sup> The department has adopted a two-tiered approach to the “valuable” classification.<sup>120</sup> First, the land as a whole must be evaluated to determine whether it is better suited for agricultural or mining purposes.<sup>121</sup> Homesteading laws apply if the land is determined to be better equipped for agricultural purposes, but mining laws apply if it is determined to be better equipped for mining.<sup>122</sup> Courts have determined that the decision to issue a patent under the homestead provision implies a determination that the land is not known to contain valuable minerals.<sup>123</sup> Furthermore, this determination is exclusively the province of the Bureau of Land Management; individuals may not challenge it in court.<sup>124</sup>

Once land has been determined to be mineral in character, a second analysis is then undertaken.<sup>125</sup> Under this analysis, the actual minerals must be evaluated to determine whether they are valuable.<sup>126</sup> If a mineral is deemed to be valuable, then the General Mining Act applies.<sup>127</sup> If the mineral is not valuable, it is said to be common and falls under the Common Varieties Act.<sup>128</sup> The Supreme Court has never clarified what the term “valuable mineral” means under the Act; however, commentators<sup>129</sup> and administrative courts<sup>130</sup> have each

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119. 30 U.S.C. § 23 (2000).

120. See generally Anne M. Payne, *Determination of Mineral Character; Land as “Valuable for Minerals”*; “Valuable Mineral Deposits,” 53A AM. JUR. 2D *Mines and Minerals* § 25 (2005).

121. See generally *Barden v. N. Pac. R.R. Co.*, 154 U.S. 288 (1894); *Murray v. White*, 113 P. 754, 758–59 (Mont. 1911) (finding title to known mineral land cannot be secured under an agricultural entry).

122. Payne, *supra* note 120, § 25. The Homestead Act specifically exempted mineral lands from its reach. 43 U.S.C. § 201 (repealed 1976). See also *United States v. Lillibridge*, 4 F. Supp. 204, 206 (S.D. Cal. 1932) (adopting a comparative value approach to the classification of national forests); *Ah Yew v. Choate*, 24 Cal. 562, 567 (1862) (adopting the comparative value approach to state land classifications).

123. *West v. Standard Oil Co.*, 278 U.S. 200 (1929) (finding that since the Secretary of the Interior did not determine the land in question was not known to be mineral land as a matter of fact, but rather did so as a proposition of law, the company’s title became unassailable and the order of dismissal by the Secretary did not remove the land from the jurisdiction of the Department of the Interior).

124. *S. Pac. R.R. Co. v. United States*, 51 F.2d 873 (9th Cir. 1931) (noting judicial courts have no role in making the determination of whether land is primarily mineral or agricultural in character); *Helit v. Gold Fields Mining Corp.*, 113 I.B.L.A. 299 (1990) (applying the same principle to administrative courts).

125. See Payne, *supra* note 120, § 25 (drawing a distinction between land “valuable for minerals” and “valuable mineral deposits”).

126. *Id.*

127. 30 U.S.C. § 22 (2000).

128. 30 U.S.C. § 611 (2000).

129. Carl J. Mayer, *The 1872 Mining Law: Historical Origins of the Discovery Rule*, 53 U. CHI. L. REV. 624, 636–37 (1986) (advocating for the use of a marketability rule for defining

attempted to provide an adequate definition. The Supreme Court has, however, adopted a marketability test for determining whether a “mineral deposit” is valuable.<sup>131</sup> Under this marketability test, a mineral deposit is valuable if it currently can be “extracted, removed, and marketed at a profit.”<sup>132</sup> Thus, it would appear that the determination of “value” under the mining laws is based on economics.<sup>133</sup>

*D. Policy Objectives Behind the Specific Reservation of Mineral Interests*

The right of the sovereign to sever land into surface and mineral components dates back to the Middle Ages.<sup>134</sup> This right transferred to colonial America, and the Continental Congress responded by enacting legislation reserving the rights to precious metals to the federal government.<sup>135</sup> As the United States grew from east to west, the government began to provide land grants as incentives for settlers to

when a mineral becomes valuable). In his article, Mayer rejects two alternative approaches. *Id.* He first rejects the argument that the phrase “valuable mineral deposit” means any deposit that could be sold on a market because that interpretation would render the word “valuable” meaningless as all minerals would have some marketable value. *Id.* at 636. He then rejects the argument that the phrase “valuable mineral deposit” is equivalent to any deposit of “valuable minerals” because deposits of minerals and valuable minerals are dealt with separately by the Mining Act. *Id. comparing* 30 U.S.C. § 21 (using the phrase “lands valuable for minerals”) with 30 U.S.C. § 22 (using the phrase “valuable mineral deposits”), 30 U.S.C. § 23 (using the phrase “other valuable deposits”), and 30 U.S.C. § 27 (using the phrase “valuable minerals and other deposits”). Finally, Mayer concludes by interpreting the statute to include only deposits of significant commercial value. *Id.* at 637.

130. *See, e.g.,* United States v. J. Gary Feezor, 90 Interior Dec. 262, 269 (1983) (stating the test used is whether a prudent man would be “justified in spending his time and means” with a reasonable prospect of developing a paying mine).

131. United States v. Coleman, 390 U.S. 599, 601–03 (1968).

132. *Id.* at 602; *accord* United States v. Pierce, 75 Interior Dec. 270, 278–79 (1968) (adopting the marketability test for all minerals). *See also* United States v. Iron Mining Co., 128 U.S. 673, 683–84 (1888) (adopting the marketability rule only for non-metals).

133. *Coleman*, 390 U.S. at 602–03. The law has developed to the point where the question of whether a “mineral deposit” is valuable or whether a mineral is a “valuable mineral” are different questions sometimes with different answers. *Id.*

134. *See* The Case of the King’s Prerogative in Saltpetre, 77 Eng. Rep. 1294, 1295 (K.B. 1606) (finding a landowner did not hold the rights to substances used to make gunpowder because the Crown’s interests in the defense of the British Isles exceeded the private rights of individuals); The Case of Mines, 75 Eng. Rep. 472, 477 (Ex. 1567) (finding the Queen of England has by prerogative of the crown the rights to any ore of gold or silver found on any estate in her realm); *see also* BLACKSTONE, 2 COMMENTARIES \*18–19 (noting the rights of the sovereign to harvest minerals has been a right from time immemorial); Hill & Ripley, *supra* note 74, at 589 (tracing the origin of the severed mineral estate).

135. Hill & Ripley, *supra* note 74, at 590 (citing 28 J. OF THE CONTINENTAL CONG. 1774–1789, at 378 (John C. Fitzpatrick ed. 1933)) (noting that the Act of May 20, 1785 reserved one-third of all gold, silver, lead and copper mines to the federal government).

cultivate the western part of the nation.<sup>136</sup> When the Industrial Revolution spread to the United States, the government realized the national economy would best be served by encouraging the concurrent development of surface and subsurface estates.<sup>137</sup> In an altruistic view, this severance reflects the aim of public policy to assure a usable mineral supply and the energy derived from the minerals, while keeping land surfaces available for individuals.<sup>138</sup>

While courts and Congress have each stated that the purpose of the land grant acts is to allow the concurrent development of both estates, in reality the severance provisions allow mineral rights to become dominant over the surface rights.<sup>139</sup> As courts have dealt with the inevitable disputes between those wishing to exert their mineral rights and those wishing to exert their surface rights, the courts have developed an “accommodation doctrine,” whereby surface owners must accommodate the mineral owners even if doing so causes harm to the surface.<sup>140</sup> In an extreme example of the application of this doctrine, the Supreme Court once permitted a mineral company to proceed to mine in the middle of an established Colorado town, an act that destroyed much of the town’s infrastructure, on the grounds that the company was advancing the national interest in the harvesting of minerals.<sup>141</sup> Eventually, courts tempered their accommodations and now allow miners to only possess the portion of land “reasonably necessary” for the exploration and development of the minerals.<sup>142</sup> The Pittman Act

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136. See *supra* Part II.B (discussing the Congressional land grant statutes); see also Hill & Ripley, *supra* note 74, at 590.

137. See *Watt v. W. Nuclear*, 462 U.S. 36, 50 (1983) (stating the purpose of the SRHA); H.R. REP. NO. 64-35, at 4, 18 (1916) (stating the primary function of the SRHA is to encourage the development of both mineral and surface estates); Hill & Ripley, *supra* note 74, at 597–600 (discussing the SRHA provisions and its regulatory amendments).

138. Hill & Ripley, *supra* note 74, at 597–98 (discussing the objectives of the federal government in passing severance legislation).

139. Michelle A. Wenzel, *The Model Surface Use and Mineral Development Accommodation Act: Easy Easements for Mining Interests*, 42 AM. U. L. REV. 607, 622–24 (1993).

140. Hill & Ripley, *supra* note 74, at 592–96 (tracing the origins of the accommodation doctrine as one that developed court by court and case by case).

141. *Steel v. St. Louis Smelting & Ref. Co.*, 106 U.S. 447, 449–50 (1882). The *Steel* decision also stated the miners’ rights are independent from the settlement of a town, and as a result, the miner is treated the same way as if he acquired the property by “discovery . . . in a wilderness.” *Id.* at 449. State court decisions of the time were also unkind to surface dwellers. See *Pa. Coal Co. v. Sanderson*, 6 A. 453, 459 (Pa. 1886), *abrogated by Commonwealth v. Barnes & Tucker Co.*, 319 A.2d 871 (Pa. 1974) (labeling the concerns of surface owners “trifling inconveniences . . . [that] must sometimes give way to the necessities of a great community”).

142. *Sanford v. Arjay Oil Co.*, 686 P.2d 566, 572 (Wyo. 1984) (stating that the amount of land “reasonably necessary” includes space required for all mining purposes, including storage and removal, and that it is a question of fact); see also Hill & Ripley, *supra* note 74, at 592–93 (discussing the temperament of the doctrine); Marvin D. Truhe, *Surface Owner vs. Mineral*

also placed limitations on subsurface developers, requiring them to compensate the surface owner for any damages done to crops or improvements on the land.<sup>143</sup> However, these decisions came after years of mineral owners asserting almost complete control of an estate.<sup>144</sup>

As the temperament of the accommodation doctrine continued, the split estate system allowed for a rapid urbanization of the American West.<sup>145</sup> Cities such as Denver, Las Vegas, Phoenix and Salt Lake City have sprung to life from stops along railroad lines into truly modern cities with diverse business communities.<sup>146</sup> The development of these cities also means that Western rural areas have become “sparse and declining.”<sup>147</sup> Thus, the government must be willing to utilize its public lands to provide incentives for the re-development of these rural areas.<sup>148</sup> Employing severed estates, the government can accomplish what it did a century ago by allowing rural Western lands to perform to their highest and best use through concurrent development.<sup>149</sup> The

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*Owner or “They Can’t Do That, Can They?”*, 27 S.D. L. REV. 376, 385–88 (1982) (surveying the reasonable and necessary standard of accommodation); RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 2.15 (2000) (codifying the accommodation doctrine as a default rule that can only be subverted with clear language to the contrary in a land conveyance).

143. Pittman Act, Pub. L. No. 66-60, § 8, 41 Stat. 293-95 (1919), *repealed in part* by Pub. L. No. 88-417, 78 Stat. 389 (1964).

144. *See* Chartiers Block Coal Co. v. Mellon, 25 A. 597, 599 (Pa. 1893) (stating the assertion of the rights of a surface owner could mean “the public might be debarred the use of the hidden treasures which the great laboratory of nature has provided for man’s use in the bowels of the earth”).

145. *See* Rasband, *supra* note 33, at 1 (advocating a need to change the current government policy of reserving large sections of the West for public use). In fact, research now shows the West is the most urban area in the country. *Id.* at 5, 7 n.18. *See also* A. Dan Tarlock & Sarah B. Van de Wetering, *Growth Management and Western Water Law: From Urban Oases to Archipelagoes*, 5 HASTINGS W.-NW. J. ENVTL. L. & POL’Y 163, 164 (1999) (noting 86% of westerners live in urban areas).

146. *See supra* Part II.A (discussing the development of Las Vegas); *see also* Rasband, *supra* note 33, at 20 (discussing the growth of urban “archipelagoes” following the Second World War).

147. Rasband, *supra* note 33, at 21 (quoting Pamela Case & Gregory Alward, *Patterns of Demographic, Economic and Value Change in the Western United States: Implications for Water Use and Management* 8 (Report to the Western Water Policy Review Advisory Commission) (1997)).

148. *See id.* (noting in particular three rural Western towns—Moab, Utah; Coeur D’Alene, Idaho; and Jackson Hole, Wyoming—which have been successful capitalizing on their proximity to national parks and created a tourism economy). While it is impossible for all rural towns near public lands to establish a tourism economy, rural towns can capitalize on public lands for other purposes. *Id.* at 24–43 (debunking the current position of the government that public lands should be used primarily for preservation and recreation).

149. *See* Stephen Sussna, *The Concept of Highest and Best Use Under the Takings Theory*, 21 URB. LAW. 113, 113 (1989) (noting the concept of “highest and best use” has long been employed in property law, especially when the Takings Clause of the Fifth Amendment is exercised). The test for whether land is at its highest and best use varies from jurisdiction to jurisdiction, but all the tests require the use to be legally and physically possible, appropriately

continuance of the reservation policy can also serve to protect rural western towns that have historically been mining communities.<sup>150</sup>

*E. The Role of Administrative Law and Interior Department Agencies in Resolving Mineral Rights Disputes*

The United States Constitution provides the federal courts with the authority to resolve cases or controversies arising under federal law.<sup>151</sup> In addition, both the federal government<sup>152</sup> and state governments<sup>153</sup> have vested certain administrative agencies with quasi-judicial authority over civil disputes.<sup>154</sup> These administrative agencies sometimes have broad authority,<sup>155</sup> and their decisions are only overturned by judicial

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supported, financially feasible and resulting in the highest land value. *Id.*

150. See Rasband, *supra* note 33, at 55; see also Dale A. Oesterle, *Public Land: How Much is Enough?*, 23 *ECOLOGY L.Q.* 521, 526–29 (1996) (discussing the impact of federal land subsidies on today's rural western towns and arguing that reservation policy wastes resources, is economically unsound, and encourages environmental damage).

151. See U.S. CONST. art. III, § 2 (“The judicial Power shall extend to Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority.”).

152. See Administrative Procedure Act, 5 U.S.C. §§ 701–706 (2000) (outlining the procedures and function of administrative courts) [hereinafter referred to as “APA”]. See also *Thomas v. Union Carbide Agric. Prods.*, 473 U.S. 568, 583 (1985) (affirming Congress’s Article I power to vest an administrative court with the authority to adjudicate disputes). The provisions of the Administrative Procedure Act are meant to create a uniform and comprehensive regulatory scheme governing such aspects of agency action such as investigations, adjudications, rulemaking, licensing, and open meeting and disclosure requirements. *Federal Administrative Procedure Act*, 2 AM. JUR. 2D *Admin. Law* § 14 (2005). It covers basically every action undertaken by an executive branch agency, other than the Defense Department. 5 U.S.C. § 701(b)(1) (2000).

153. See *Maksimovic v. Tsogalis*, 687 N.E.2d 21, 23–24 (Ill. 1997) (permitting the state Human Rights Commission to adjudicate common law tort claims that are “inextricably linked” to claims of sexual harassment, which the agency is statutorily commissioned to investigate and adjudicate); *McHugh v. Santa Monica Rent Control Bd.*, 777 P.2d 91, 108 (Cal. 1989) (upholding the authority of a California administrative court to set aside excess rents).

154. See generally JEFFREY A. PARNES, *CIVIL PROCEDURE FOR FEDERAL AND STATE COURTS* 251–74 (2001) (discussing the role of administrative courts in the judicial system).

155. See *Powers of Presiding Officers and Administrative Law Judges*, 2 AM. JUR. 2D *Admin. Law* § 312 (2005) (indicating an administrative law judge or presiding officer has the authority to administer oaths and affirmations; issue subpoenas authorized by law; rule on offers of proof and receive relevant evidence; take depositions or have depositions taken when the ends of justice would be served; regulate the course of the hearing; hold conferences for the settlement or simplification of the issues by consent of the parties or by the use of alternate means of dispute resolution; inform the parties as to the availability of one or more alternative means of dispute resolution and encourage use of such methods; require the attendance, at any conference for the settlement or simplification of the issues, of at least one representative of each party who has authority to negotiate concerning resolution of the issues in controversy; dispose of procedural requests or similar matters; make or recommend decisions; or take other action authorized by agency rule consistent with the APA); see also *In re Samuel Joseph*, 22 I. & N. Dec. 799 (1999) (illustrating that an administrative agency has the power to detain and/or remove an immigrant

courts in rare circumstances.<sup>156</sup>

The principle of judicial review has always applied to Interior Department administrative review agencies.<sup>157</sup> Typically, these adjudications take place in front of the Bureau of Land Management, which is charged by the Secretary of the Interior and the Federal Land Policy and Management Act to handle all disputes regarding the disbursement of public lands.<sup>158</sup> The Interior Department permits these determinations to be appealed internally to the Board of Land Appeals (BLA).<sup>159</sup> These appellate decisions become the decision of record, and as a result, the reviewing district court will only look to the record of

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from the United States); *Maksimovic*, 687 N.E.2d at 22 (illustrating that an administrative agency has the authority to issue punitive damages); *Jody Desomma v. All World Farms*, 61 Agric. Dec. 821, 827 (2002) (illustrating an administrative agency has the authority to issue injunctive relief).

156. 5 U.S.C. § 706(2). The APA states a reviewing court may set aside an agency action only if the action is found to be:

- (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
- (B) contrary to constitutional right, power, privilege, or immunity;
- (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
- (D) without observance of procedure required by law;
- (E) unsupported by substantial evidence in a case subject to [specific provisions of the title]; or
- (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

*Id.*

157. *See, e.g.*, *Bales v. Ruch*, 522 F. Supp. 150, 152 (E.D. Cal. 1981) (noting that while the Interior Department did have primary responsibility to determine the validity of mining claims, the district courts maintained the right to review those determinations); *Roberts v. Morton*, 389 F. Supp. 87, 89 (D. Colo. 1975), *aff'd*, 549 F.2d 158 (10th Cir. 1976) (stating the district court did have jurisdiction under the Administrative Procedure Act to review Interior Department decisions regarding mining claims). *See also* J.R. Kemper, Annotation, *Judicial Review of Interior Department Decisions Affecting Claims of Mineral Interests in Public Lands*, 5 A.L.R. FED. 566, § 2 (1970) (discussing the relationship between the federal courts and the decisions of the Interior Department's agencies).

158. David L. Hughes, *Practice and Procedure Before the Interior Board of Land Appeals*, 14 PUB. LAND L. REV. 113, 116–17 (1993). The BLA consists of nine administrative judges, all of whom are attorneys with backgrounds in natural resources law. *Id.* at 118–19. One judge is appointed as the chief administrative judge and supervises the other administrative judges and manages the operations of the BLA. *Id.* at 119. The deputy chief administrative judge assists the chief judge in managing BLA operations. *Id.* Although the chief judge participates in determining how to consider a particular case, the chief judge has only one voice in how a particular case is decided. *Id.* The BLA conducts a *de novo* review of the BLM's decision. *Id.* (citing 43 C.F.R. § 4.1).

159. *See, e.g.*, *W. Va. Highlands Conservancy v. Norton*, 343 F.3d 239, 241–43 (4th Cir. 2003) (illustrating the appellate power of the BLA); *Pa. Fed'n of Sportsmen's Clubs v. Hess*, 297 F.3d 310, 328 (3rd Cir. 2002) (discussing the procedure for appeals of Bureau of Land Management decisions).

this appellate proceeding.<sup>160</sup> In most cases, a losing party must take its appeal to the BLA before going into federal district court as the district court will not review the decision of an administrative agency until the administrative remedies have been exhausted.<sup>161</sup> Judicial review of BLA proceedings does not stay the effect of the BLA's decision.<sup>162</sup> Once a decision is rendered by the BLA, petitioners must make a special request for injunctive relief or a restraining order.<sup>163</sup> Thus, while the decisions of the Bureau of Land Management and the BLA carry little precedential value, their decisions carry great weight to those wishing to avoid expensive court battles.<sup>164</sup>

#### *F. A Primer on Statutory Interpretation*

Just as the principles of administrative law play an important role in understanding the *BedRoc Ltd.* case and the reasons for a lack of judicial case law on the important subject of mineral rights, the

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160. *United States v. Smith Christian Mining Enters., Inc.*, 537 F. Supp. 57, 60 (D. Or. 1981). The practice of making the appeal decision based on the record is fairly common. *See, e.g.*, *Greenlaw v. Dep't of Employment Sec.*, 701 N.E.2d 175, 177 (Ill. App. Ct. 1998) (noting an adjudication from the Illinois Department of Employment Security's Board of Review is the only decision considered by the reviewing court). Procedurally speaking, a party seeking judicial review must bring the action against the Secretary of the Interior and not directly against the United States or subordinate bureaus of the department. *See Chournos v. United States*, 335 F.2d 918, 918 (10th Cir. 1964) (affirming a dismissal of a suit against the United States, Bureau of Land Management, Interior Department and a local subordinate of the Interior Department on the grounds of lack of jurisdiction).

161. *See Best v. Humboldt Placer Mining Co.*, 371 U.S. 334, 338 (1963) (holding federal courts, in some cases, must wait for an agency's adjudication procedures to be exhausted before evaluating the sufficiency of the petitioner's claim); *Burnham Chem. Co. v. Krug*, 81 F. Supp. 911, 913 (D.D.C. 1949), *aff'd sub nom. Burnham Chem. Co. v. Chapman*, 181 F.2d 288 (D.C. Cir. 1950) (holding the failure of an applicant to exhaust his administrative remedies served as a bar to injunctive relief in federal court). A limited exception to this exhaustion requirement is recognized in cases where the department has exceeded its authority or the administrative remedy would be inadequate relief. *See Ickes v. Va.-Colo. Dev. Corp.*, 295 U.S. 639, 647 (1935) (holding an action by the Interior Department that was beyond its statutory authority is subject to immediate judicial review); *Oil Shale Corp. v. Udall*, 235 F. Supp. 606, 607-08 (D. Colo. 1964) (holding in cases where agency relief would be an inadequate remedy, the petitioner could seek immediate judicial review).

162. *See Udall*, 235 F. Supp. at 608 (noting that injunctive relief is required to keep the Interior Department from enforcing its administrative determination).

163. *Winkler v. Andrus*, 494 F. Supp. 946, 947 (D. Wyo. 1980) (stating that a request for judicial review by a federal district court must be commenced within ninety days of the BLA decision).

164. *See, e.g.*, *Fabi Constr. Co. v. Sec'y of Labor*, 370 F.3d 29, 35 (D.C. Cir. 2004) (upholding the findings of the Occupational Safety and Health Review Commission on eight separate points). For example, in *BedRoc Ltd. v. United States*, the mining company's legal battle lasted twelve years and involved going before the Bureau of Land Management twice, the Board of Land Appeals, a federal district court, the Ninth Circuit Court of Appeals, and ultimately the United States Supreme Court. *BedRoc Ltd. v. United States*, 124 S. Ct. 1587, 1591-92 (2004).

interpretation of statutes plays an especially important role in ultimately deciding whether a substance is or is not reserved to the government.<sup>165</sup> Thus, in order to fully understand the *BedRoc Ltd.* decision, one must first understand how courts interpret statutes.<sup>166</sup> As the Supreme Court has consistently recognized, when Congress puts language in a statute, it says what it means and means what it says.<sup>167</sup> The Court will generally not entertain an argument that the statute was improperly drafted when it is asked to interpret a statute.<sup>168</sup> Thus, when the Court finds an unambiguous statutory text, judicial inquiry begins and ends with the language used.<sup>169</sup> Courts may not presume that a legislature did not know what it was doing when it used particular language.<sup>170</sup> This rule is similar to the parol evidence rule in contract law, which states that when a contract is unambiguous and meant to be a written elaboration of an agreement, no extrinsic evidence may be considered and the language of the text is all that is consulted.<sup>171</sup>

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165. Richard Yuen, Casenote, *BedRoc Ltd. v. United States: Deciding How Courts Interpret Statutes When There are Ambiguous Terms*, 8 GREAT PLAINS NAT. RESOURCES J. 89 (2003).

166. *See id.* at 93–95 (discussing the method in which the Ninth Circuit interpreted the Pittman Act and the SRHA).

167. *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) (citing *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992)). *See, e.g., Lamie v. U.S. Trustee*, 540 U.S. 526, 536 (2004) (interpreting an attorney's fee provision in the bankruptcy code); *Hartford Underwriters Ins. Co.*, 530 U.S. at 6 (also interpreting the bankruptcy code); *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999) (interpreting ERISA). In fact, the Court has called this principle the pre-eminent canon of statutory interpretation. *Perrin v. United States*, 444 U.S. 37, 42 (1979).

168. *See, e.g., Inhabitants of the Twp. of Montclair, County of Essex v. Ramsdell*, 107 U.S. 147, 152 (1883) (holding that it is the Court's duty to give effect to each word of a statute, assuming the legislature is aware of the words it used).

169. *See, e.g., Lamie*, 124 S. Ct. at 1029 (setting forth its methodology for interpreting statutory bankruptcy protections); *Barnhart v. Sigmon Coal*, 534 U.S. 438, 450 (2002) (requiring courts to first determine whether a statute is ambiguous before attempting any other method of analysis).

170. *Montclair*, 107 U.S. at 152.

171. *See, e.g., Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 284 (1990) (noting most states forbid oral testimony to the varying terms in a contract); *Petereit v. S.B. Thomas, Inc.*, 63 F.3d 1169, 1177 (2d Cir. 1995) (referring to the parol evidence rule as a rule of substantive contract law); *Jeanes v. Henderson*, 703 F.2d 855, 861 (5th Cir. 1983) (recognizing the existence of the parol evidence rule under Texas law); *Comm'r v. Danielson*, 378 F.2d 771, 779 (3d Cir. 1967) (confirming the parol evidence rule as a rule of substantive law); *Globe Motors, Inc. v. Studebaker-Packard Corp.*, 328 F.2d 645, 649 (3d Cir. 1965) (noting that the parol evidence rule forbids oral modification of a contract under Pennsylvania law); ARTHUR CORBIN, 6-26 CORBIN ON CONTRACTS § 573 (Interim Ed. 2002) (defining the parol evidence rule as a rule of contract as opposed to a rule of evidence); WILLIAM J. BOWE ET AL., PAGE ON WILLS §§ 19.3–.5 (2003) (exploring the effect of the writing requirement on oral testimony for wills); SAMUEL WILLISTON & RICHARD LORD, A TREATISE ON THE LAW OF CONTRACTS § 33:1 (4th ed. 1999) (discussing the parol evidence rule as a rule of substantive contract law). Hence, the parol evidence rule has become universally accepted as a rule of substantive contract law.

In making a determination of ambiguity, courts must ask the ambiguity question not as a general matter but rather whether the statute specifically conveys an ambiguous meaning “with regard to the particular dispute” before the court.<sup>172</sup> If the court finds ambiguity, then it may look to extrinsic “statutory” evidence in order to determine congressional intent when the statute was enacted.<sup>173</sup> This extrinsic evidence can take the form of committee reports, floor statements and even amendments considered but not passed.<sup>174</sup> Courts must also defer to administrative agency interpretations when a statute is silent or ambiguous unless that determination is arbitrary or capricious.<sup>175</sup>

When a statute contains clear language, the court will interpret the words used by Congress as meaning their ordinary, contemporary and common meaning at the time Congress enacted the statute unless Congress specifically defines the words to mean something else.<sup>176</sup> Furthermore, when Congress uses words or phrases with a specific common law meaning, the courts will then presume Congress meant to incorporate the common law meaning into the statute.<sup>177</sup> Judges adopt different philosophies in using extrinsic evidence to interpret statutes within this framework.<sup>178</sup> Judges who use little extrinsic evidence are said to exercise “judicial restraint”<sup>179</sup> whereas judges who find extrinsic evidence to be significant and persuasive are said to exercise “judicial

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172. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340–41 (1997) (stating that in making the determination the court will consider “the language itself, the specific context . . . and the broader context of the statute as a whole”).

173. *See, e.g., Lamie*, 540 U.S. at 539 (declining to resort to an analysis of the legislative history of the bankruptcy statutes on the grounds the language used by Congress was clear, definite, and unambiguous).

174. *See Intel Corp. v. Advanced Micro Devices*, 124 S. Ct. 2466, 2774 (2004) (using Senate Reports as evidence of congressional intent); *Conroy v. Aniskoff*, 507 U.S. 511, 517 n.11 (1993) (using floor statements as evidence of congressional intent); *Fed. Election Comm’n v. Nat’l Right to Work Comm.*, 459 U.S. 197, 204 (1982) (using amendments considered but not passed as evidence of what Congress did not intend).

175. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843–46 (1984) (requiring the courts to use EPA determinations on the definition of the phrase “stationary source” found within the federal Clear Air Act before turning to the legislative history of the law).

176. *Perrin v. United States*, 444 U.S. 37, 42 (1979) (describing the ordinary, contemporary, common meaning as a “fundamental canon of statutory construction”).

177. *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323 (1992) (adopting the “common-law test” when a statutory definition is circular and explains nothing, and interpreting the term as defined in a specific area of law “would thwart congressional design or lead to absurd results”).

178. *See supra* notes 171–77 (citing to cases with various uses of extrinsic evidence).

179. BLACK’S LAW DICTIONARY 864 (8th ed. 2004) (defining judicial restraint as a “philosophy of judicial decision-making whereby judges avoid indulging their personal beliefs about the public good and instead try merely to interpret the law as legislated and according to precedent”).

activism.”<sup>180</sup> Throughout the twentieth century both approaches have been adopted by courts in interpreting the mining laws.<sup>181</sup> However, a distinct trend has started in the Court’s 2003-2004 term to construe statutes narrowly.<sup>182</sup>

### G. Judicial Interpretation of Mineral Rights Reservation

This Section will take a chronological look at the important cases leading up to the *BedRoc Ltd.* decision.<sup>183</sup> First, it will explore the administrative law determinations at the time the Pittman Act and the SRHA were being considered, in order to better appreciate the circumstances that Congress considered when enacting these laws.<sup>184</sup> After looking at these decisions, this Section will review the judicial interpretation of the mining laws in effect at the time the Pittman Act was passed by discussing the Supreme Court decision, *Northern Pacific Railway v. Soderberg*.<sup>185</sup> Then, it will discuss the 1983 Supreme Court case *Watt v. Western Nuclear* that serves as the seminal case on mineral reservations under the early twentieth century land grant statutes.<sup>186</sup> Next, this Section will discuss the 1999 Supreme Court decision in *Amoco v. Southern Ute Indian Tribe* as an illustration of how the Supreme Court dealt with interpreting these land grant statutes.<sup>187</sup> Finally, this Section will conclude with a Tenth Circuit decision applying the *Western Nuclear* rationale to determine the classification of geothermal steam under the SRHA mineral reservation provision.<sup>188</sup>

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180. BLACK’S LAW DICTIONARY 862 (8th ed. 2004) (defining judicial activism as a “philosophy of a judicial decision-making whereby judges allow their personal views about public policy, among other factors, to guide their decisions”).

181. Compare *Watt v. W. Nuclear*, 462 U.S. 36, 55–56 (1983) (applying a textual analysis to the SRHA) with *Pa. Coal v. Sanderson*, 6 A. 453, 459 (Pa. 1886) (using the impact of mining on the “great community” to rule in favor of the mining industry).

182. *Engine Mfrs. Ass’n v. S. Coast Air Quality Mgmt. Dist.*, 124 S. Ct. 1756, 1761–62 (2004) (distinguishing “standard” from “methods of standard enforcement” in the context of the Clean Air Act); *Household Credit Servs. v. Pfennig*, 124 S. Ct. 1741, 1748–49 (2004) (interpreting the phrase “finance charge” in the Truth in Lending Act); *Lamie v. U.S. Trustee*, 124 S. Ct. 1023, 1032 (2004) (construing the term “attorney” for purposes of the bankruptcy code).

183. See *infra* notes 184–256 and accompanying text (discussing the important case law leading up to *BedRoc*).

184. See *infra* Part II.G.1 (discussing the *Zimmerman v. Brunson*, 39 Pub. Lands Dec. 310, 313 (D.O.I. 1910) and *Layman v. Ellis*, 52 Pub. Lands Dec. 714, 721 (D.O.I. 1929) decisions made by the Interior Department).

185. See *infra* Part II.G.2 (discussing *N. Pac. Ry. Co. v. Soderberg*, 188 U.S. 526 (1903)).

186. See *infra* Part II.G.3 (discussing *Watt v. W. Nuclear*, 426 U.S. 36 (1983)).

187. See *infra* Part II.G.4 (discussing *Amoco Prod. Co. v. S. Ute Indian Tribe*, 526 U.S. 865 (1999)).

188. See *infra* Part II.G.5 (discussing *Rosette v. United States*, 277 F.3d 1222 (10th Cir.

### 1. Early Administrative Law Determinations

In 1910, the Interior Department issued the landmark decision *Zimmerman v. Brunson* and ruled that the mineral laws and the homestead reservation provisions do not cover gravel and sand that is suitable for mixing with cement for concrete construction.<sup>189</sup> Importantly, the Interior Department, in deciding *Zimmerman*, treated the analysis of what constitutes a mineral for the purposes of the mining laws and what constitutes a mineral for the purposes of homestead laws as interchangeable.<sup>190</sup> Thus, whatever is considered a mineral under the General Mining Act is also a mineral under the homestead acts.<sup>191</sup> The Department decided that for the purposes of these statutes, the phrase “mineral” only included substances that had intrinsic value, as defined by standard American authorities.<sup>192</sup> According to *Zimmerman*, substances like sand and gravel will be treated as a “valuable mineral” worthy of coverage under the mining and homestead laws, only when some extrinsic condition is present that gives the mineral its value, such as proximity to a town.<sup>193</sup> Also of significance, the Secretary found that references to “gravel” in the mineral laws were not all-encompassing terms; therefore, the court reasoned that the statutes’ reservation of

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2002), *cert. denied*, 537 U.S. 878 (2002)).

189. *Zimmerman v. Brunson*, 39 Pub. Lands Dec. 310, 313 (D.O.I. 1910).

190. At the time this determination was made, land was still dispersed by the General Land Office. *See supra* note 68 and accompanying text (outlining the origins of the General Land Office). The Bureau of Land Management and the Bureau of Land Appeals did not exist yet. *See supra* notes 75–76 (outlining the origins of the Bureau of Land Management). Instead, the appeals were heard at the direction of the Secretary of the Interior. *See, e.g.*, *Ostlund v. N. Pac. R.R. Co.*, 11 Pub. Lands Dec. 502, 502 (D.O.I. 1890) (indicating the Secretary ordered an appeal rehearing by the register and receiver to determine whether the settlement of Ostlund in 1871 was made within the “limits of the Indian country”). *See also Zimmerman*, 39 Pub. Lands Dec. at 313 (concluding that land was not mineral in character solely because the land’s gravel and sand was used for building purposes).

191. *Zimmerman*, 39 Pub. Lands Dec. at 313.

192. *Id.* at 312. Here, the Interior Department cited a specific test laid out in *Pac. Coast Marble Co. v. N. Pac. R.R. Co.*, 25 Pub. Lands Dec. 233 (D.O.I. 1897). *Id.* at 312. Under the *Pacific Coast* test:

Whatever is recognized as a mineral by the standard authorities, whether of metallic or other substances, when found in the public lands, in quantity and quality sufficient to render the land more valuable on account thereof than for agricultural purposes, must be treated as coming within the purview of the mining laws.

*Pac. Coast*, 25 Pub. Lands Dec. at 233.

193. *Zimmerman*, 39 Pub. Lands Dec. at 313. To make this determination, the Secretary cited a number of its previous decisions. *See, e.g.*, *McGlenn v. Wienbroer*, 15 Pub. Lands Dec. 370, 374 (D.O.I. 1892) (holding that stone valuable only for building purposes is not covered by the mining laws); *Dunluce Placer Mine*, 6 Pub. Lands Dec. 761, 761 (D.O.I. 1887) (holding deposits of brick clay of insufficient quality for other purposes are not a “mineral” covered by the mining laws), *cited with approval in King v. Bradford*, 31 Pub. Lands Dec. 108, 109–10 (1901).

“gravel” were limited only to gravel bearing gold or other metallic substances.<sup>194</sup> Importantly, this interpretation remained the position of the Interior Department when the SRHA and the Pittman Act were enacted in the early twentieth century.<sup>195</sup>

After SRHA and the Pittman Act were enacted and nineteen years after the *Zimmerman* decision, the Interior Department decided *Layman v. Ellis* and changed its position on common sand and gravel.<sup>196</sup> In this case, the General Land Office determined that a parcel of land was valuable for its gravel deposits, but the *Zimmerman* decision required the Office to conclude the land was mineral in character and thus not subject to entry under the General Mining Act.<sup>197</sup> The Office then asked the Secretary to reconsider its position, which it subsequently did in a written opinion.<sup>198</sup> In choosing to reverse *Zimmerman*, the Secretary used the standard American authorities’ approach previously used in *Zimmerman* and cited a number of geological surveys discussing the economic value of gravel deposits and their classification of gravel as a valuable mineral.<sup>199</sup> However, unlike the *Zimmerman* decision, the Secretary in *Layman* adopted the three part Lindley test to determine whether a substance is a mineral.<sup>200</sup>

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194. *Zimmerman*, 39 Pub. Lands Dec. at 313. Interestingly, the Secretary did not offer any authority for this interpretation. *Id.*

195. See *BedRoc Ltd. v. United States*, 124 S. Ct. 1587, 1594–95 (2004) (“It is beyond dispute that when the Pittman Act became law in 1919, common sand and gravel could not constitute a locatable ‘valuable mineral deposit’ under the General Mining Act. The Secretary of the Interior had held as much in *Zimmerman v. Brunson*.”).

196. *Layman v. Ellis*, 52 Pub. Lands Dec. 714, 721 (D.O.I. 1929).

197. *Id.* at 715.

198. *Id.* at 715–16. In this case, Joseph Ellis and Gertrude and Dallas Layman were neighbors occupying two subdivisions of land homesteaded to Mr. Ellis. *Id.* Gertrude and Dallas Layman entered into an invalid contract where they would pay Mr. Ellis 15 cents per ton or 20 cents per cubic yard of all the gravel hauled away, the proceeds of which would be used to make improvements upon the land. *Id.* at 716–17.

199. *Id.* at 718–19. The Secretary in *Layman* makes specific reference to the following facts: (1) in 1909, 23 million tons of gravel were sold and used for a combined value of \$5.7 million, (2) by 1927, over 100 million tons were sold for \$51.2 million, and (3) the United States Geological Survey has uniformly classified sand and gravel as not only a mineral resource but also a commercially useful one. *Id.*

200. *Id.* at 719–20. As previously discussed, the Secretary chose a test outlined by Charles Lindley that would classify a substance as a mineral if it is (1) recognized as mineral, by its chemical composition, by the standard authorities, (2) classified as a mineral product in trade or commerce, and (3) possesses economic value for use in trade, manufacturing, or the arts. *Id.* at 719. See also *supra* notes 107–08 and accompanying text (discussing the Interior Department’s adoption of the Lindley test); CURTIS LINDLEY, *supra* note 108, § 98 (outlining a method for determining the mineral character of land).

## 2. Northern Pacific Railway Co. v. Soderberg

In 1903, the Supreme Court dealt with resolving the question of whether land containing a harvestable quantity of gravel makes the land “mineral” in character.<sup>201</sup> Through an 1864 Act of Congress,<sup>202</sup> Congress incorporated the Northern Pacific Railway Company and vested it with the power to build a railroad from Lake Superior to Puget Sound with a branch line down the Columbia River to Portland.<sup>203</sup> To accomplish this, Congress allowed the railroad to choose from up to twenty alternative sections of public non-mineral land per mile on which the rail line would be constructed.<sup>204</sup> Litigation arose as to the classification of one of these sections, which Soderberg argued was unavailable for use on the project because it was mineral in character, and hence excluded under the 1864 Act.<sup>205</sup>

In evaluating this question, the Court first turned to two sections of the Act: Section 3 containing the actual mineral reservation, and Section 2 allowing the railroad to use materials from the adjacent lands in the construction of railway.<sup>206</sup> It noted that these sections were designed to ease the construction and operation of the railroad and not to be substantive declarations of mineral reservations.<sup>207</sup> The Court then turned to its analysis of what is or is not a mineral for the purpose of classifying the land as “mineral” or “agricultural” in character and indicated that given the broad range of the use of the phrase “mineral” in the law, the Court must look at legislative intent as to the definition and not consider how the scientific community would classify a substance.<sup>208</sup> The Court then turned to an evaluation of additional materials including public land legislation,<sup>209</sup> administrative agency

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201. N. Pac. Ry. Co. v. Soderberg, 188 U.S. 526 (1903).

202. 13 Stat. 365 (1864). Section 3 of the Act states: “*Provided further*, That all mineral lands be, and the same are hereby, excluded from the operations of this act. . . . *And provided, further*, That the word ‘mineral,’ when it occurs in this act, shall not be held to include iron or coal.” *Id.*

203. *Soderberg*, 188 U.S. at 526.

204. *Id.* at 527.

205. *Id.* Soderberg entered the land in 1898 and began to quarry, remove, and dispose of the granite under a mineral location, contending that such land is excepted from the general land grant to the railroad under the 1864 Act. *Id.* The railroad brought suit to enjoin the extraction. *Id.*

206. *Id.* at 529. Section 2 of the Act states: “the right, power, and authority is hereby given to said corporation to take from the public lands, adjacent to the line of said road, material of earth, stone, timber, and so forth, for the construction thereof.” 13 Stat. 365 (1864).

207. *Soderberg*, 188 U.S. at 529–30.

208. *Id.* at 530. The *Soderberg* court indicated that given the wide use of the phrase “mineral” in the law, it has become “absurd” to use scientific principles for making the determination. *Id.*

209. 17 Stat. 91 (1872) (providing “mining claims upon veins or lodes of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper or other valuable deposits herein located”

determinations<sup>210</sup> and decisions of American state courts<sup>211</sup> and British courts<sup>212</sup> issued contemporaneously with the 1864 statute in order to determine what Congress intended by the Northern Pacific grant in the 1864 Act.<sup>213</sup> The Court indicated these sources strongly suggested a broad definition of “minerals” and concluded that the intent of the 1864 Act was no different.<sup>214</sup> Hence, it ruled in favor of Soderberg in holding the gravel deposits in the land Soderberg entered did make the land mineral in character and hence, not subject to the railroad grant.<sup>215</sup>

### 3. Watt v. Western Nuclear

In 1983, the Supreme Court, for the first time, interpreted the SRHA mineral reservation provision and found that it included all types of gravel.<sup>216</sup> In *Western Nuclear*, the Bureau of Land Management issued a notice of trespass to Western Nuclear, a firm specializing in uranium mining that held land patented under the SRHA in 1926.<sup>217</sup> In its

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shall be subject to coverage under the Act); 16 Stat. 217 (1870) (outlining placer mine regulation); 14 Stat. 251 (1866) (declaring that all public lands shall be free and open to exploration and occupation subject to the operation of the law and subject to the customs of the mining industry).

210. *Soderberg*, 188 U.S. at 534 (noting that Land Department rulings support the assertion that all lands “chiefly valuable for other than agricultural purposes” are mineral in nature).

211. *Freezer v. Sweeney*, 21 P. 20, 21 (Mont. 1889) (concluding that the owner of a placer claim was entitled to all the minerals contained within the registered claim); *Armstrong v. Lake Champlain Granite Co.*, 42 N.E. 185, 189 (N.Y. 1895) (“We are of the opinion, therefore, that the words ‘minerals and ores,’ in the grant of 1871, standing alone, would include the granite on the premises.”); *Gill v. Weston*, 1 A. 921, 923 (Pa. 1885) (concluding that mining lands included those bearing petroleum because petroleum was a “mineral substance obtained from the earth by a process of mining”); *Funk v. Haldeman*, 53 Pa. 229 (1866) (“Throughout this opinion I have treated oil as a mineral.”); *Johnston v. Harrington*, 31 P. 316, 318 (Wash. 1892) (stating “[t]hat stone is a mineral will hardly be disputed”).

212. *Rosse v. Wainman*, 14 M. & W. 859, 872 (1845) (“Beds of stone, which may be dug by winning or quarrying, are therefore properly minerals.”); *Micklethwait v. Winter*, 6 L.R. Exch. 644, 655 (1851) (“[W]hatever stone is got from quarries, and separated from other stone, is minerals in the ordinary sense of the word.”); *Midland Ry. Co. v. Checkley*, 4 L.R.Eq. 19 (1867) (holding that stone is “clearly” a mineral).

213. *Soderberg*, 188 U.S. at 530–37.

214. *Id.* at 536. Specifically, the court stated:

It is sufficient to say that we see nothing in [the 1864 Act], or in the legislation of Congress up to the time this road was definitely located, which can be construed as putting a different definition upon these words from that generally accepted by the text writers upon the subject.

*Id.*

215. *Id.* at 536–37.

216. *Watt v. W. Nuclear*, 462 U.S. 36, 42 n.4 (1983); see also Edward A. Amestoy, *Is Gravel a Mineral? The Impact of Western Nuclear on Lands Patented Under the Stock Raising Homestead Act*, 5 PUB. LAND L. REV. 171 (1984) (outlining the method by which the Supreme Court decided *Western Nuclear*).

217. *W. Nuclear*, 462 U.S. at 39–40. In the six months prior to receiving the notice of trespass,

complaint, the BLM stated Western Nuclear's removal of gravel trespassed against the government's mineral rights reserved in the SRHA patent.<sup>218</sup> The Interior Department's Board of Land Appeals affirmed the determination of the BLM and awarded damages.<sup>219</sup> Western Nuclear then brought suit against the Secretary of the Interior challenging the Board's determination pursuant to the Administrative Procedure Act.<sup>220</sup> The district court concluded the government position was supported by the law because both legislative history and court decisions have required narrow construction for the public land grant statutes.<sup>221</sup> The Tenth Circuit reversed the decision relying heavily on *Zimmerman's* determination that sand and gravel did not constitute minerals when Congress enacted the SRHA.<sup>222</sup>

The Supreme Court granted certiorari, citing the importance of the case to the administration of the more than 33 million acres of land patented under the SRHA.<sup>223</sup> In a 5-4 decision, authored by Justice Marshall, the Court reversed the Tenth Circuit's determination and found that sand and gravel did constitute minerals for the purposes of the SRHA.<sup>224</sup> The Court noted that traditional definitions of the term "mineral" tend to be exclusive, defining what a mineral is not, as opposed to defining what a mineral is.<sup>225</sup> The Court also noted that the purpose of the SRHA was to facilitate concurrent development by bifurcating surface and mineral estates.<sup>226</sup> This finding provided a rationale for ruling in favor of the government's contention that sand and gravel did constitute the type of minerals whose interest was reserved to the government.<sup>227</sup> The Court then conducted an extensive

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the firm had extracted 43,000 cubic yards of gravel, used primarily for paving and pouring streets and sidewalks in its company town. *Id.* at 39.

218. *Id.* at 40. Interestingly, Western Nuclear, prior to obtaining the land from its predecessor in interest, obtained a permit from the Wyoming Department of Environmental Quality expressly allowing it to extract gravel from the land. *Id.* at 39.

219. *W. Nuclear, Inc.*, 85 Interior Dec. 129, 139 (D.O.I. 1978).

220. *W. Nuclear v. Andrus*, 475 F. Supp. 654, 656 (D. Wyo. 1979).

221. *Id.* at 663.

222. *W. Nuclear v. Andrus*, 664 F.2d 234, 240 (10th Cir. 1981); *see also W. Nuclear*, 462 U.S. at 42 (providing the procedural history of the *Western Nuclear* decision). The court used *Zimmerman* and not *Layman* because the *Zimmerman* holding was in effect at the time the SRHA was passed. *W. Nuclear*, 664 F.2d at 240.

223. *W. Nuclear*, 462 U.S. at 42; *see* 456 U.S. 988 (1982) (granting certiorari).

224. *W. Nuclear*, 462 U.S. at 60.

225. *Id.* at 43. Here, the court noted *United States v. Toole*, 224 F. Supp. 440 (D. Mont. 1963). *Id.* The *Toole* decision held that deposits of peat and peat moss were not minerals for the purposes of the general mining laws. *Id.* at 43-44.

226. *Id.* at 47.

227. *Id.*

survey of the Roosevelt land grant reforms.<sup>228</sup> It cited a long list of attempts by Congress and the Interior Department to preserve the government's interest in mineral rights as a vehicle to promote mineral exploration in a more honest and fair-handed manner.<sup>229</sup> The Court rejected a strict "commercially marketable" test and instead adopted a four-pronged definition for what constitutes a "mineral" for the purposes of the SRHA.<sup>230</sup> The Court found the SRHA reserved substances that (1) are inorganic, (2) can be removed from the soil, (3) used for commercial purposes, and (4) were not intended to be included in the surface estate.<sup>231</sup> Based on this test, the Court found that sand and gravel did constitute minerals reserved under the SRHA.<sup>232</sup> However, the Court never discussed the applicability of their holding to other land grant statutes.<sup>233</sup>

#### 4. Amoco Production Company v. Southern Ute Indian Tribe

In 1999, the Supreme Court evaluated whether coal-bed methane gas (CBM) is a substance reserved in a mineral reservation provision of two other Roosevelt land grant reform acts, the Coal Lands Acts of 1909 and 1910.<sup>234</sup> In *Amoco*, the government issued a series of surface land patents to various settlers but gave its coal reservation to the Southern

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228. *Id.* at 47–56. *See also supra* Part II.B (discussing the development of mineral rights and reservations in the United States).

229. *W. Nuclear*, 462 U.S. at 47–56. This section of the decision makes reference to a series of congressional committee reports and congressional testimony by members of the Interior Department. *E.g.*, H.R. REP. NO. 64-35, at 5, 10 (1916) (showing a need for mineral reservation provisions in the SRHA); 41 CONG. REC. 2615 (1907) (referencing a statement by President Theodore Roosevelt stating that the prevalence of land fraud and the need to dispose coal "under conditions which would inure to the benefit of the public as a whole"); H.R. DOC. NO. 60-5, at 15 (1907) (quoting a statement by the Interior Secretary advocating for the bifurcation of land interests as the best possible way to insure the public against land fraud). However, the court did note that the efforts of the Interior Department and Congress went on without either knowing fully what the other side was doing. *W. Nuclear*, 462 U.S. at 45–47.

230. *W. Nuclear*, 462 U.S. at 53.

231. *Id.*

232. *Id.* at 60.

233. *See* Petition for Certiorari at i, *BedRoc Ltd. v. United States*, 124 S. Ct. 1587 (2004) (No. 02-1593) (requesting clarification of the *Western Nuclear* rule). In its petition for certiorari, *BedRoc*, as one of its questions presented, asked whether the *Western Nuclear* decision called for a per se rule that all sand and gravel were reserved on land patented by the early twentieth century. *Id.*

234. *Amoco Prod. Co. v. S. Ute Indian Tribe*, 526 U.S. 865 (1999). *See also* Coal Lands Act of 1909, 35 Stat. 844 (1909) (codified as amended at 30 U.S.C. § 81 (2000 & West Supp. 2005)) (authorizing the Interior Department to issue land patents to homesteaders for agricultural use of lands that reserved the government's interest in coal); Coal Lands Act of 1910, 36 Stat. 583 (1910) (codified as amended at 30 U.S.C. §§ 83–85 (2000 & West Supp. 2005)) (expanding the 1909 Act to additional lands).

Ute Indian Tribe.<sup>235</sup> A dispute arose between the Indian tribe and the oil company, who, in reliance upon a 1981 determination of the Interior Department that CBM gas was not reserved by the Coal Lands Acts, bought up these surface patents and began extracting the CBM gas at considerable profits.<sup>236</sup> The dispute reached the Supreme Court, which ruled CBM gas was not in the contemplation of Congress when it reserved the government's interest in "coal" and, hence, was not the property of the Indian tribe.<sup>237</sup>

In making this determination, the Court noted that, at the time Congress enacted the Coal Lands Act, CBM gas was considered such a dangerous by-product of coal mining that Congress had already enacted coal mining safety regulations<sup>238</sup> aimed at curbing CBM explosions.<sup>239</sup> While the Court noted some attempts to harvest CBM gas for commercial use prior to the Coal Lands Acts,<sup>240</sup> it determined the relatively small industry fell beyond the "contemplation of Congress" when it enacted the Coal Lands Acts.<sup>241</sup> According to the majority of the Court, Congress only began to recognize the commercial viability of CBM gas during the OPEC oil embargo of the 1970s.<sup>242</sup> In response to the embargo, the government issued substantial grants and tax credits as a way of encouraging its production.<sup>243</sup> Significantly, the Court's decision established that substances reserved by the early 1900s land grant statutes are fixed and, thus, not subject to revisions based on

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235. *Amoco*, 526 U.S. at 870.

236. *Id.* at 871 (citing Ownership of and Right to Extract Coalbed Gas in Federal Coal Deposits, 88 Interior Dec. 538, 539 (D.O.I. 1979)). Interestingly, the Interior Department withdrew the 1981 determination and endorsed the position of the tribe in a one-line order entered the day the government's response to Amoco's petition for certiorari was due. *Amoco*, 526 U.S. at 872.

237. *Id.* at 880.

238. *See, e.g.*, Territorial Mine Inspection Act, § 6, 26 Stat. 1105 (1891) (providing for the appointment of mine inspectors to conduct inspections and report on safety conditions).

239. *Amoco*, 526 U.S. at 875-76.

240. *See, e.g.*, U.S. Steel v. Hoge, 468 A.2d 1380, 1383 (Pa. 1983) (noting that as early as the 1900s, wells were drilled in Pennsylvania for the purposes of extracting CBM); Edward A. Craig and Marlee S. Myers, *Ownership of Methane Gas in Coalbeds*, 24 ROCKY MTN. MIN. L. INST. 767, 768-79 (noting that as early as 1746, methane was being used as a heating source in Great Britain).

241. *Amoco*, 526 U.S. at 877.

242. *Id.* at 870.

243. *Id.* at 870-71 (citing 26 U.S.C. § 29 (West 2000 & Supp. 2005) (providing tax savings for those engaged in the production of CBM gas); 42 U.S.C. §§ 5901-15 (West 2000) (authorizing the Secretary of the Interior to issue grants promoting the production of CBM gas); Maurice Duel & Ann G. Kimm, *Coal Beds: A Source of Natural Gas*, OIL AND GAS J., June 16, 1975, at 48 (advocating for the commercial production of CBM gas as a response to the OPEC embargo)).

advances of science.<sup>244</sup> In other words, what was or was not a mineral in 1910 will or will not be a mineral in 2010; a substance cannot become a mineral through scientific realization.<sup>245</sup> Hence, these statutes only cover “minerals” specifically in the contemplation of Congress in the early 1900s.<sup>246</sup>

### 5. Rosette v. United States

In 2002, the Tenth Circuit in *Rosette v. United States* construed the SRHA’s mineral reservation provision to include geothermal steam.<sup>247</sup> This was the first time an appellate court addressed the mineral reservation provision of the SRHA since the *Western Nuclear* decision.<sup>248</sup> It used the *Western Nuclear* four-part test to determine if a substance such as geothermal steam had been reserved to the government under the SRHA.<sup>249</sup> Under this test, a substance would be classified as mineral if it is (1) mineral in character, *i.e.*, inorganic, (2) removable from the soil, (3) usable for commercial purposes, and (4) of such a character that there was no reason to suppose that Congress intended it to be included in the surface estate when it enacted the SRHA.<sup>250</sup> The parties stipulated geothermal steam satisfied parts (2) and (3) of the test but disputed parts (1) and (4).<sup>251</sup>

Rather than following the traditional deference given to an administrative agency applying the same four-part test, the *Rosette* court evaluated these areas independently.<sup>252</sup> In evaluating the first element,

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244. *Amoco*, 526 U.S. at 875–79. The *Amoco* court never mentioned the economic and scientific advances that were central in the *Layman* court’s determination. *Id.* Instead, it focused squarely on the meaning of the word “coal” in 1909 and 1910. *Id.*

245. *Id.* at 880.

246. *Id.*

247. *Rosette v. United States*, 277 F.3d 1222, 1224 (10th Cir.), *cert. denied*, 537 U.S. 878 (2002); *see also* McNutt, *supra* note 77, at 44 (analyzing the *Rosette* decision reaffirming the precedent that geothermal resources are reserved minerals).

248. *Rosette*, 277 F.3d at 1227. The court did find one instance where the geothermal steam question was reached by an appellate court prior to *Western Nuclear*. *Id.* In *United States v. Union Oil Co. of California*, the court construed the SRHA to include geothermal steam. 549 F.2d 1271, 1280 (9th Cir. 1977). In rendering its decision the court found the SRHA’s mineral reservation provision was drafted with “novel breadth.” *Id.* at 1278. *See supra* Part II.G.3 (discussing the *Western Nuclear* decision).

249. *Rosette*, 277 F.3d at 1228.

250. *Id.*

251. *See id.* at 1228–29 (evaluating the first and fourth element, but as to the second and third element, the court stated: “The parties do not dispute that geothermal resources as a whole are removable from the soil and usable for commercial purposes. Therefore, these two parts of the *Western Nuclear* test are satisfied.”).

252. *Id.* at 1230 (“While it is true that great deference is given to the interpretation of a statute by the agency charged with its administration, this respect is particularly due where the

the court found that the *Western Nuclear* decision superseded a prior Supreme Court determination that water is not a “valuable mineral deposit” under the General Mining Act.<sup>253</sup> In evaluating the fourth element, the court noted it must determine not what the government intended to reserve in the mineral estate, but rather what it intended to include in the surface estate.<sup>254</sup> Under this evaluation, the court concluded that it was highly unlikely that Congress intended that homesteaders taking a patent to the surface area could develop geothermal resources for agricultural purposes.<sup>255</sup> Thus, it concluded that geothermal steam is in fact a “mineral” reserved to the government.<sup>256</sup>

### III. DISCUSSION

This Part will focus specifically on the *BedRoc Ltd.* dispute. It will begin by explaining in detail the facts behind the litigation.<sup>257</sup> Then it will discuss the Interior Department dispute,<sup>258</sup> before moving on to the litigation in the Federal District Court<sup>259</sup> and the Ninth Circuit Court of Appeals.<sup>260</sup> Finally, it will discuss, in detail, the Supreme Court’s decision,<sup>261</sup> including the concurring<sup>262</sup> and dissenting opinions.<sup>263</sup>

#### A. Facts of the Case

In 1940, Newton and Mabel Butler obtained a Pittman Act land patent for 560 acres of land in Lincoln County, Nevada, sixty-five miles north of Las Vegas.<sup>264</sup> Prior to receiving the patent, the Director of the United States Geological Survey conducted an inspection of the land

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administrative practice is a contemporaneous construction of the statute, which is not the case here.”).

253. *Id.* at 1228 (distinguishing *Andrus v. Charlestone Stone Products*, 436 U.S. 604 (1978) from *Western Nuclear*).

254. *Rosette*, 277 F.3d at 1229. In drawing this distinction, the court noted that the “established rule is that land grants are construed favorably to the government and nothing passes except that which is conveyed in clear language, resolving all doubts in favor of the government.” *Id.* (citing *Watt v. W. Nuclear*, 462 U.S. 36, 59 (1983)).

255. *Rosette*, 277 F.3d at 1229.

256. *Id.* at 1230.

257. *See infra* Part III.A (discussing the events leading up to the commencement of legal action).

258. *See infra* Part III.B (discussing the activities in the Interior Department).

259. *See infra* Part III.C (discussing the District Court action).

260. *See infra* Part III.D (discussing the Ninth Circuit decision).

261. *See infra* Part III.E.1 (discussing the plurality opinion authored by Justice Rehnquist).

262. *See infra* Part III.E.2 (discussing the concurrence authored by Justice Thomas).

263. *See infra* Part III.E.3 (discussing the dissent authored by Justice Stevens).

264. *BedRoc Ltd. v. United States*, 124 S. Ct. 1587, 1591 (2004).

and certified the land as non-mineral in nature and recommended its distribution pursuant to the Pittman Act.<sup>265</sup> As Section 8 of the Act requires, the patent explicitly contained a mineral reservation of “coal and other valuable minerals in the land.”<sup>266</sup> On February 24, 1993, Earl Williams acquired the patented land and soon thereafter began to extract the sand and gravel on the land.<sup>267</sup> On two separate occasions in the spring of 1993, the Interior Department’s Bureau of Land Management issued two notices of trespass for this extraction.<sup>268</sup> During the early stage of the proceedings, Earl Williams sold his interest in the land to BedRoc.<sup>269</sup> The Interior Department continued to assert its rights to the mineral deposits against BedRoc.<sup>270</sup> After some negotiations, however, the Department agreed to permit BedRoc to continue to remove these deposits if it would hold in escrow a sum of money for each cubic yard of sand or gravel removed that would be dispersed to the appropriate party pending resolution of the Interior Department’s trespassing claim.<sup>271</sup>

#### *B. Round 1: The Interior Department Makes Its Findings*

The Bureau of Land Management issued an unpublished decision on April 23, 1993, finding that Earl Williams had removed and sold federally owned minerals without the benefit of a mineral contract and was liable for future damages.<sup>272</sup> In reaching its decision, the BLM consulted the Supreme Court’s SRHA mineral determination in *Western Nuclear* and found that the Court’s holding constituted a per se rule for

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265. *BedRoc Ltd. v. United States*, 50 F. Supp. 2d 1001, 1003 (D. Nev. 1999), *aff’d*, 314 F.3d 1080 (9th Cir. 2002), *rev’d*, 124 S. Ct. 1587 (2004).

266. *Earl Williams*, 140 I.B.L.A. 295, 299 (1997). Section 8 of the patent states:

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.

*Id.*

267. *BedRoc Ltd.*, 50 F. Supp.2d at 1003.

268. *Id.* These notices were issued pursuant to 43 C.F.R. § 9239.0-7 (2005). *See supra* note 18 (quoting the full text of the regulation).

269. *BedRoc Ltd.*, 50 F. Supp.2d at 1004.

270. *Id.*

271. *Id.*

272. *See id.* at 1003–04 (outlining the procedural history of the case). Prior to the BLM’s adjudication, Mr. Williams sent a letter to the BLM stating “[t]his property is my own personal property and I do not feel that these are valuable minerals. Once we remove the over burdens [sic] and the fact that it is 70 miles from Las Vegas, it is not valuable to anyone.” *Earl Williams*, 140 I.B.L.A. 295, 297 (1997).

the SRHA and the Pittman Act as well.<sup>273</sup> Williams appealed the decision to the Interior Board of Land Appeals.<sup>274</sup> In his appeal, Williams advanced the argument that the *Western Nuclear* decision is not applicable to the Pittman Act because the statutes contain two separate reservation provisions,<sup>275</sup> that the land had been certified by the government as not containing valuable minerals,<sup>276</sup> and that the true test of whether a mineral deposit is owned by the Federal Government is whether the deposit was locatable under the 1872 General Mining Act.<sup>277</sup>

The Board of Land Appeals rejected this argument and affirmed the decision of the BLM.<sup>278</sup> Administrative Law Judge R.W. Mullen's decision noted that reliance on a single piece of analogous legislation is of less value than an analogy to several statutes or a general course of legislation in a particular period.<sup>279</sup> Judge Mullen explored the legislative history of the Pittman Act and noted that the crafting of the mineral reservation provision occurred only after a careful compromise.<sup>280</sup> Thus, after reviewing the legislative history, the Board concluded that there was no evidence to show Congress meant to convey sand and gravel to the surface estate.<sup>281</sup> The Board cited a series of Supreme Court cases suggesting that any ambiguity in reservation provisions must be resolved in favor of the government and noted if the government wished to convey an interest, it must have done so with clear language.<sup>282</sup>

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273. *BedRoc Ltd.*, 50 F. Supp.2d at 1004.

274. *Earl Williams*, 140 I.B.L.A. at 296.

275. *Id.* at 300. See also *supra* Part II.G.3 (discussing *Western Nuclear*); Part II.B (discussing the differences between the Pittman Act and the SRHA).

276. *Earl Williams*, 140 I.B.L.A. at 300–01.

277. *Id.* at 301.

278. *Id.* at 315.

279. *Id.* at 303 (citing NORMAN J. SINGER, 2B SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 53.05 (5th ed. 1992)).

280. *Id.* at 304–13. Judge Mullen discussed in detail the careful compromise crafted by Senator Pittman of Nevada and Representative Hayden of Arizona. *Id.* at 304. The board cited the Census of 1910, *id.* at 305, letters and reports submitted by the Interior Department to Congress, *id.* at 306, and even sections of two floor debates, one between Senator Thomas of Colorado and Senator Pittman and another between Representative Blanton and Representative Evans of Nevada regarding the mineral reservation provision, *id.* at 307–13.

281. *Id.* at 313–14.

282. *Id.* at 314 (citing *Watt v. W. Nuclear*, 462 U.S. 36, 59 (1983); *Andrus v. Charlestone Stone Prods.*, 436 U.S. 604, 617 (1978); *United States v. Union Pac. R.R. Co.*, 353 U.S. 112, 116 (1957); *Caldwell v. United States*, 250 U.S. 14, 20–21 (1919); *N. Pac. Ry. Co. v. Soderberg*, 188 U.S. 526, 534 (1903) to support the conclusion that sand and gravel are substances reserved to the United States).

*C. Round 2: BedRoc Goes to Court*

Following the Board's ruling, BedRoc and Williams brought suit in federal district court against the government pursuant to Section 706 of the Administrative Procedure Act on the grounds that the Board's determination was "arbitrary and capricious" and based on an erroneous interpretation of the mineral reservation provision of the Pittman Act.<sup>283</sup> BedRoc and Williams also argued that the proper interpretation of the statute would be to define "valuable minerals" the same way as in the General Mining Act, where deposits are only "valuable" if they are reasonably marketable or profitable at the time of the patent's issuance.<sup>284</sup> However, this position was dismissed by the district court without explanation.<sup>285</sup> The district court first noted that statutory language must first be construed using the plain and ordinary meaning of the disputed language and the statute as a whole.<sup>286</sup> The court noted the term "mineral" defies simple resolution through a plain meaning analysis, requiring the court to turn to the statute's legislative history.<sup>287</sup>

The district court agreed with the Board of Land Appeals' position on the use of analogies in statutory interpretation but found that there were not enough "similar statutes" for such analogies to be appreciated and that the proper way of determining congressional intent is to examine directly the legislative history of the Pittman Act.<sup>288</sup> In its exposition of this history, the court found especially significant a floor statement made by Senator Pittman on the minerals reservation provision.<sup>289</sup> In this statement, he noted, "it is the policy of Congress, as I see it, not to permit the acquisition of any character of minerals through agricultural

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283. *BedRoc Ltd. v. United States*, 50 F. Supp. 2d 1001, 1003 (D. Nev. 1999), *aff'd*, 314 F.3d 1080 (9th Cir. 2002), *rev'd*, 541 U.S. 176 (2004).

284. *Id.* at 1005; *see also* *United States v. Coleman*, 390 U.S. 599, 602 (1968) (adopting a marketability test for determining whether a "mineral deposit" is valuable); *supra* notes 129–30 and accompanying text (discussing the definition of "valuable" under the General Mining Act).

285. *Compare BedRoc Ltd.*, 50 F. Supp. 2d at 1005 ("This is an argument that this Court declines to accept.") with *Earl Williams*, 140 I.B.L.A. at 300–01 (outlining the petitioner's mining law argument but declining to evaluate it on the grounds the legislative history of the Pittman Act provides the proper framework from which to conduct the court's analysis).

286. *BedRoc Ltd.*, 50 F. Supp. 2d at 1004 (citing *Craft v. Campbell Soup Co.*, 161 F.3d 1199, 1201 (9th Cir. 1998)).

287. *Id.* at 1007 (citing *N. Pac. Ry. Co. v. Soderberg*, 188 U.S. 526, 530 (1903)) ("The word 'mineral' 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.").

288. *Id.* at 1005 ("When plentiful sister statutes are absent, as in the case *sub judice*, it is best to examine the legislative history and purpose of the disputed statute to discern Congressional intent.").

289. *Id.* at 1006.

entry.”<sup>290</sup> Thus, the district court found the term “valuable minerals” to be a broad term meant to encompass all minerals with desirable uses<sup>291</sup> and granted summary judgment in favor of the government.<sup>292</sup>

#### D. Round 3: The Ninth Circuit Decision

BedRoc then appealed the district court’s determination to the Ninth Circuit, which affirmed the decision.<sup>293</sup> In making its determination, the Ninth Circuit also cited the *Soderberg* decision for the proposition that the term “mineral” is one beyond easy definition.<sup>294</sup> However, unlike the district court, the Ninth Circuit was able to create a generalized meaning for the word to include anything that is neither animal nor vegetable.<sup>295</sup> The Ninth Circuit then addressed an argument raised by BedRoc in the district court but dismissed without explanation—that the modifier “valuable” meant that the Pittman Act contained a limited reservation similar to those substances covered under the General Mining Act.<sup>296</sup> The court noted that a typical individual would not find sand and gravel “valuable” in the way that diamonds or gold might be considered valuable; however, the court did note that sand and gravel are valuable in the sense that they have commercial worth.<sup>297</sup> Thus, the court concluded the mineral reservation provision was ambiguous, requiring it to turn to the purpose and legislative history of the statute.<sup>298</sup>

The court began its investigation of the legislative history by noting the main function of the Pittman Act was to encourage the exploration and development of water sources for agricultural uses within the state

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290. *Id.* (citing 53 CONG. REC. S705, S707 (1916)). Senator Pittman also noted that “[t]here was not the slightest chance on earth of passing such a bill through the House of Representatives if there was the slightest suspicion that the bill could be utilized for the purpose of acquiring mineral lands under the guise of obtaining agricultural lands.” 53 CONG. REC. S707 (1916) (emphasis added in *BedRoc Ltd.*, 50 F. Supp. 2d at 1006).

291. *BedRoc Ltd.*, 50 F. Supp. 2d at 1007 (citing *Soderberg*, 188 U.S. at 536-37 (discerning the legislative intent to reserve geological deposits useful to the arts or manufacturing processes)).

292. *Id.* at 1008. Both parties had moved for summary judgment. *Id.*

293. *BedRoc Ltd. v. United States*, 314 F.3d 1080, 1082 (9th Cir. 2002), *rev’d*, 541 U.S. 176 (2004).

294. *Id.* at 1083-84. See also *supra* note 287 (discussing the definition of “mineral”).

295. *BedRoc Ltd.*, 314 F.3d at 1084. To create this generalized definition, the Ninth Circuit cited to the Third New International Dictionary and also noted that the Merriam-Webster Dictionary included sand as an example of a “mineral.” *Id.*

296. *Id.* Cf. *supra* notes 284-85 and accompanying text (discussing the district court’s treatment of the *BedRoc* petitioner’s “valuable” argument).

297. *BedRoc Ltd.*, 314 F.3d at 1084. To make its point, the court cited an 1897 dictionary defining “valuable” as “having value or worth; being possessed of worth or useful properties; . . . useful.” *Id.*

298. *Id.* at 1085.

of Nevada.<sup>299</sup> Based on this desire to strengthen the agricultural base of Nevada, the court concluded Congress, in enacting the Pittman Act, intended to reserve all minerals for other uses.<sup>300</sup> The court also cited two cases, *United States v. Union Oil of California*<sup>301</sup> and *Watt v. Western Nuclear*,<sup>302</sup> to show that the Ninth Circuit's interpretation that mineral reservation provisions are to be construed broadly had also been used in evaluating other land grant statutes of the same period.<sup>303</sup>

However, the court specifically rejected the notion that these cases and the statutory history provided any guidance on the question of whether sand and gravel were "valuable minerals" under the Pittman Act.<sup>304</sup> To answer this question, the court turned to Interior Department publications of the time.<sup>305</sup> These publications indicated that the mining industry in 1914 sold \$24 million of sand and gravel.<sup>306</sup> The court also distinguished "valuable minerals" used in the Pittman Act and "valuable mineral deposits" used in the General Mining Act<sup>307</sup> and, as a result, affirmed the district court's determination that sand and gravel are included in the "valuable mineral" reservation of the Pittman Act.<sup>308</sup> BedRoc then petitioned the Supreme Court, which granted certiorari in

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299. *Id.* at 1085 (citing H.R. REP. NO. 66-286, at 1 (1919)) (stating the purpose of the Act was to "encourage the exploration for and development of artesian and subsurface waters in the State of Nevada") and H.R. REP. NO. 64-731, at 1 (1916) ("The primary object of the bill is to encourage the development of the agricultural portions of the public domain in the State of Nevada, not susceptible of irrigation from any known source of surface water supply . . .").

300. *Id.* at 1085.

301. *Id.* at 1085–86 (citing *United States v. Union Oil Co. of Cal.*, 549 F.2d 1271 (9th Cir. 1977) (holding geothermal steam was reserved to the United States under the SRHA)). *See also supra* note 248 (discussing the *Union Oil* decision).

302. *BedRoc Ltd.*, 314 F.3d at 1086 (citing *Watt v. W. Nuclear*, 462 U.S. 36 (1983) (holding sand and gravel were also reserved to the United States under the SRHA)). *See also supra* Part II.G.3 (discussing *W. Nuclear*).

303. *BedRoc Ltd.*, 314 F.3d at 1085–86.

304. *Id.* at 1088. The court wrote:

The breadth of the reservation of mineral rights discussed in the legislative history supports the government's position: Congress did not intend to convey any mineral rights to patentees under the Act. However, neither the cases construing the SRHA, nor the floor debates on the Pittman Act, shed any light on whether the term "valuable" significantly limits the reservation.

*Id.*

305. *Id.* at 1088–89 (noting that government publications at the time indicate that sand and gravel were thought to be valuable, and hence reserved under the Pittman Act).

306. *Id.* at 1089. The court noted that \$24 million is worth approximately \$423 million today. *See id.* at 1089 n.5 (converting the figure into today's dollars using a formula by John J. McCusker, <http://www.eh.net/hmit/ppowerusd> (last visited August 6, 2005)).

307. *Id.* at 1089–90 (noting that Congress did not mean to limit itself under the Pittman Act the same way it desired to limit a mineral speculator under the General Mining Act).

308. *Id.*

late 2003.<sup>309</sup>

*E. The Final Round: The Supreme Court Rules for BedRoc*

The Supreme Court's 6-3 decision did not come without serious disagreement amongst the Justices of the court.<sup>310</sup> Chief Justice Rehnquist wrote the plurality opinion, joined by Justices O'Connor, Scalia and Kennedy.<sup>311</sup> Justice Thomas filed a concurring opinion joined by Justice Breyer.<sup>312</sup> Justice Stevens issued a dissenting opinion joined by Justices Souter and Ginsburg.<sup>313</sup> This Section will explore each of these opinions in detail starting with the plurality,<sup>314</sup> continuing with the concurrence<sup>315</sup> and finishing with the dissent.<sup>316</sup>

1. The Plurality Opinion

The plurality began with a short history lesson as to the function of land grant statutes as a vehicle for Western expansion and a geography lesson as to the location and climatology of Nevada.<sup>317</sup> The opinion followed with a discussion of the mechanics of the Pittman Act<sup>318</sup> and the facts of the case<sup>319</sup> before turning to the merits of the case, which began with a discussion of *Western Nuclear*.<sup>320</sup>

The plurality first evaluated whether the Government's argument that the determination in *Western Nuclear*, cited at every level as controlling the determination of the BedRoc and Williams matter,<sup>321</sup> did indeed

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309. See *BedRoc Ltd. v. United States*, 539 U.S. 986, 986 (2003) (granting the petition for certiorari).

310. *BedRoc Ltd. v. United States*, 541 U.S. 176, 178 (2004).

311. *Id.*

312. *Id.* at 187.

313. *Id.* at 189.

314. See *infra* Part III.E.1 (discussing Chief Justice Rehnquist's plurality opinion).

315. See *infra* Part III.E.2 (discussing Justice Thomas's concurrence).

316. See *infra* Part III.E.3 (discussing Justice Stevens's dissent).

317. *BedRoc Ltd.*, 541 U.S. at 178-79. The plurality cited the same House Report as the Ninth Circuit stating the purpose of the Pittman Act was to promote the development and population growth of Nevada. See also *supra* note 299 (discussing H.R. REP. NO. 66-286 (1919)).

318. *BedRoc Ltd.*, 541 U.S. at 179-80.

319. *Id.* at 180-81.

320. *Id.* at 181-82. In its questions presented, *BedRoc* asked whether the court's ruling in *Western Nuclear* "calls for a per se rule that all sand and gravel were reserved on land patented by the federal government in the early 20th century, whether congressional intent would be better served by a rule that such common materials were not reserved to the government as 'valuable minerals.'" Brief for Petitioners at i, *BedRoc Ltd. v. United States*, 541 U.S. 176 (2004) (No. 02-1593).

321. *BedRoc Ltd. v. United States*, 314 F.3d 1080, 1089-90 (9th Cir. 2002), *rev'd*, 124 S. Ct. 1587 (2004) (referencing *Western Nuclear*); *BedRoc Ltd. v. United States*, 50 F. Supp. 2d 1001, 1003, 1008 (D. Nev. 1999), *aff'd*, 314 F.3d 1080 (9th Cir. 2002), *rev'd*, 541 U.S. 176 (2004)

control the determination.<sup>322</sup> Here, the plurality found that *Western Nuclear* was not controlling as it dealt with a different statute entirely.<sup>323</sup> The opinion then stated that in spite of a vigorous dissent in *Western Nuclear*, it would not overrule its precedent or extend its holding to conclude that sand and gravel were per se “valuable minerals.” Instead, the Court limited its holding to the conclusion that sand and gravel are in fact minerals.<sup>324</sup> As justification, the plurality recognized that the vagueness of the SRHA’s mineral reservation provision required the *Western Nuclear* court to speculate as to congressional intent.<sup>325</sup> By using the modifier “valuable” in the Pittman Act, the plurality noted Congress textually narrowed the scope of the term “mineral” and, hence, clarified the confusion the *Western Nuclear* court found with its reservation provision.<sup>326</sup> As the plurality stated, the rules regarding the interpretation of unambiguous statutory text require it to simply evaluate whether the sand and gravel found in Nevada were commonly regarded as “valuable minerals” in 1919 when the Pittman Act was enacted.<sup>327</sup>

Significantly, the plurality described the Government’s position as not contesting the proposition that sand and gravel were not commonly thought of as “valuable” when the Pittman Act was enacted.<sup>328</sup> The plurality went on to state that sand and gravel were commercially

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(referring to *Western Nuclear*); Earl Williams, 140 I.B.L.A. 295, 314 (1997) (citing *Western Nuclear*).

322. *BedRoc Ltd.*, 541 U.S. at 182.

323. *Id.* at 183.

324. *Id.* Interestingly, while the Court describes the petitioner’s position that the decision in *Western Nuclear* is either distinguishable from *BedRoc*’s or, in the alternative, should be overruled altogether, that position was not argued in the petitioner’s brief. *Cf.* Brief for Petitioners, *supra* note 320, at 32–35 (arguing the *Western Nuclear* decision is consistent with the understanding that deposits of sand and gravel without commercial value at the time of the patent are not reserved to the United States as “valuable minerals”).

325. *BedRoc Ltd.*, 541 U.S. at 183.

326. *Id.* at 183–84.

327. *Id.* at 184 (citing *Amoco Prod. Co. v. S. Ute Indian Tribe*, 526 U.S. 865, 873 (1999) (stating that Congress intended terms to be understood in “their ordinary and popular sense”); *Perrin v. United States*, 444 U.S. 37, 42 (1979) (stating that land grant laws should be interpreted with the circumstances of the country at the time the act was passed in mind); *Leo Sheep v. United States*, 440 U.S. 668, 682 (1979) (stating that the proper interpretation focuses on the regular meaning of the reservation at the time Congress enacted it)).

328. *BedRoc Ltd.*, 541 U.S. at 184 (noting the government answered this question with an emphatic “no”). The government did, however, title a two page section of its argument “Even If There Is A Difference Between ‘Minerals’ And ‘Valuable Minerals,’ Sand And Gravel Were ‘Valuable Minerals’ When The Pittman Act Was Enacted.” Brief for the Respondents at 30–32, *BedRoc Ltd. v. United States*, 541 U.S. 176 (2004) (No. 02-1593). *See also infra* Part IV.A (discussing the efforts of the government to persuade the court that a substance could be a mineral but not valuable).

worthless in 1919 Nevada due to its sparse population and desert climate.<sup>329</sup> Thus, the plurality rejected the position advanced by the Government, that sand and gravel were commercially marketable at that time in other parts of the United States as evidence that it was a valuable mineral.<sup>330</sup> Furthermore, the plurality also rejected the argument on the grounds that it previously rejected a commercial marketability meaning of “valuable minerals” in *Amoco v. Southern Ute Indian Tribe*.<sup>331</sup> Since the plurality found sand and gravel unambiguously unvaluable, it did not need to resort to the statutory canon used in many of the earlier cases that ambiguities in land grant statutes are to be resolved in favor of the Government.<sup>332</sup>

The plurality also accepted *BedRoc*’s argument that the phrase “valuable minerals” means the same in the Pittman Act as it does in the General Mining Act,<sup>333</sup> a position rejected by the district court with no explanation<sup>334</sup> and by the Ninth Circuit with minimal explanation.<sup>335</sup> Here, the plurality used the statutory text’s use of the phrase “mineral land laws in force at the time of such disposal”<sup>336</sup> as an explicit cross-reference to the General Mining Act,<sup>337</sup> which used the phrase “valuable mineral deposits.”<sup>338</sup> Using as guidance the *Zimmerman*<sup>339</sup> determination, in effect at the time Congress enacted the Pittman Act, which stated sand and gravel did not constitute valuable minerals under the mining laws, the plurality found that sand and gravel are likewise

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329. *BedRoc Ltd.*, 124 S. Ct. at 184 (citing Brief for Petitioners, *supra* note 320, at 6 (stating “even the most enterprising settler could not have sold sand in the desert”)).

330. *BedRoc Ltd.*, 541 U.S. at 184.

331. *Id.* at 184-85. See also *supra* Part II.G.4 (discussing the *Amoco* decision).

332. *BedRoc Ltd.*, 124 S. Ct. at 185 (citing *Amoco*, 526 U.S. at 880 (stating “ambiguities in land grants are construed in favor of the sovereign”)).

333. *Id.*

334. *BedRoc Ltd. v. United States*, 50 F. Supp. 2d 1003, 1005 (D. Nev. 1999). See also *supra* notes 284–85 and accompanying text (discussing the argument and its treatment at the district court level).

335. *BedRoc Ltd. v. United States*, 314 F.3d 1080, 1089–90 (9th Cir. 2002), *rev’d*, 541 U.S. 176 (2004); see also *supra* notes 307–08 (discussing the argument and its treatment at the Ninth Circuit).

336. Pittman Act, Pub. L. No. 66-60, § 8, 41 Stat. 295 (1919), *repealed in part* by Pub. L. No. 88-417, 78 Stat. 389 (1964).

337. 30 U.S.C. § 22 (2000 & West. Supp. 2005).

338. *BedRoc Ltd.*, 541 U.S. at 185. In making its determination, the Court pointed out the relationship between the mining laws and the land grant laws had also been recognized in *Western Nuclear. Id.*

339. *Zimmerman v. Brunson*, 39 Pub. Lands Dec. 310 (D.O.I. 1910). See also *supra* Part II.G.1 (discussing the *Zimmerman* determination). While the *Zimmerman* decision was eventually overruled by the *Layman* decision, the *Zimmerman* decision was the position of the Interior Department at the time the Pittman Act was enacted. See *supra* Part II.G.1 (discussing these two decisions).

not a valuable mineral under the Pittman Act.<sup>340</sup> The plurality recognized the finding in *Western Nuclear* that Congress may not have been aware of the *Zimmerman* decision when it enacted the land grant statutes but declined to entertain this proposition and instead limited this finding to the SRHA.<sup>341</sup> Instead, the plurality noted the Pittman Act, unlike the SRHA, unambiguously conveys its meaning that the reservation provision of “valuable minerals” did not include sand and gravel.<sup>342</sup>

Finally, the plurality opinion dismissed the argument that the legislative history of the Pittman Act indicated that Congress meant to reserve sand and gravel rights to the federal government.<sup>343</sup> Both the district court and the Ninth Circuit relied heavily upon this history and each quoted large sections of this history in their opinion because of their determination that the statute was ambiguous as to what constitutes a “valuable mineral.”<sup>344</sup> The plurality opinion, however, determined the statute was not ambiguous, and as a result, they did not need to resort to legislative history.<sup>345</sup> Furthermore, the plurality noted that a discussion of the legislative history of the Act would serve as a backdoor attempt to extend the *Western Nuclear* decision to the Pittman Act and refused to evaluate the congressional reports, floor debates, and proposed amendments cited by the lower courts.<sup>346</sup> As a result of its findings, the plurality reversed the Ninth Circuit and remanded the case for further proceedings.<sup>347</sup>

## 2. The Concurring Opinion

The plurality’s method of analysis differed greatly from the previous four bodies addressing this issue.<sup>348</sup> As a result, it is not surprising that

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340. *BedRoc Ltd.*, 541 U.S. at 185-86.

341. *Id.* at 186 (“The Government is correct that the *Western Nuclear* court sidestepped the impact of this line of reasoning by relying on the ambiguity of the term ‘minerals’ and the possibility that Congress was not aware of Interior’s *Zimmerman* decision.”) (citing *Watt v. W. Nuclear*, 462 U.S. 36, 45–47 (1983)).

342. *Id.* at 185.

343. *Id.* at 186-87.

344. See *supra* Part III.C (discussing the district court opinion) and Part III.D (discussing the Ninth Circuit opinion).

345. *BedRoc Ltd.*, 541 U.S. at 186.

346. *Id.* at 186-87 (quoting *Inhabitants of the Twp. of Montclair, County of Essex v. Ramsdell*, 107 U.S. 147, 152 (1883) (noting the court will not resort to any inquiry that presumes “the legislature was ignorant of the meaning of the language it employed”)).

347. *Id.* at 187.

348. Compare *BedRoc Ltd.*, 541 U.S. at 178-87 (finding sand and gravel were not valuable minerals under the Pittman Act) with *BedRoc Ltd. v. United States*, 314 F.3d 1080 (9th Cir. 2002), *rev’d*, 541 U.S. 176 (2004) (finding sand gravel deposits were valuable minerals under the

this method of analysis did not come with total agreement on the bench.<sup>349</sup> Justice Thomas issued a concurring opinion joined by Justice Breyer suggesting that sand and gravel are not reserved to the government under both the Pittman Act and the SRHA.<sup>350</sup> Justice Thomas noted the Pittman Act uses the phrases “valuable minerals” and “minerals” interchangeably indicating congressional intent to make the phrases synonymous.<sup>351</sup> Justice Thomas also noted that *Western Nuclear*’s rejection of the commercial marketability test as further evidence that the Court should not place so much emphasis on the word “valuable.”<sup>352</sup> While the concurrence agreed with *Western Nuclear*’s determination regarding commercial marketability, it disagreed with *Western Nuclear*’s conclusion that sand and gravel are “minerals” under the SRHA on the grounds the substances hypothetically could have been used for commercial purposes.<sup>353</sup> However, Justice Thomas did not advocate a reversal of *Western Nuclear* on the grounds of *stare decisis* principles and the fact that property owners and the Interior Department have heavily relied upon its ruling.<sup>354</sup>

### 3. Dissenting Opinion

Justice Stevens’s dissenting opinion heavily criticized the plurality opinion’s reliance on the textual difference between the reservation of “all the coal and other minerals” found in the SRHA and the reservation of “all the coal and other *valuable* minerals” found in the Pittman Act.<sup>355</sup>

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Pittman Act); *BedRoc Ltd. v. United States*, 50 F. Supp. 2d 1001 (D. Nev. 1999), *aff’d*, 314 F.3d 1080 (9th Cir. 2002), *rev’d*, 541 U.S. 176 (2004) (finding sand and gravel deposits were valuable minerals under the Pittman Act); and *Earl Williams*, 140 I.B.L.A. 295 (1997) (finding sand and gravel were valuable minerals under the Pittman Act).

349. See *supra* notes 310–16 and accompanying text (noting the disagreements amongst the Justices of the Court) and note 348 (noting the plurality’s differing analysis from the other bodies addressing the issue).

350. *BedRoc Ltd.*, 541 U.S. at 187-88 (Thomas, J., concurring).

351. *Id.* Justice Stevens made the same observation in the dissent. *Id.*

As Justice Stevens points out, the term ‘minerals’ in the Pittman Act provision is only twice modified by the adjective ‘valuable,’ which ‘suggest[s] that the terms ‘valuable minerals’ and ‘minerals’ were intended to be synonymous.’ I concur in the judgment, however, because I believe that mineral reservations pursuant to both the Pittman Act and the SRHA do not include sand and gravel.

*Id.* at 188 (Thomas, J., concurring) (citations omitted).

352. *BedRoc Ltd.*, 541 U.S. at 187-88 (Thomas, J., concurring) (“If the word ‘valuable’ were the textual source of a commercial purpose requirement, then the SRHA’s lack of that modifier would strongly imply that the SRHA contains no commercial purpose requirement.”).

353. *Id.* at 188.

354. *Id.* (indicating “*stare decisis* concerns are at their acme in cases involving property rights and contract rights” (citing *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997))).

355. *BedRoc Ltd.*, 541 U.S. at 190 (Stevens, J., dissenting) (emphasis in original).

He noted that the entire mineral reservation provision of the Pittman Act made reference to the phrases “mineral” or “minerals” eight times.<sup>356</sup> Since these phrases were only modified twice by the adjective “valuable,” Justice Stevens concluded the terms “minerals” and “valuable minerals” are actually synonymous.<sup>357</sup> As a result, Justice Stevens suggested the *Western Nuclear* decision did adopt a per se rule that also would pertain to the Pittman Act.<sup>358</sup> The dissent found no public policy reason that Congress would enact a broad reservation provision in the SRHA but a narrow provision in the Pittman Act,<sup>359</sup> and found that the plurality, in creating different tests, bucked the well-recognized “need for certainty and predictability where land titles are concerned.”<sup>360</sup>

Finally, Justice Stevens concluded his dissent by labeling the plurality’s unwillingness to consult the Pittman Act’s legislative history as deliberately uninformed.<sup>361</sup> He noted this method will increase the risk that a judge will substitute his own policy preferences for the preferences of Congress.<sup>362</sup> For additional support, Justice Stevens cited Israeli Supreme Court Justice Aharon Barak’s attack on “minimalist” judging, noting that a proper judicial determination will attempt to seek guidance from every reliable source.<sup>363</sup> An evaluation of congressional intent, Justice Stevens indicates, shows a Congress that has acquiesced to the Court’s decision in *Western Nuclear* that sand and gravel are in fact “minerals” reserved to the government and the Interior Department, which has consistently construed the mineral reservation statutes as including sand and gravel.<sup>364</sup> As a result, the dissent argued sand and gravel should be included in the mineral reservation provision of the

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356. *Id.* The plurality addressed Stevens’s proposition in a footnote where it stated, “despite the textual difference, Justice Stevens nonetheless finds *Western Nuclear* dispositive because, according to him, ‘the Court’s interpretation of the term ‘mineral’ in the SRHA included the requirement that the material be valuable.’ That is not quite correct.” *Id.* at 183 n.5 (plurality opinion) (citations omitted).

357. *Id.* at 191-92 (Stevens, J., dissenting).

358. *Id.* at 190. According to Justice Stevens, the *Western Nuclear* test also would require that a mineral be “valuable”, i.e., able to be used for commercial purposes. *Id.* at 190-91 (outlining the *Western Nuclear* test).

359. *Id.* at 191-92.

360. *Id.* at 190 (citing *Leo Sheep v. United States*, 440 U.S. 668, 687 (1979) (holding that the government had no implied easement to build a road across land that was originally granted to the Union Pacific Railroad under the Union Pacific Act of 1862)).

361. *BedRoc Ltd.*, 541 U.S. at 192 (Stevens, J., dissenting).

362. *Id.* Justice Stevens explained that the “policy choice at issue in this case is surely one that should be made either by Congress itself or by the executive agency administering the Pittman Act.” *Id.*

363. *Id.* (citing AHARON BARAK, *JUDICIAL DISCRETION* 62 (Y. Kaufmann trans., 1989)).

364. *Id.*

Pittman Act.<sup>365</sup>

#### IV. ANALYSIS

This Part will analyze the Supreme Court's decision and show that the method employed by Justice Thomas provides the best resolution to the case because it creates a "win-win" situation.<sup>366</sup> To arrive at this conclusion, this Part will first illustrate that the government should have been more forceful in its assertion that the mineral reservation provision of the Pittman Act is ambiguous in its language and that the inclusion of the word "valuable" did little, if anything, to clear up the ambiguity.<sup>367</sup> Then, this Part will evaluate the plurality opinion authored by Chief Justice Rehnquist and show that the opinion's quick dismissal of the ambiguity of the reservation provision proved to be the fatal error in its determination.<sup>368</sup> After the plurality opinion is scrutinized, this Part will turn to the dissenting opinion of Justice Stevens and show that, while he was correct in finding the provision ambiguous, he ignored the statutory canon that a law must be interpreted to give force to all of its words.<sup>369</sup> Finally, this Part will show that Justice Thomas's concurrence, while short and direct, achieved the proper result with the proper methodology.<sup>370</sup>

##### *A. The Government Should Have Been More Forceful in its Assertion that the Mineral Reservation Provision Is Ambiguous*

One of the most important sentences in the plurality opinion is the one which states the Government did not contest the fact that sand and gravel were not valuable.<sup>371</sup> The Government did, however, on numerous occasions present the opinion that sand and gravel were indeed valuable minerals.<sup>372</sup> During oral argument, the Government answered a question regarding the distinction between substances that

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365. *Id.*

366. *See id.* at 187-89 (Thomas, J., concurring) (arguing that sand and gravel are not reserved to the government under the Pittman Act and the SRHA).

367. *See infra* Part IV.A (indicating the Government's argument was flawed from the beginning).

368. *See infra* Part IV.B (discussing the plurality's error in declaring the reservation provision unambiguous).

369. *See infra* Part IV.C (describing Justice Stevens's opinion as only partially correct).

370. *See infra* Part IV.D (explaining the correctness in Justice Thomas' concurring opinion).

371. *BedRoc Ltd.*, 541 U.S. at 184. "Common sense tells us, and the Government does not contest, that the answer to [the question of whether Nevada sand and gravel were commonly regarded as valuable in 1919] is an emphatic 'No.'" *Id.*

372. *See infra* notes 373-79 and accompanying text (outlining the government's argument on this point).

have intrinsic value, like uranium or gold, and substances that are widespread and commonly found, like sand or gravel, by stating that all of these substances are valuable minerals, but all have varying degrees of value.<sup>373</sup> The Government's brief to the Supreme Court contained an entire section arguing that sand and gravel are indeed valuable minerals.<sup>374</sup> The Government noted that between 1914 and 1919, the Interior Department devoted an entire section of its annual report on mineral resources to sand and gravel.<sup>375</sup> In 1914, the Interior Department placed the commercial value of the sand and gravel industry at \$24 million nationwide.<sup>376</sup> Two years later, the Department reported that the sand and gravel market had boomed.<sup>377</sup> By the time the United States entered the First World War, sand and gravel had an annual value higher than all but four non-metallic minerals produced in the United States.<sup>378</sup>

The Government did argue from a commercial standpoint that sand and gravel were in fact valuable minerals at the time Congress enacted the Pittman Act of 1919 and that, given the widespread use of sand and gravel in the wartime economy, Congress had knowledge of the value

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373. Transcript of Oral Argument at 34, *BedRoc Ltd.*, 541 U.S. 176 (No. 02-1593). Specifically, the question was raised concerning the limits placed upon the mineral estate holder and whether he or she can extract anything they would like. *Id.* Thomas Sansonetti, the government lawyer arguing the case, stated "Maybe the sand and gravel are the—the poor stepchildren to brother gold and—and sister silver, but they're just as valuable as a member of the mineral family." *Id.*

374. Brief for the Respondents, *supra* note 328, at 30–32. This section is entitled "Even If There Is A Difference Between 'Minerals' and 'Valuable Minerals,' Sand And Gravel Were 'Valuable Minerals' When The Pittman Act Was Enacted." *Id.* at 30. This section specifically addresses the question the plurality chose to answer in its opinion. *See BedRoc Ltd.*, 541 U.S. at 184 (defining the issue as whether Congress thought sand and gravel were valuable minerals when it enacted the Pittman Act).

375. Brief for the Respondents, *supra* note 328, at 30.

376. *Id.* *See also supra* note 306 (noting that \$24 million in 1914 is equivalent to \$423 million today).

377. Brief for the Respondents, *supra* note 328, at 31. The Department noted the production of sand and gravel 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." *Id.*

378. *Id.* at 32. The four non-metallic minerals with a larger value were petroleum, natural gas, coal and stone. *Id.* In 1917, the government pegged the value of the sand and gravel industry at \$37 million. *Id.* This figure amounts to a 54% growth in a matter of three years. *Compare id.* (stating the value of the sand gravel industry in 1917 was \$37 million) with *supra* note 376 (showing in 1914, sand and gravel was a \$24 million industry). As a matter of reference, the National Stone, Sand & Gravel Association states the industry sold over three billion tons of the substance in 2003, contributing \$37.5 billion to America's GDP. Nat'l Stone, Sand & Gravel Ass'n, *What is NSSGA?*, <http://www.nssga.org/communications/howeare.cfm> (last visited January 7, 2005).

of sand and gravel when it passed the Act.<sup>379</sup> Thus, the plurality mischaracterized the Government's position as not contesting the proposition that sand and gravel were not valuable minerals when Congress passed the Pittman Act.<sup>380</sup> Instead, the plurality should have explained that the term "valuable" requires more than simple commercial marketability required under the General Mining Act.<sup>381</sup> Thus, the Government needed to be much more persuasive in this area, possibly by citing specific Interior Department rulings after the Act was passed as an illustration of how difficult the Act is to interpret.<sup>382</sup>

*B. The Plurality Opinion Should Have Found the Statute's Mineral Reservation Provision Ambiguous on an As-Applied Basis*

The plurality predicated its decision on the fact that the Pittman Act's language was not ambiguous.<sup>383</sup> In making this determination, the plurality rejected the idea that sand and gravel are in fact "valuable minerals" because of their present commercial market value and used its decision in *Amoco v. Southern Ute Indian Tribe* as justification for its

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379. See Earl Williams, 140 I.B.L.A. 295, 309 (1997) (citing 53 CONG. REC. S707 (1916) (discussing a floor debate between Senator Pittman and Senator Thomas)). In this debate, Senator Thomas noted the bill "provides that the Government shall retain title to virtually everything except the surface of the ground and such rights as are inseparable from its use for agricultural purposes." *Id.* Furthermore, the sponsors of the bill expressly debated sand and gravel. *Id.*

380. *BedRoc Ltd. v. United States*, 541 U.S. 176, 184 (2004).

381. See *United States v. Coleman*, 390 U.S. 599 (1968) (discussing the history of the marketability test); *supra* notes 129–32 and accompanying text (noting the Supreme Court has come close to adopting a marketability test for determining "valuable mineral deposits" under the mining laws).

382. See, e.g., Susan J. Kayler, 162 I.B.L.A. 245 (2004) (arguing that the mineral estate owner must be allowed to prospect and mine insofar as it is reasonably incident to obtaining the minerals); Sierra Club, 156 I.B.L.A. 144 (2002) (concerning BLM compliance with the National Historic Preservation Act, National Environmental Policy Act, and the Endangered Species Act); *Am. Colloid Co.*, 154 I.B.L.A. 7 (2000) (stating that mining claims cannot be located on lands patented under the Stock Raising Homestead Act until a person who intends to enter the lands to explore or locate a mining claim has first filed a notice of intent to locate with the proper BLM state office and served a copy of that notice upon the surface owners of record); Kenneth Snow, 153 I.B.L.A. 371 (2000) (finding that unauthorized extraction and/or removal of mineral materials from public lands is an act of trespass); *Mt. Gaines Consol.*, 144 I.B.L.A. 49 (1998) (stating that mining claims cannot be located on lands patented under the Stock Raising Homestead Act until the claimant has first filed a notice of intent to locate with the proper BLM state office and served a copy of the notice upon the surface owner of record); Maurice Tanner, 141 I.B.L.A. 373 (1997) (finding that where there is a dispute as to whether a mineral resource is included in a patent issued under the Stock Raising Homestead Act, the determination should be made in light of the use of the surface estate that Congress contemplated and the manner in which the material is extracted and used).

383. See *BedRoc Ltd.*, 541 U.S. at 183-84 (stating "we think the term 'valuable' makes clear that Congress did not intend to include sand and gravel in the Pittman Act's mineral reservation").

position.<sup>384</sup> Instead, based on *Amoco*, the plurality noted the proper method of analysis was to determine whether the materials were valuable at the time the enabling Act was passed.<sup>385</sup> The *Amoco* ruling did not extend a reservation of “coal” to include CBM gas on the grounds that the gas became commercially viable decades after Congress enacted the land grant statute at issue.<sup>386</sup> While the plurality seemed to find the harvesting of CBM gas and the harvesting of sand and gravel analogous, sand and gravel harvesting did have a commercial market in the 1910s—the government even federalized its production during World War I.<sup>387</sup> Thus, from one point of view, sand and gravel should be considered a “valuable mineral” reserved under the Pittman Act.<sup>388</sup>

On the other hand, sand and gravel are perhaps the most plentiful substances in a desert, and ones that are found abundantly on the surface.<sup>389</sup> When a patent is issued on a piece of land, the patentee only receives rights to the surface, which he or she must use for reclamation or cultivation purposes,<sup>390</sup> and they only receive the land once the Secretary of the Interior conducts an inspection and classifies the land as not containing valuable minerals and as non-mineral in character.<sup>391</sup> Therefore, a question arises regarding how sand and gravel, abundant on the surface of land, can be considered a “valuable mineral” when the Secretary of the Interior has conducted an inspection of the land and certified that he does not believe the land contains “valuable minerals.”<sup>392</sup> The Government attempted to clarify this ambiguity in oral argument by separating the determination of what constitutes a “valuable mineral” for the purposes of classification with what

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384. *Id.* at 1594. See also *supra* Part II.G.4 (discussing the *Amoco* decision).

385. *BedRoc Ltd.*, 541 U.S. at 186.

386. *Amoco Prod. Co. v. S. Ute Indian Tribe*, 526 U.S. 865, 873–880 (1999).

387. Brief for the Respondents, *supra* note 328, at 32 (stating that in 1918 and “because of the ‘exigencies of war,’ the ‘entire output of some sand and gravel was commandeered by the Government’”).

388. See *id.* (suggesting the decision to commandeer the industry could imply that the Government had recognized the “value” in the harvesting of the sand and gravel).

389. UNITED STATES GEOLOGICAL SURVEY, MINERAL COMMODITY SUMMARIES: 2005, 140–43 (2005) (discussing the wide commercial use of sand and gravel in the United States).

390. Pittman Act, Pub. L. No. 66-60, § 3, 41 Stat. 293-95 (1919), *repealed in part by* Pub. L. No. 88-417, 78 Stat. 389 (1964); see also *Earl Williams*, 140 I.B.L.A. 295, 313 (1997) (discussing the legislative history and intent of the Pittman Act).

391. Pittman Act, § 2, 41 Stat. at 294 (1919); see also *supra* Part II.B (discussing the mechanics of the Pittman Act).

392. *Earl Williams*, 140 I.B.L.A. at 313. At the Board of Land Appeals, Earl Williams noted in his Statement of Reasons that on October 2, 1934, the Director of the Interior Department’s Geological Survey certified the land was in fact non-mineral in character. *Id.*

constitutes a “valuable mineral” for the purposes of reservation.<sup>393</sup> However, at best, this response demonstrates the ambiguity of the Pittman Act and, under the rules of statutory interpretation, requires the Court to look into the legislative history and Congressional intent of enacting the Pittman Act.<sup>394</sup> Instead, the plurality chose to bypass this analysis by its repeated insistence that the Pittman Act’s reservation provision was unambiguous.<sup>395</sup> This is a significant departure, considering every court or administrative agency charged with evaluating the legislative history of the Pittman Act had found the mineral reservation provision ambiguous but nonetheless reserved sand and gravel.<sup>396</sup>

*C. Justice Stevens Ignores the Statutory Canon that Proper Statutory Interpretation Gives Meaning to ALL Words Used*

In his dissenting opinion, Justice Stevens explicitly states the terms “minerals” and “valuable minerals” found in the Pittman Act’s enabling clause are intended to be interchangeable and synonymous.<sup>397</sup> As such, he found the *Western Nuclear* case controlling and the sand and gravel reserved to the government.<sup>398</sup> In making this determination, he stated that no policy reason existed for Congress to include a different reservation provision in the Pittman Act as they did in the SRHA.<sup>399</sup> While Justice Stevens did note the well established need for certainty

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393. Transcript of Oral Argument, *supra* note 373, at 44–45.

394. See *supra* Part II.E (discussing the method by which ambiguous statutes are interpreted under Supreme Court precedents).

395. See, e.g., *BedRoc Ltd. v. United States*, 541 U.S. 176, 183–84 (2004) (“We think the term ‘valuable’ makes clear that Congress did not intend to include sand and gravel in the Pittman Act’s mineral reservation.”). “[W]e readily conclude that the ‘most natural interpretation’ of the mineral reservation does not encompass sand and gravel. . . . Because we have held that the text of the statutory reservation clearly excludes sand and gravel, we have no occasion to resort to legislative history.” *Id.* at 186.

396. See *BedRoc Ltd. v. United States*, 314 F.3d 1080 (9th Cir. 2002), *rev’d*, 541 U.S. 176 (2004) (holding that sand and gravel are encompassed by the reservation of “valuable minerals” to the United States); *BedRoc Ltd. v. United States*, 50 F. Supp. 2d 1001 (D. Nev. 1999), *aff’d*, 314 F.3d 1080 (9th Cir. 2002), *rev’d*, 541 U.S. 176 (2004) (holding that sand and gravel deposits are the reserved property of the United States); *Earl Williams*, 140 I.B.L.A. 295 (1997) (reserving sand and gravel to the government).

397. *BedRoc Ltd.*, 541 U.S. at 189–92 (Stevens, J., dissenting). Justice Stevens wrote “the term ‘mineral’ or ‘minerals’ appears eight times in § 8 of the Pittman Act, and only twice it is modified by the adjective ‘valuable,’ strongly suggesting that the terms ‘valuable minerals’ and ‘minerals’ were intended to be synonymous.” *Id.* at 191.

398. *Id.* at 191.

399. *Id.*; see also *supra* note 358 and accompanying text (according to Justice Stevens, the *Western Nuclear* test would also require that a mineral be “valuable,” i.e., able to be used for commercial purposes).

and predictability in land titles,<sup>400</sup> he did not address the well established doctrine that proper statutory interpretation requires that all words in a statute be given effect.<sup>401</sup> If Justice Stevens had attempted to find meaning in the term “valuable,” he would likely have encountered great difficulty pinning down a specific meaning.<sup>402</sup> Had Justice Stevens explored the meanings for the phrase advocated by the two parties, he could have concluded that the statute was ambiguous and either affirmed the Ninth Circuit on the grounds that any ambiguity in the land grant statute must be resolved in favor of the government<sup>403</sup> or explored the legislative history in order to determine congressional intent in the reservation as the other courts resolving this dispute had done.<sup>404</sup> Instead, Justice Stevens simply scoffed at the plurality’s failure to conduct the analysis and cited to an Israeli Supreme Court Justice for

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400. *BedRoc Ltd.*, 541 U.S. at 192 (Stevens, J., dissenting) (citing *Leo Sheep v. United States*, 440 U.S. 668, 687 (1979) (finding that the government did not have free access rights to land without compensating the property owner, and that “[the Supreme Court] has traditionally recognized the special need for certainty and predictability where land titles are concerned and [was] unwilling to upset settled expectations to accommodate some ill-defined power to construct public thoroughfares without compensation”).

401. *See* *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) (requiring the court to give meaning to every phrase in a statute provided the interpretation does not arrive at an absurd result); *Bailey v. United States*, 516 U.S. 137, 145 (1995) (interpreting the word “use” in a federal sentencing law regarding handgun crimes); *supra* Part III.E (discussing the proper method of statutory interpretation). In *Bailey*, the Court noted that statutory interpretation will be predicated on the assumption that Congress meant to give each word in a statute meaning. *Bailey*, 516 U.S. at 145. When courts are confronted with interpreting a specific word, the court may look toward the placement of the word, the purpose of the overall statutory scheme, and most importantly, the ordinary and common meaning of the word if it is not defined elsewhere in the statute. *Id.*

402. *BedRoc Ltd.*, 541 U.S. at 191 (Stevens, J., dissenting). In fact, Justice Stevens devotes the dissenting opinion’s only footnote to showing the phrase “valuable” has been very difficult to define. *Id.* (citing *Watt v. W. Nuclear*, 462 U.S. 36, 53–54 (1983) (stating mineral reservations must encourage both surface and subsurface development and should not be interpreted to interfere with substances that can be taken from the topsoil); *N. Pac. Ry. Co. v. Soderberg*, 188 U.S. 526, 536–37 (1903) (stating mineral lands include all such lands chiefly valuable for their deposits in the arts or manufacturing); *United States v. Isabell Constr.*, 78 Interior Dec. 385, 390 (1971) (allowing a reservation only if the substance has a separate value apart from the soil); 1 AM. L. OF MINING § 3.26 (1982) (stating a mineral reservation should be considered to sever from the surface all mineral substances which can be taken from the soil and which have a separate value)).

403. *W. Nuclear*, 462 U.S. at 59; *Andrus v. Charlestone Stone Prod. Co.*, 436 U.S. 604, 617 (1978); *United States v. Union Pac. R.R. Co.*, 353 U.S. 112, 116 (1957); *Caldwell v. United States*, 250 U.S. 14, 20–21 (1919); *Soderberg*, 188 U.S. at 534 (all holding that ambiguities in land grant statutes must be resolved in favor of the government).

404. *See* *BedRoc Ltd. v. United States*, 314 F.3d 1080 (9th Cir. 2002), *rev’d*, 541 U.S. 176 (2004); *BedRoc Ltd. v. United States*, 50 F. Supp. 2d 1001 (D. Nev. 1999), *aff’d*, 314 F.3d 1080 (9th Cir. 2002), *rev’d*, 541 U.S. 176 (2004); *Earl Williams*, 140 I.B.L.A. 295 (1997) (all using the legislative history of the Pittman Act to conclude sand and gravel were reserved to the government under section 8).

the principle that sorting through the history of a piece of legislation will keep judges' personal opinions out of statutory interpretation.<sup>405</sup>

*D. Justice Thomas's Concurring Opinion Arrives at the Best Resolution of the Matter*

The opinion authored by Justice Thomas employed the traditional method of statutory interpretation by giving all words meaning, and properly criticized the *Western Nuclear* decision and limited its reach.<sup>406</sup> Justice Thomas, like Justice Stevens, recognized that section 8 employed both the phrases "mineral(s)" and "valuable mineral(s)" and that the reservation provision of the Pittman Act cannot be meaningfully distinguished from the SRHA.<sup>407</sup> The concurrence, however, suggested that each phrase should be given meaning by noting the plurality interpreted the term "minerals" too broadly to include sand and gravel but also read the term "valuable" too narrowly to mandate a commercial purpose requirement.<sup>408</sup> Justice Thomas also noted the error in *Western Nuclear's* logic that sand and gravel are "minerals" under the SRHA because at the time of passage, they could have hypothetically been used for commercial purposes.<sup>409</sup> Instead, Justice Thomas noted the statutory context of the SRHA should not be read to include sand and gravel as valuable minerals and also argued the Pittman Act, which contains slightly different but functionally equivalent language, should also be read to exclude sand and gravel as valuable minerals.<sup>410</sup> But,

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405. See *supra* notes 356–63 and accompanying text (outlining Justice Stevens's characterization of the plurality opinion as headstrong and deliberately uninformed).

406. *BedRoc Ltd.*, 124 S. Ct. at 187-89 (Thomas, J., concurring); see also Part III.E.2 (summarizing Justice Thomas's concurrence).

407. *BedRoc Ltd.*, 124 S. Ct. at 187 (Thomas, J., concurring). Justice Thomas wrote "I agree with Justice Stevens that the mineral reservation provision in the [Pittman Act] cannot be meaningfully distinguished from the analogous provision in the [SRHA]." *Id.*

408. *Id.* In a footnote, Justice Thomas noted the *Western Nuclear* court suggested a narrower definition of "mineral" stating that "Congress plainly contemplated that mineral deposits on SRHA lands would be subject to location under the mining laws." *Id.* at 188 (citing *W. Nuclear*, 462 U.S. at 51). Under this method of analysis, Justice Thomas noted that only *valuable mineral deposits* would be reserved to the government. *Id.*

409. *Id.* at 187. It is important to note that both Justice Thomas who authored the concurrence, and Justice Breyer who joined him were not on the bench when the Court decided *Western Nuclear*. See Wikipedia: The Free Encyclopedia, List of Justices of the Supreme Court of the United States, [http://en.wikipedia.org/wiki/Supreme\\_Court\\_Justice](http://en.wikipedia.org/wiki/Supreme_Court_Justice) (last visited Oct. 8, 2005) (indicating Justice Breyer was appointed in 1994 and that Justice Thomas was appointed in 1991). Justices Rehnquist, Stevens and O'Connor served on the Court when the *Western Nuclear* decision came down from the bench in 1983. *Id.*

410. *BedRoc Ltd.*, 124 S. Ct. at 189 (Thomas, J., concurring). Justice Thomas likely relied upon a requirement of both acts that the Secretary certify the land as non-mineral in character and as not known to contain any valuable minerals. See Pittman Act, Pub. L. No. 66-60, § 2, 41 Stat. 293-95 (1919), *repealed in part by* Pub. L. No. 88-417, 78 Stat. 389 (1964); SRHA, § 2, 43

like the plurality, Justice Thomas noted the principle of *stare decisis* and its heightened importance in property law and declined to overrule *Western Nuclear*, but instead limit the Court's holding to the SRHA.<sup>411</sup>

## V. IMPACT

While the Pittman Act only applied to a rather small number of land permits in a single state, the significance of *BedRoc Ltd. v. United States* has already been illustrated.<sup>412</sup> Specifically, the impact of the decision will be analyzed in four discrete areas. First, this Part will address the impact of the decision from the viewpoint of a legislator and illustrate that the Court now requires lawmakers to be far more precise in their wording.<sup>413</sup> Second, it will show that the opinion suggests that under the right circumstances, the Court may be willing to overturn the *Western Nuclear* decision.<sup>414</sup> Then, this Part will address the specific impact the decision will have in the areas of construction and environmental law.<sup>415</sup> Finally, this Part will explore the role the decision will play in what could be the next great congressional public land grant—permits for exploratory oil drilling in the Alaskan National Wildlife Reserve.<sup>416</sup> This subject has consistently been one of the most hotly contested political debates in recent memory with some members of Congress stating the outcome will have serious ramifications in the areas of national security, the environment, the economy, and even the very principles of federalism.<sup>417</sup>

### A. Legislatures Must Choose Their Words Carefully and Should Define

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U.S.C. § 292 (repealed 1976) (explaining the requirements for the Secretary).

411. *BedRoc Ltd.*, 124 S. Ct. at 189 (Thomas, J., concurring).

412. *Nevada Sand and Gravel Case Defines U.S. Land Grant Law*, ENGINEERING NEWS-REC., Apr. 12, 2004, at 15. “The decision in [*BedRoc Ltd.*] is narrow and specifically affects only about 8,500 acres.” *Id.* The newspaper quotes an attorney who represents the National Stone, Sand & Gravel Association who stated: “[The *BedRoc Ltd.* decision] has much broader implications . . . . The issue comes up again and again. The government is trying to back out of the deal it made 100 years ago.” *Id.*

413. See *infra* Part V.A (discussing the case from the legislator's point of view).

414. See *infra* Part V.B (demonstrating the Court could overturn *Western Nuclear* if it is given the right case). With the retirement of Justice O'Connor, who sided with the plurality, the death of Chief Justice Rehnquist, and the appointment of Chief Justice Roberts, this becomes an even greater possibility.

415. See *infra* Part V.C (showing the particular application of *BedRoc Ltd.* in cases already *sub judice*).

416. See *infra* Part V.D. (discussing ANWR and *BedRoc Ltd.*'s potential application).

417. See, e.g., *Republican Calls ANWR First Priority*, ANCHORAGE DAILY NEWS, Jan. 7, 2005, at B2; *Pombo Makes ANWR Priority*, THE OIL DAILY, Jan. 7, 2005, available at 2005 WLNR 899173 (showing both the Senate and House Committee Chairmen with jurisdiction over ANWR have identified the issue as a priority item on their agenda).

*Potentially Ambiguous Phrases*

The *BedRoc Ltd.* decision fits in a series of cases decided by the Court in its October 2003 term in which the proper meaning of a statutory provision was before the Court.<sup>418</sup> In all of these cases, the Court adopted a narrow view of the statutory provision at issue, leading some commentators to characterize the term as an exercise in judicial restraint.<sup>419</sup> In all of these cases, the Supreme Court not only refused to find any of the statutes ambiguous,<sup>420</sup> but also went further by stating that even if a statute is awkward and poorly written, it still can be unambiguous on an as-applied basis.<sup>421</sup> Only in *Household Credit v.*

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418. See *Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 124 S. Ct. 1756 (2004) (interpreting the Clean Air Act); *Household Credit Servs. v. Pfennig*, 124 S. Ct. 1741 (2004) (interpreting the Truth in Lending Act); *Lamie v. U.S. Trustee*, 124 S. Ct. 1023 (2004) (interpreting an attorney's fee provision of the bankruptcy code).

419. See Charles H. Whitebread, *The Rule of Law, Judicial Self-Restraint, and Unanswered Questions: Decisions of the United States Supreme Court's 2003-2004 Term*, 26 WHITTIER L. REV. 101 (2004) (summarizing the major decisions issued by the Supreme Court in the last term); Charles H. Whitebread, *Significant Pronouncements of the High Court*, ORANGE COUNTY LAW., Dec. 2004, at 14 (noting the October 2003 term made significant pronouncements on federalism, presidential power, elections, and civil statutory power). In *Engine Manufacturers*, a trade association representing diesel engine companies challenged the validity of state imposed Fleet Rules that generally prohibit the purchase or lease of vehicles that do not meet stringent emission requirements, on the grounds that the regulations were pre-empted by section 209(a) of the Federal Clean Air Act. *Engine Mfrs.*, 124 S. Ct. at 1759. This section prohibits states from imposing or enforcing any state or local "standard relating to the control of emissions from new motor vehicles or new motor vehicle engines." Clean Air Act, § 209(a) (codified as amended at 42 U.S.C. § 7543(a) (West 2000) (cited in *Engine Mfrs.*, 124 S. Ct. at 1760)). The Supreme Court faced the task of determining section 209(a)'s meaning of the word "standard" as the district court took the opinion that the word applied only to regulations that compelled manufacturers to meet certain limits. *Engine Mfrs.*, 124 S. Ct. at 1761. In *Lamie*, an attorney challenged whether he was entitled to attorney's fees in a case that began under Chapter 11 but was later transferred to Chapter 7 of the Bankruptcy Code because the statutory provision awarding him fees was unintentionally left out of an amendment to the Code. *Lamie*, 124 S. Ct. at 1027. Prior to 1994, the Chapter 11 Bankruptcy Code expressly allowed the court to award "to a trustee, to an examiner, to a professional person employed under section 327 or 1103 of this title or to the debtor's attorney—(1) reasonable compensation for actual, necessary services rendered by such trustee." *Id.* In 1994, the Code was amended and the five words "or to the debtor's attorney" were unintentionally left out of the new version. *Id.* As a result of this deletion, circuits have been split on its effect and the Supreme Court stepped in to resolve the split. *Id.* at 1028.

420. *Engine Mfrs.*, 124 S. Ct. at 1761 (requiring "statutory construction [to] begin with the language employed by Congress and [the] assumption that [the] ordinary meaning of that language accurately expresses the legislative purpose."); *BedRoc Ltd. v. United States*, 124 S. Ct. 1587, 1594 (2004) ("The proper inquiry focuses on the ordinary meaning of the reservation at the time Congress enacted it."); *Lamie*, 540 U.S. at 534 ("It is well established that 'when the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms.'")

421. *Lamie*, 540 U.S. at 534 ("The statute is awkward, and even ungrammatical, but that does not make it ambiguous on the point at issue.").

*Pfennig*,<sup>422</sup> when the Court was confronted with a statute and a corresponding, potentially contradictory, administrative regulation did it rule that the statute was ambiguous.<sup>423</sup> In *Household Credit*, the Court had to determine whether an exclusion provision in Regulation Z<sup>424</sup> conflicted with a section of the Truth in Lending Act<sup>425</sup> requiring the disclosure of “finance charges” by credit companies.<sup>426</sup> The Court concluded that the statute was ambiguous, thus allowing the Federal Reserve Board’s regulation to stand unless the regulation was found to be procedurally defective, arbitrary or capricious.<sup>427</sup> While the Court did find this statute ambiguous, it found the regulation unambiguous and controlling.<sup>428</sup> Thus, the Court did not consult legislative history in any of these cases.<sup>429</sup>

These decisions send a strong message to all those drafting statutory

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422. *Household Credit Servs. v. Pfennig*, 124 S. Ct. 1741, 1741 (2004).

423. *Id.* at 1750.

424. Regulation Z, Federal Reserve Board, 12 C.F.R. § 226.4(c) (2005) states:

Charges excluded from the finance charge. The following charges are not finance charges:

- (1) Application fees charged to all applicants for credit, whether or not credit is actually extended.
- (2) Charges for actual unanticipated late payment, for exceeding a credit limit, or for delinquency, default, or a similar occurrence.
- (3) Charges imposed by a financial institution for paying items that overdraw an account, unless the payment of such items and the imposition of the charge were previously agreed upon in writing.
- (4) Fees charged for participation in a credit plan, whether assessed on an annual or other periodic basis.
- (5) Seller’s points.
- (6) Interest forfeited as a result of an interest reduction required by law on a time deposit used as security for an extension of credit.
- (7) Real-estate related fees. The following fees in a transaction secured by real property or in a residential mortgage transaction, if the fees are bona fide and reasonable in amount . . .
- (8) Discounts offered to induce payment for a purchase by cash, check, or other means, as provided in section 167(b) of the act.

*Id.*

425. Truth in Lending Act, 15 U.S.C. § 1605(a) (2000 & West Supp. 2005). This section defines a “finance charge” as:

Any consumer credit transaction shall be determined as the sum of all charges, payable directly or indirectly by the person to whom the credit is extended, and imposed directly or indirectly by the creditor as an incident to the extension of credit. The finance charge does not include charges of a type payable in a comparable cash transaction. The finance charge shall not include fees and amounts imposed by third party closing agents (including settlement agents, attorneys, and escrow and title companies) if the creditor does not require the imposition of the charges or the services provided and does not retain the charges.

*Id.*

426. *Household Credit*, 124 S. Ct. at 1744.

427. *Id.* at 1748 (citing *United States v. Mead Corp.*, 533 U.S. 218, 227 (2001)).

428. *Id.*

429. See *supra* notes 419 and accompanying text (indicating that the court did not consult legislative history).

text—the courts will assume a legislature meant to draft a statute in the manner it appears in the law books.<sup>430</sup> The *BedRoc Ltd.* decision came down on March 31, 2004.<sup>431</sup> By the close of 2004, the decision had already been used by two state supreme courts, three United States Courts of Appeals and in a subsequent United States Supreme Court opinion.<sup>432</sup> In the first half of 2005, four additional circuits have joined in holding that the *BedRoc Ltd.* decision mandates a textual analysis of statutory language before any extrinsic evidence may be considered.<sup>433</sup> These courts used the *BedRoc Ltd.* decision not for its principles in mineral law, but rather for its statutory interpretation framework.<sup>434</sup> Furthermore, these cases involved a wide variety of matters and illustrate the *BedRoc Ltd.* decision has already proven to have a significant impact on a wide variety of federal, state and municipal laws.<sup>435</sup> Consider the fact that in 1999 the Court interpreted a reservation provision by considering legislative history and the “contemplations of Congress.”<sup>436</sup> Five years later, the same Court with no change in membership, outright rejected the use of legislative history to interpret a similarly dated reservation provision on the grounds it would be a “backdoor” to the policy preferences of the particular judges.<sup>437</sup>

### B. *The BedRoc Ltd. Court Opens the Door to a Rethinking of What*

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430. See, e.g., *BedRoc Ltd. v. United States*, 541 U.S. 176, 184 (2004) (describing this principle as the “preeminent canon of statutory interpretation”).

431. *Id.* at 176.

432. *Hibbs v. Winn*, 124 S. Ct. 2276, 2292 (2004); *Ortega v. Star-Kist Foods*, 370 F.3d 124, 135 (1st Cir. 2004); *Olden v. Lafarge Corp.*, 383 F.3d 495, 506 (6th Cir. 2004); *Avendano-Ramirez v. Ashcroft*, 365 F.3d 813, 818 (9th Cir. 2004); *Mayor of Lansing v. Mich. Pub. Serv. Comm’n*, 680 N.W.2d 840, 851 (Mich. 2004) (Cavanagh, J., dissenting); *State ex rel. Lee v. Karnes*, 817 N.E.2d 76, 81 (Ohio 2004); *State ex rel. Steele v. Morrissey*, 815 N.E.2d 1107, 1113 (Ohio 2004) (courts citing the *BedRoc Ltd.* decision by the end of 2004).

433. *Nicolaou v. Horizon Media*, 402 F.3d 325, 329 (2d Cir. 2005); *Howard Delivery Servs. v. Zurich Am. Ins. Co.*, 403 F.3d 227, 238 (4th Cir. 2005); *Ashley v. U.S. Dep’t of Interior*, 408 F.3d 997, 1001 (8th Cir. 2005); *Am. Bankers Ins. Group v. United States*, 408 F.3d 1328, 1332 (11th Cir. 2005) (courts holding that the *BedRoc Ltd.* decision mandates a textual analysis before any extrinsic evidence may be considered).

434. See, e.g., *Ortega*, 370 F.3d at 135 (citing the *BedRoc Ltd.* decision for the principle that all statutory interpretations begin with a discussion of the text of the statute); *Morrissey*, 815 N.E.2d at 1113 (citing *BedRoc Ltd.* as standing for the proposition that when the court encounters an unambiguous statute, it must apply the statute and avoid construing it).

435. Compare *Avendano-Ramirez*, 365 F.3d at 813 (dealing with the definition of “good moral character” in the immigration law), with *Mayor of Lansing*, 680 N.W.2d at 840 (concerning whether a piping company had to seek approval from a Michigan mayor to construct a 26-mile gas pipeline).

436. *Amoco Prod. Co. v. S. Ute Indian Tribe*, 526 U.S. 865, 880 (1999).

437. *BedRoc Ltd. v. United States*, 541 U.S. 176, 187 (2004).

*Constitutes a “Mineral” Under the Mining and Land Grant Acts and to a Possible Overturning of Western Nuclear*

While the above cases demonstrate the wide application of the *BedRoc Ltd.* decision to statutory law, they do not address the application of the case to mineral law. *BedRoc Ltd.*'s plurality recognized a potential flaw in the *Western Nuclear* decision but did not overrule the case on the grounds that *BedRoc Ltd.* and *Western Nuclear* dealt with different statutes, each with slightly different language.<sup>438</sup> In both the dissenting and concurring opinions, the Justices explicitly noted the errors of *Western Nuclear* but also declined to overrule it in order to preserve land titles.<sup>439</sup> Since all of the Justices agree that the *Western Nuclear* decision is flawed, the Court may be willing to overturn the decision if it receives the right case.<sup>440</sup>

In 2002, the Tenth Circuit decided *Rosette v. United States*, which relied heavily upon the determination in *Western Nuclear*, and held geothermal steam was included in the mineral reservation provision of the SRHA.<sup>441</sup> Two years later in the *BedRoc Ltd.* case, every Justice of the United States Supreme Court seriously questioned the method of analysis employed by the *Western Nuclear* court.<sup>442</sup> Had the *Rosette* case been decided after the *BedRoc Ltd.* decision, it is likely the Court would have ruled geothermal steam is not a mineral reserved to the government.<sup>443</sup> Under the ordinary and popular meaning approach of the *BedRoc Ltd.* Court, the Court could have easily arrived at the conclusion that steam, a gaseous substance, is not a “mineral,” a word typically associated with solid substances.<sup>444</sup>

If the Court were to decide to overturn *Western Nuclear*, it would seriously undermine the consistency in land titles that all the *BedRoc*

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438. *Id.* at 183 (“Whatever the correctness of *Western Nuclear*'s broad construction of the term ‘minerals,’ we are not free to so expansively interpret the Pittman Act's reservation.”).

439. *Id.* at 188-89 (Thomas, J., concurring). “I disagree, however, with the Court's conclusion in *Western Nuclear* that sand and gravel are ‘minerals’ under the SRHA.” *Id.* at 191-92 (Stevens, J., dissenting). “The policy of including sand and gravel in the reservation may well be unwise, and, indeed, the majority in *Western Nuclear* may have misinterpreted Congress' intent in 1916.” *Id.* at 192.

440. See *supra* Part IV (analyzing the Justices' opinions as they pertain to *Western Nuclear*).

441. *Rosette v. United States*, 277 F.3d 1222, 1224 (10th Cir. 2002), *cert. denied*, 537 U.S. 878 (2002). See also *supra* Part II.G.5 (outlining the *Rosette* decision).

442. See *supra* notes 438-40 and accompanying text (describing the reactions of the Justices to *Western Nuclear* in the *BedRoc Ltd.* case).

443. Cf. *BedRoc Ltd.*, 541 U.S. at 176; *Rosette*, 277 F.3d at 1222.

444. *BedRoc Ltd.*, 124 S. Ct. at 184. “In interpreting statutory mineral reservations like the one at issue here, we have emphasized that Congress ‘was dealing with a practical subject in a practical way’ and that it intended the terms of reservation to be understood in their ordinary and popular sense.” *Id.*

*Ltd.* Justices thought essential.<sup>445</sup> Thus, the Court must be willing to construct new property rights to replace the SRHA.<sup>446</sup> Commentators have described the common law of reservation and retention as having three broad themes: (1) favoring the government's interest over the interests of private parties, (2) providing the national government with primary control over public lands, as opposed to state and local governments and (3) supporting the concerns of protectionism and environmental conservation over development concerns.<sup>447</sup> The *BedRoc Ltd.* Court chipped away at the first theme by resolving a legitimate mineral rights dispute in favor of a private party and against the government.<sup>448</sup> While *BedRoc Ltd.* never addressed the validity of the first theme, the decision might be the first step toward re-writing the common law of mineral rights in a way that would favor private parties.<sup>449</sup>

### C. *BedRoc Ltd. Has Already Played a Role in Construction and Environmental Law*

Since Williams and BedRoc began extracting sand and gravel for use in the booming Las Vegas construction industry,<sup>450</sup> it is not surprising that the construction industry would react favorably to a verdict in favor of BedRoc.<sup>451</sup> Thus, as the issue was pending before the court, several construction trade associations filed amici curiae briefs in support of the petitioner.<sup>452</sup> After the verdict was announced, these groups proclaimed

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445. See, e.g., *id.* at 189 (Thomas, J., concurring) (noting the concern over *stare decisis* should be at its highest when property and contract rights are involved).

446. *Id.*

447. John D. Leshy, *A Property Clause for the Twenty-First Century*, 75 U. COLO. L. REV. 1101, 1106 (2004) (summarizing the themes of common law land management).

448. *BedRoc Ltd.*, 541 U.S. at 180-81 (plurality opinion).

449. Leshy, *supra* note 447, at 1108-09 (illustrating recent Supreme Court decisions that have given private parties greater rights in mineral rights disputes). Aside from *BedRoc Ltd.*, Leshy notes the *Leo Sheep* case. *Id.* In *Leo Sheep*, the Court rejected the government's claim that it had reserved a right of way across land it granted to a railroad on the grounds the facts and circumstances of the case did not support the application of the canon that ambiguities in land grants are to be construed in favor of the government. *Leo Sheep Co. v. United States*, 440 U.S. 668, 683 (1979).

450. *BedRoc Ltd.*, 124 S. Ct. at 1591-92. See also *supra* notes 59-62 and accompanying text (discussing some of Las Vegas's significant construction projects of the time).

451. Mayer, Brown, Roe & Maw, LLP, Supreme Court Docket Report, October Term 2003, at 4, [http://www.appellate.net/docketreports/pdf/docketreport1\\_2003.pdf](http://www.appellate.net/docketreports/pdf/docketreport1_2003.pdf) (last visited September 14, 2005) (describing the *BedRoc Ltd.* decision as significant because "[it] may be applied to other grants of federal land" and "may also affect other businesses across the western United States that extract sand and gravel or rely on their abundant supply for construction projects").

452. Brief Amicus Curiae of Nat'l Stone, Sand and Gravel Ass'n in Support of Petitioners and Urging Reversal at 1, *BedRoc Ltd. v. United States*, 541 U.S. 176 (2004) (No. 02-1593), 2003 WL 22766728; Brief of Amici Curiae, Associated Gen. Contractors of Am. et al. at 1-5, *BedRoc*

victory and noted the ruling would save a modest producer \$125,000 in government fees.<sup>453</sup> This Section will discuss specific cases which have been impacted by the *BedRoc Ltd.* decision in the construction and environmental arena.<sup>454</sup>

### 1. Mayor of Lansing v. Michigan Public Service Commission

An example of *BedRoc Ltd.*'s application in the construction industry can be found in a decision by the Michigan Supreme Court.<sup>455</sup> In *Mayor of Lansing v. Michigan Public Service Commission*,<sup>456</sup> a construction company received state but not city approval to drill and install twenty-six miles of pipeline adjacent to an interstate highway.<sup>457</sup> Prior to the start of work, the mayor's office intervened and demanded the project first receive city approval before going to the appropriate state administrative agency for final approval.<sup>458</sup> As justification, the city relied upon a Michigan statute stating that this type of work must receive city approval "before any work of this is commenced."<sup>459</sup> In resolving this dispute, the court stayed close to the statute and refused to entertain policy arguments or consult any legislative history.<sup>460</sup> Just as

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*Ltd. v. United States*, 541 U.S. 176 (2004) (No. 02-1593), 2003 WL 22733917 (urging reversal and joined by the Associated General Contractors of California, Associated General Contractors of Alaska, Colorado Contractors Association, Montana Contractors Association, Wyoming Stock Growers Association, and Wyoming Stock Growers Agricultural Land Trust).

453. Gus Edwards, *Court Decisions Save NSSGA Producer Members \$100,000*, NAT'L STONE, SAND & GRAVEL ASS'N E-DIGEST, Apr. 27, 2004, available at <http://www.nssga.org/newsletter/digest/0427web.htm#3>.

454. *Infra* Part V.C.1-3.

455. *Mayor of Lansing v. Mich. Pub. Serv. Comm'n*, 680 N.W.2d 840 (Mich. 2004).

456. *Id.*

457. *Id.* at 842.

458. *Id.*

459. *Id.* at 843 (citing MICH. COMP. LAWS ANN. § 247.183(1) (West 2004)). This statute states in full:

Telegraph, telephone, power, and other public utility companies, cable television companies, and municipalities may enter upon, construct, and maintain telegraph, telephone, or power lines, pipe lines, wires, cables, poles, conduits, sewers or similar structures upon, over, across, or under any public road, bridge, street, or public place, including, subject to subsection (2), longitudinally within limited access highway rights-of-way, and across or under any of the waters in this state, with all necessary erections and fixtures for that purpose. A telegraph, telephone, power, and other public utility company, cable television company, and municipality, before any of this work is commenced, shall first obtain the consent of the governing body of the city, village, or township through or along which these lines and poles are to be constructed and maintained.

MICH. COMP. LAWS ANN. § 247.183(1) (West 2004).

460. *Mayor of Lansing*, 640 N.W.2d at 844. In this case, the mayor presented an argument suggesting the court must rule in his favor from a policy standpoint. *Id.* The court responded to this argument by noting "[w]e have observed many times in the past that our Legislature is free to

the *BedRoc Ltd.* case had a vigorous dissent authored by Justice Stevens and cautioned the plurality on the potential ramifications of their strict methodology, Justice Cavanagh of the Michigan Supreme Court also cautioned this approach by quoting Justice Stevens's concerns.<sup>461</sup>

## 2. Ashley v. United States Department of Interior

*Ashley v. United States Department of Interior*<sup>462</sup> centered around the dispute between the Interior Department and a group of Crow Creek Sioux Indians regarding the use of funds paid as a result of the Crow Creek Sioux Tribe Infrastructure and Development Trust Fund Act of 1996<sup>463</sup> and a subsequent amendment<sup>464</sup> to the Act.<sup>465</sup> The 1996 Act required the Interior Department to make periodic payments to the Crow Creek Sioux Indian Tribe and required the tribe to submit a plan for its use to the Department.<sup>466</sup> The Act also required the plan to allot money for the construction of an educational facility, a health facility and a water system.<sup>467</sup> Between the passage of the Act and the 2000 Amendment, the tribe issued bonds to fund land purchases, consolidated its loans and sold bonds underwritten by a private investment bank.<sup>468</sup>

Members of the tribe brought suit against the government, the bond underwriter and the bond purchaser (but not the Indian tribe) seeking rescission of the deal on the grounds the payments to the bond purchaser were not authorized by the 1996 Act.<sup>469</sup> The tribal members sought to rescind based on a number of grounds, including 25 U.S.C. §

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make policy choices that, especially in controversial matters, some observers will inevitably think unwise. This dispute over the wisdom of a law, however, cannot give warrant to a court to overrule the people's Legislature." *Id.*

461. *Id.* at 851 (Cavanagh, J., dissenting) (quoting *BedRoc Ltd.*, 124 S. Ct. at 1598 (Stevens, J., dissenting) ("A method of statutory interpretation that is deliberately uninformed, and hence unconstrained, increases the risk that the judge's own policy preferences will affect the decisional process."))

462. *Ashley v. U.S. Dep't of Interior*, 408 F.3d 977, 999 (8th Cir. 2005).

463. Pub. L. No. 104-223, 110 Stat. 3026 (1996) (calling for government approval for certain transfers of tribal funds).

464. Indian Tribal Economic Development and Contract Encouragement Act of 2000, Pub. L. No. 106-179, § 2, 114 Stat. 46, 46-47 (2000) (narrowing the approval provision of 28 U.S.C. § 81 to only contracts that "encumbers Indian lands for a period of 7 or more years."). Interestingly, the *BedRoc Ltd.* decision and the *Ashley* decision both dealt with not widely applicable Interior statutes. *BedRoc Ltd. v. United States*, 124 S. Ct. 1587 (2004); *Ashley*, 408 F.3d at 997.

465. *Ashley*, 408 F.3d at 999.

466. *Id.* (citing Pub. L. No. 104-223, §§ 4(d)(2), 5).

467. *Id.* (citing Pub. L. No. 104-223, § 5).

468. *Id.* As part of the bond sale, the tribe agreed to assign its rights to the trust fund payments to the purchaser. *Id.* The government gave its official approval and began making payments directly to the purchaser. *Id.*

469. *Id.*

464, which prohibits the sale or other transfer of “restricted Indian lands or of *shares in the assets* of an Indian tribe or corporation [organized under the Indian Reorganization Act]” unless in a narrow context that also requires approval from the Interior Department.<sup>470</sup> The tribal members made the argument that the trust fund payments constituted a transfer of “shares in assets” and hence, must be voided as a violation of section 464.<sup>471</sup>

In evaluating this argument, the court used *BedRoc Ltd.* for the proposition that the text of the statute must be consulted first and the words used must be given their ordinary meaning.<sup>472</sup> Hence, the court consulted *Black’s Law Dictionary* to determine the meaning of “share” as having an ownership component<sup>473</sup> and an IRS determination that trust payments do not constitute a transfer of shares so long as the payee does not take an ownership interest or a right to control in the underlying trust fund.<sup>474</sup> Hence, the court allowed the Indian tribe to keep its construction financing arrangement in place.<sup>475</sup> In short, both the *Ashley* and *Mayor of Lansing* decisions serve as two very different examples of the role the *BedRoc Ltd.* decision has played in construction law.<sup>476</sup>

### 3. Southern Utah Wilderness Alliance v. Bureau of Land Management

The *BedRoc Ltd.* decision has also begun to play a role in environmental law cases.<sup>477</sup> In *Southern Utah Wilderness*, two

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470. *Id.* at 1001 (emphasis added) (citing 25 U.S.C. § 464).

471. *Id.* at 1001–02.

472. *Id.* at 1001. In addition to the *BedRoc Ltd.* decision, the court also made reference to a 1985 Supreme Court case, *Mills Music, Inc. v. Snyder*, 469 U.S. 153, 164 (1985) (stating “it is appropriate to assume that the ordinary meaning of the language that Congress employed ‘accurately expresses the legislative purpose.’”). In *Mills Music*, the Court was asked to interpret § 304 of the Copyright Act of 1909 in order to resolve a dispute between two heirs of the author composing the song “Who’s Sorry Now.” *Mills Music*, 469 U.S. at 154–56.

473. *Ashley*, 408 F.3d at 1001. Specifically, *Black’s Law Dictionary* defines “share” as “part or definite portion of a thing owned by a number of persons in common . . . and has reference to that part of the undivided interest which belongs to some one of them.” BLACK’S LAW DICTIONARY 1375 (6th ed. 1990).

474. *Yonadi v. Comm’r*, 64 T.C.M. (CCH) 1052 (1992), *rev’d on other grounds*, 21 F.3d 1292 (3d Cir. 1994) (finding that trust payments do not amount to transferring of shares if payee does not have ownership rights in primary trust fund).

475. *Ashley*, 408 F.3d at 1002. The court also rejected all of the plaintiffs’ additional substantive arguments before finally concluding that by not suing the Indian tribe, the plaintiffs did not have standing against the government and other private entities as no harm was suffered directly by them. *Id.* at 1002–03.

476. *See supra* Part V.C (discussing the effect on the construction industry).

477. *S. Utah Wilderness Alliance v. Bureau of Land Mgmt.*, 147 F. Supp. 2d 1130 (D. Utah 2001). The other environmental group bringing suit was the Sierra Club. *Id.* (listing the Sierra

environmental groups challenged a county's use of federal lands as a right-of-way for a county highway.<sup>478</sup> At issue was the construction of Section 2477 of the Federal Land Management Policy Act,<sup>479</sup> allowing the Bureau of Land Management to grant rights-of-way for state and local governments who wish to build highways on Interior Department lands and requiring the Interior Secretary to consider environmental impact, economic efficiency, safety, security and state land use policies before issuing the rights-of-way.<sup>480</sup> The district court granted the environmental group's request for injunctive relief barring the county from continuing its road construction.<sup>481</sup> The BLM and the counties involved appealed the case to the Tenth Circuit, the disposition of which is still pending.<sup>482</sup> After the district court ruled in favor of the environmental groups, the Supreme Court issued its decision in *BedRoc Ltd.*<sup>483</sup> Since both of these cases involved land grant statutes and procedures, the *BedRoc Ltd.* case should be considered in ultimately determining the outcome of Southern Utah's case.<sup>484</sup> In fact, the

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Club as a co-plaintiff).

478. *Id.* (providing a brief sketch of the controversy). See also Michael J. Wolter, *Revised Statute 2477 Rights-Of-Way Settlement Act: Exorcism or Exercise for the Ghosts of Land Use Past*, 5 DICK. J. ENVTL. L. & POL'Y 315 (1996) (illustrating the longevity of this dispute).

479. See *supra* note 71 and accompanying text (describing the Federal Land Policy and Management Act).

480. Revised Statute 2477, 43 U.S.C. § 1763 states:

In order to minimize adverse environmental impacts and the proliferation of separate rights-of-way, the utilization of rights-of-way in common shall be required to the extent practical, and each right-of-way or permit shall reserve to the Secretary concerned the right to grant additional rights-of-way or permits for compatible uses on or adjacent to rights-of-way granted pursuant to this Act. In designating right-of-way corridors and in determining whether to require that rights-of-way be confined to them, the Secretary concerned shall take into consideration national and State land use policies, environmental quality, economic efficiency, national security, safety, and good engineering and technological practices. The Secretary concerned shall issue regulations containing the criteria and procedures he will use in designating such corridors. Any existing transportation and utility corridors may be designated as transportation and utility corridors pursuant to this subsection without further review.

43 U.S.C. § 1763 (2000 & West Supp. 2005).

481. *S. Utah Wilderness*, 147 F. Supp. 2d at 1133.

482. *S. Utah Wilderness Alliance v. Bureau of Land Mgmt.*, No. 04-4071, 2005 WL 2160136 (10th Cir. Sept. 8, 2005).

483. *BedRoc Ltd.* was decided on March 31, 2004. *BedRoc Ltd. v. United States*, 124 S. Ct. 1587, 1587 (2004). The district court decided *Southern Utah Wilderness* on June 25, 2001. *S. Utah Wilderness*, 147 F. Supp. 2d at 1130.

484. Compare *BedRoc Ltd.*, 124 S. Ct. at 1594, with *S. Utah Wilderness*, 147 F. Supp. 2d at 1133 (using both the FLPMA and the General Mining Act in reaching their conclusions). Not only do the questions in both acts concern federal land grant policy, but both also require an analysis of the mining laws. *BedRoc Ltd.*, 124 S. Ct. at 1594 (interpreting the Pittman Act); *S. Utah Wilderness*, 147 F. Supp. 2d at 1133 (interpreting Revised Statute 2477).

environmental groups used the case explicitly in its reply brief, which they argue mandates the method of statutory interpretation that must be used to resolve their dispute.<sup>485</sup> On September 8, 2005, the Tenth Circuit reversed the district court and remanded the case for a de novo evidentiary proceeding to determine whether the work performed on the routes in this case went beyond routine maintenance and thus constituted trespass.<sup>486</sup> Thus, as this case progresses into an evidentiary stage, *BedRoc Ltd.* will continue to play a role in determining its final disposition.<sup>487</sup>

*D. BedRoc Ltd. Will Also Influence the Next Major Government Land Grant – Exploratory Oil Drilling in the Alaskan National Wildlife Refuge*

Congress and the Executive Branch have been debating a National Energy Policy for many years.<sup>488</sup> Perhaps one of the most controversial aspects of a potential energy policy involves the issue of exploratory oil drilling in the Alaskan National Wildlife Refuge (ANWR), a large chunk of Northern Alaska owned by the federal government and kept for preservation.<sup>489</sup> Congress created this refuge in 1980 pursuant to the Alaska National Interests Lands Conservation Act.<sup>490</sup> The entire refuge lies entirely above the Arctic Circle, constitutes 19 million acres, making it larger than ten states, and is one of the most sparsely populated areas in the world.<sup>491</sup> Immediately to the west of the refuge lies the Trans-Alaskan Oil Pipeline, a major distribution network for oil that would also make the production of oil in ANWR economically

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485. Appellants' Reply Brief at 1, 24, *S. Utah Wilderness Alliance v. Bureau of Land Mgmt.*, 2004 WL 2466043 (10th Cir. Sept. 16, 2004) (No. 04-4071).

486. *S. Utah Wilderness Alliance v. Bureau of Land Management*, Nos. 04-4071, 04-4073 cons., 2005 WL 2160136, at \*6 (10th Cir. Sept. 8, 2005).

487. *S. Utah Wilderness Alliance, The Great R.S. 2477 Land Giveaway*, [http://www.suwa.org/entry.php?entry\\_id=364](http://www.suwa.org/entry.php?entry_id=364) (last visited Aug. 7, 2005) (labeling the practice of applying for these permits as destroying the sanctity of public lands and that the permits are based on an "archaic federal law enacted in 1866").

488. See generally ROBERT L. BAMBERGER AND CARL E. BERHRENS, CONGRESSIONAL RESEARCH SERVICE, CRS CODE IB10143, ENERGY POLICY: COMPREHENSIVE ENERGY LEGISLATION (H.R. 6) IN THE 109TH CONGRESS (2005), available at <http://fpc.state.gov/documents/organization/45212.pdf> (outlining the general historical background of efforts to create a national energy policy and discussing the current House proposal).

489. See Jeffery H. Wood, *Protecting Native Coastal Ecosystems: CZMA and Alaska's Coastal Plain*, 19 NAT. RESOURCES J. 57 (2004) (discussing the history of the ANWR debate).

490. 16 U.S.C.A. §§ 3101–3233 (West 2004 & Supp. 2005); see also Wood, *supra* note 489, at 57 (noting that Congress created ANWR in 1980).

491. Arctic Power, *What is ANWR and Where is the Coastal Plain*, <http://www.anwr.org/backgrnd/where.htm> (last visited Jan. 8, 2005).

feasible.<sup>492</sup> Thus, for over a decade, oil companies have been lobbying Congress and the Executive Branch for permission to engage in exploratory oil drilling along the northern Coastal Basin, an area that is roughly eight percent of the total refuge.<sup>493</sup> While environmental groups and energy companies disagree over whether the government should continue its practice of prohibiting oil companies from engaging in exploratory drilling, the Bush Administration and leaders of Congress all staunchly support opening the refuge up for oil drilling.<sup>494</sup> In fact, Senator Pete Domenici of New Mexico, Chairman of the Senate Energy Committee, has vowed to move quickly on authorization for oil drilling in ANWR, which fell one vote short in the 108th Congress.<sup>495</sup>

The *BedRoc Ltd.* case can provide Congress and the President with a guide on how to go about ANWR oil drilling.<sup>496</sup> First, the Roosevelt land grant statutes can show Congress that concurrent development may be possible, if it is managed in the right way.<sup>497</sup> The *BedRoc Ltd.* Court cautions Congress to be explicit in what types of “minerals” the oil companies may harvest from ANWR and what types of “minerals” are to be kept as government property.<sup>498</sup> In the 1890s, gold was discovered in the Klondike Mountains, an area near the ANWR.<sup>499</sup> Thus, with the past history of discovering “valuable minerals” in the state, the *BedRoc Ltd.* case warns Congress to be precise in defining what explorers can harvest and what they cannot.<sup>500</sup> If Congress defines its patents in an unambiguous manner, courts will not consult the decade long debate over ANWR oil exploration because the *BedRoc Ltd.* Court requires

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492. *Id.* The federal government believes that oil drilling in ANWR will be able to produce 10 billion barrels of crude oil annually. See Set America Free Act of 2005, H.R. 6, 109th Cong., § 2302(11)(F) (2005) (stating that ANWR has a mean technically recoverable resource of more than 10 billion barrels of oil).

493. Arctic Power, *Which One is the Real ANWR?*, <http://www.anwr.org/backgrnd/theissue.htm> (last visited Aug. 8, 2005).

494. NATIONAL ENERGY POLICY DEVELOPMENT GROUP, NATIONAL ENERGY POLICY 51 (2001), available at <http://www.whitehouse.gov/energy/National-Energy-Policy.pdf> (last visited January 8, 2005).

495. Ben Geman, *On The Hill-Energy Policy: Domenici Vows Quick Action on ANWR Bill*, ENV'T & ENERGY DAILY, Jan. 5, 2005, art. 2.

496. See *supra* Part IV (analyzing how the Justices evaluate land grants under *BedRoc Ltd.*); Part V.A (describing how legislators should craft statutory language).

497. See *BedRoc Ltd. v. United States*, 314 F.3d 1080, 1086 (9th Cir. 2002), *rev'd*, 124 S. Ct. 1587 (2004) (noting the goal of the Roosevelt land grant reforms was to “facilitate development of both surface and subsurface resources”).

498. *BedRoc Ltd. v. United States*, 124 S. Ct. 1587, 1593 (2004) (discussing how a court will infer congressional intent).

499. See, e.g., KATHERINE TAYLOR MORSE, THE NATURE OF GOLD: AN ENVIRONMENTAL HISTORY OF THE KLONDIKE GOLD RUSH (2003).

500. *BedRoc Ltd.*, 124 S. Ct. at 1589.

judicial inquiry to begin and end with consulting the statutory text, unless that text is considered ambiguous (a high threshold to overcome).<sup>501</sup>

While significant progress has been made in making ANWR oil drilling a reality, drilling is still many years off.<sup>502</sup> On April 28, 2005, both houses of Congress passed a joint budget resolution, which for the first time, contains an allowance for oil drilling on the coastal plain of ANWR.<sup>503</sup> This legislation allows the appropriate authorizing committees to move forward with its legislation.<sup>504</sup> Authorization for ANWR drilling is found in the Energy Policy Act of 2005—a bill that has passed the House of Representatives and awaits approval in the Senate.<sup>505</sup> While the measure seems to have broad support in the House and in the Bush Administration, its reception in the Senate has generally not been favorable.<sup>506</sup> In fact, members of the oil industry believe that ANWR drilling will likely be cut from the bill as a compromise in order to get the rest of the President's energy initiatives passed.<sup>507</sup> Thus,

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501. *Id.* at 1593. See also *supra* Part V.A (describing the impact of the *BedRoc Ltd.* decision on lawmakers).

502. Seth Linden, *Final ANWR Vote Could Have Nothing To Do With Drilling* (KTUU2 News-Alaska broadcast Sept. 15, 1999), available at [http://www.ktuu.com/cms/templates/alaska\\_news/master.asp?articleid=15021&zoneid=4](http://www.ktuu.com/cms/templates/alaska_news/master.asp?articleid=15021&zoneid=4) (last visited Sept. 5, 2005) (discussing the long road ANWR faces legislatively to allow for drilling to begin).

503. H.R. Con. Res. 95, 109th Cong. (2005) (enacted). See also Rose Ragsdale, *Congress Approves Budget Resolution With ANWR Drilling*, PETROLEUM NEWS, May 1, 2005, available at <http://www.petroleumnews.com/pnarchpop/050501-04.html> (describing the budget resolution as moving thru the two bodies with “apparent ease” but cautioning that ANWR proponents are not ready to begin “dancing in the streets.”). The House passed the budget resolution by a 214-211 margin while the Senate passed it after lengthy debate 52-47. *Id.*

504. See generally WALTER J. OLESZEK, CONGRESSIONAL PROCEDURES AND THE POLICY PROCESS (CQ Press 2001). Policy initiatives start by determining whether government money is needed. *Id.* at 41-43. If an initiative will use federal dollars, it must be budgeted. *Id.* at 42 (indicating this requirement is not based on the Constitution but rather on the political development of the nation). Generally, once Congress agrees on a Joint Budget Resolution, authorizing committees then propose legislation that will allow the executive branch to implement the policy initiative. *Id.* at 43. Once authorized, the executive branch must then wait for the money to come from the appropriating committees to actually fund the project. *Id.* at 44. Departures from this “typical” process are quite normal as budget resolutions sometimes do not get passed. *Id.* at 45 (indicating that only 30% of all federal spending actually goes through the appropriations process). In cases, additional procedures are required and a continuing resolution is needed. *Id.* at 45.

505. H.R. 6, 109th Cong. (2005). The House passed the measure 249-183 on April 21, 2005. Roll Call No. 132, 109th Cong. (2005).

506. Joseph Curl, *Bush: Act on Energy Bill Now Senate Slates Debate, Vote*, WASH. TIMES, June 15, 2005, at A04.

507. See Rose Ragsdale, *Plenty for Alaska in Senate Energy Bill*, PETROLEUM NEWS, June 5, 2005, available at <http://www.petroleumnews.com/pnarchpop/050605-24.html> (last visited June 16, 2005) (noting threats of Senate filibuster as keeping ANWR off the table).

while *BedRoc Ltd.* will play a significant role in determining how to craft the appropriate ANWR drilling permits, it appears that these permits are still years away.<sup>508</sup>

#### VI. CONCLUSION

The Supreme Court's holding in *BedRoc Ltd.* that sand and gravel are not valuable minerals reserved to the government under the Pittman Act is not one with broad applicability; however, this fact does not mean the decision has been inconsequential. The decision provided a methodology for statutory interpretation that, while controversial, has a universal application that has already been applied in areas as diverse as immigration deportation procedures and federal income tax treatment. In the arena of mineral law, the *BedRoc Ltd.* decision opens the door to a future challenge of the decision in *Western Nuclear*, a case with a much broader application. All of the Supreme Court Justices in *BedRoc Ltd.* seriously questioned the *Western Nuclear* decision but distinguished *BedRoc Ltd.* on *stare decisis* grounds. Thus, the *BedRoc Ltd.* decision is a deceptively significant case of which all lawmakers, judges and attorneys must take notice.

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508. Linden, *supra* note 502.