

1                   IN THE SUPREME COURT OF THE UNITED STATES

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3   BEDROC LIMITED, LLC, AND                   :

4   WESTERN ELITE, INC. ,                   :

5                   Petitioners                   :

6                   v.                   :   No. 02-1593

7   UNITED STATES, ET AL.                   :

8   - - - - -X

9   Washington, D. C.

10   Tuesday, January 20, 2004

11                   The above-entitled matter came on for oral  
12   argument before the Supreme Court of the United States at  
13   10:03 a.m.

14   APPEARANCES:

15   R. TIMOTHY McCURM, ESQ., Washington, D. C. ; on behalf of  
16                   the Petitioners.

17   THOMAS L. SANSONETTI, ESQ., Assistant Attorney General,  
18                   Department of Justice; Washington, D. C. ; on behalf of  
19                   the Respondents.

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P R O C E E D I N G S

(10:03 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument  
now in No. 02-1593, BedRoc Limited and Western Elite v.  
the United States.

Mr. McCrum

ORAL ARGUMENT OF R. TIMOTHY McCRUM  
ON BEHALF OF THE PETITIONERS

MR. McCRUM Mr. Chief Justice, and may it  
please the Court:

This case began in 1993 when the Bureau of Land  
Management issued notices of trespass for the extraction  
of common sand and gravel from private land in the Nevada  
desert about 60 miles from Las Vegas.

The central issue in this case is whether, under  
the 1919 Pittman Act, the reservation of valuable minerals  
included common sand and gravel that were -- that were  
widespread and made up the bulk of the land.

Now, the purpose of the Pittman Act was to  
develop the State of Nevada by granting private land to  
citizens who made personal sacrifices to discover and  
develop underground sources of water that was not -- that  
were not previously known.

QUESTION: It applied only in Nevada, did it  
not?

1                   MR. McCRUM   Yes, Your Honor.

2                   Now, Mabel and Newton Butler in this case  
3 explored and found a -- a source of underground water and  
4 obtained a land patent from the United States Government  
5 in 1940.

6                   As we've explained in the briefs, the plain  
7 meaning of the words valuable minerals, as used in the  
8 1919 Pittman Act, did not include the sand and gravel at  
9 issue here because these common earthen materials in the  
10 Nevada desert were not included in the contemporaneous  
11 legal understanding of the term mineral when the act was  
12 passed in 1919 and these materials did not have intrinsic  
13 value at the time of the enactment of the act in 1990 --  
14 1919 and at the time of the patent granting in 1940.

15                  QUESTION: Does the gravel excavation take up  
16 what? About 16 to 20 acres out of some 500, which is the  
17 total surface area or?

18                  MR. McCRUM   Yes, Justice Kennedy. That's --  
19 that's the approximate size at the time BLM conducted its  
20 report in 1999 or so.

21                  QUESTION: Do we know, is that the sum total of  
22 the gravel that's there? Could they -- does it go on for  
23 the -- another 100 acres or so?

24                  MR. McCRUM   We have photographs of the site in  
25 the joint appendix of the case that show the area of the

1 -- of the land in the general vicinity to be essentially  
2 the same. It's common. Sand and gravel is -- is pretty  
3 much covering that whole general area.

4 Now, the Pittman Act's structure reserved  
5 valuable minerals to the Government in section 8, and at  
6 the same time it did that, it provided that those reserved  
7 valuable minerals would be subject to location and  
8 development by others. At that time, the -- the  
9 expectation of how this -- how these materials would be  
10 developed, whatever was reserved as valuable minerals, was  
11 under the 1872 Mining Law which itself applied to valuable  
12 minerals. So those were --

13 QUESTION: Are you now -- the time you're  
14 referring to is 1919 or 1940?

15 MR. McCrum 1919, Mr. Chief Justice.

16 At that -- in -- in the act itself, it provided  
17 for location to occur of the reserved valuable mineral  
18 estate under the 1872 Mining Law. So, therefore, it's --  
19 it's quite important to look --

20 QUESTION: Mr. McCrum, you left out one word in  
21 the Mining Law. It didn't say valuable minerals. It  
22 said, valuable mineral deposits, and there's a significant  
23 difference between -- a lump of silver might be  
24 tremendously valuable, but it wouldn't be a deposit if  
25 that's all there was.

1                   MR. McCrum Your Honor is -- is correct that  
2   valuable mineral deposits is the -- is the language  
3   referred to in -- in 30 U.S.C., section 22 of the 1872  
4   Mining Law. 30 U.S.C., section 21 actually refers to  
5   valuable mineral lands. And those terms were really  
6   viewed as quite similar by the Interior Department at the  
7   time, and the question was whether a particular type of  
8   mineral was -- was within the class of minerals that the  
9   1872 Mining Law was subject to.

10                  And in 1919, if an individual sought to  
11   establish a mining claim for common sand and gravel,  
12   claiming a discovery of valuable minerals in 1919, it is  
13   quite clear and certain how the Interior Department would  
14   have addressed that in 1919. Interior would have quickly  
15   denied the patent and rejected the application of the 1872  
16   Mining Law to common sand and gravel.

17                  Now, we know that because we can look to the  
18   published Interior Department decisions of the day which  
19   were published at that time, as they are now, available  
20   for citizens, as well as the Congress to -- to look at.  
21   And the repeated decisions from 1901, in particular,  
22   through 1919 made it very clear that common earthen  
23   materials, such as clay, sand and gravel, used for road  
24   base, cement-making purposes, things of that nature, were  
25   simply not subject to the -- the Mining Law.

1                   QUESTION: Now, what would -- what would Land  
2 Management have done in 1940?

3                   MR. McCRUM In -- by 1940, the -- the Interior  
4 Department had modified its view in 1929 and there said  
5 that -- that sand and gravel could be subject to the  
6 Mining Law if valuable on a site-specific basis. And  
7 under that modified view, adopted by Interior in 1929 in  
8 the Layman v. Ellis decision, it confirmed the importance  
9 of assessing the marketability on a site-specific basis.

10                  QUESTION: At -- at the time of the patent?

11                  MR. McCRUM At -- well, the Layman decision  
12 involved a -- a question of whether it was valuable at the  
13 time of the patent in that case, which was a Mining Law  
14 patent being considered. And then in 1956, the Interior  
15 Department, looking at the -- at the position that Layman  
16 v. Ellis took, applied that in the context of a mineral  
17 reservation, as we have here, and said in the context of a  
18 mineral reservation, if it's to include these -- these  
19 common materials, it can only include those materials when  
20 there is value at the time of the patent.

21                  QUESTION: You say the Interior Department took  
22 that position. How? Was that a -- a solicitor's opinion  
23 or what?

24                  MR. McCRUM Yes. Yes, Your Honor. That was in  
25 a solicitor's opinion in 1956. It's a solicitor's opinion

1    which this Court took note of in the Western Nuclear  
2    decision in 1983 and -- and relied on.

3                   QUESTION:  Well, Western Nuclear certainly cuts  
4    the other way from your argument here today.  I didn't  
5    agree with the holding, but that was the holding of the  
6    Court.  It was under a different act, not the Pittman Act,  
7    but certainly very similar.

8                   MR. McCRUM  Justice O'Connor, the Western  
9    Nuclear decision did hold that gravel could be reserved  
10   under the Stock-Raising Homestead Act of 1916, but  
11   importantly, the issue of whether that sand and gravel had  
12   to be valuable at the time of the patent was not addressed  
13   in the holding of the Court, as the Government has  
14   acknowledged in its brief.

15                   QUESTION:  Well, wasn't that because the word  
16   valuable didn't include in the -- wasn't included in the  
17   reservation of Stock-Raisers Act?

18                   MR. McCRUM  It -- it could well have been --  
19   that -- that could have been part of the Court's thinking.  
20   In -- in the Pittman Act, we do have an emphasis on the  
21   term, valuable minerals, in the plain language of the  
22   statute, and certainly that is a further reason why the  
23   element of value is all the more important in this case,  
24   both at the time of enactment in 1919, as well as at -- at  
25   the 1940 patent.



1                   QUESTION: Why couldn't it be that the -- the  
2 word valuable doesn't mean at the time of the patent? It  
3 means reserves the mineral rights, and if and when they  
4 prove valuable, the Government will assert its right. I  
5 mean, one could imagine a metal that was not considered  
6 worth anything. Let's just suppose that was the view of  
7 uranium. And then years later, one realizes the  
8 tremendous value of that metal. Would one say that, well,  
9 because when the patent was granted, no one had any idea  
10 how valuable this would be, therefore when it turns out  
11 that it is indeed very valuable, the United States hasn't  
12 any reserved rights?

13                  MR. McCRUM: Well, Your Honor, that -- that  
14 could be a possible construction, but in this case the  
15 Interior Department in the 1956 solicitor's opinion took  
16 note of the common nature of sand and gravel and how  
17 widespread it is across the western public domain and  
18 recognized that there was a need to look at -- at value on  
19 a site-specific marketability basis, which was actually  
20 consistent with the -- the approach the Department took in  
21 the Layman v. Ellis decision in -- in 1929, looking at the  
22 site-specific marketability of sand and gravel, because  
23 unlike a precious metal like gold which, once you extract  
24 it, it can be sold on an international market without  
25 regard to transportation costs and has intrinsic value,

1 sand and gravel and -- and similar materials are -- are  
2 common and widespread across the western public domain  
3 and, in fact, across the country. And it is only where  
4 you have a market on a site-specific basis that you can  
5 have value established.

6 QUESTION: What would happen, though, if you --  
7 what -- would any bad thing happen if the words were  
8 interpreted to mean any mineral at all that ever becomes  
9 valuable in the future so that then a person who bought  
10 this land could never take anything off of it? The  
11 Government would have the right to all the dirt. Anything  
12 that he -- anything that the individual sold, he couldn't  
13 sell. It would be the Government that would have to sell  
14 it. Now, if you took that interpretation, what would  
15 happen?

16 MR. McCURUM Justice Breyer, if -- if you took  
17 that interpretation, you would have western landowners  
18 essentially being -- having a very, very limited surface  
19 -- surface estate interest that would essentially be at  
20 the discretion of the Government where when local -- local  
21 demands for these materials arose, the Government at any  
22 time could come in and assert that they have ownership of  
23 these widespread common materials which would actually  
24 destroy -- potentially destroy the value of the land and  
25 -- and further, eliminate any private incentives to

1 develop the private land, which was the intent of Congress  
2 in 1919.

3 QUESTION: One -- one way to -- to rule for your  
4 client here would be for the Court to hold that it is not  
5 a mineral if it can't be removed without disturbing the --  
6 the surface, and that certainly would resolve this case.  
7 I'm hesitant to say that, though, because of the placer  
8 mining of gold, et cetera. Could you comment on that?

9 MR. McCRUM Yes, Justice Kennedy. We are not  
10 advocating such a rule, although it certainly in this case  
11 bears -- is certainly a significant factor that this  
12 common, widespread material actually would essentially  
13 destroy the surface of the land.

14 QUESTION: Yes, that's what's bothering me.  
15 What -- what are we to do with that factor? I just don't  
16 see how you can get the gravel without completely  
17 destroying the -- the surface use that -- that the owner  
18 might want to put to it --

19 MR. McCRUM Well --

20 QUESTION: -- assuming there's a different  
21 owner. This -- this happens to be the owner that makes  
22 that choice.

23 MR. McCRUM Yes. Justice Kennedy, it's just  
24 that type of factor that have caused the vast majority of  
25 State and Federal court decisions that have addressed the

1 question of whether gravel is a reserved mineral in any  
2 type of private conveyance and cases involving the  
3 Government where they acquire a surface interest that have  
4 caused these -- the Federal and State courts to rule  
5 almost uniformly that gravel is not a -- a reserved  
6 mineral in the absence of some express intent to indicate  
7 that it should be reserved.

8 QUESTION: Of course, but you're -- you're in  
9 that boat too. I mean, you -- you acknowledge that if the  
10 sand and gravel was valuable at the time the patent was  
11 issued, the Government would -- would own it under the  
12 mineral reservation. So, I mean, despite the fact that  
13 you'd have to chew up the surface land to -- to get at it  
14 with a commercial value. Right?

15 MR. McCURM Well, Justice Scalia, we -- we --  
16 so, I mean, we have two positions here and -- and one is  
17 that sand and gravel was -- was not reasonably within the  
18 -- the meaning of this phrase as it was -- was used in  
19 1919 considering the common legal understanding which had  
20 -- had been developed by the Interior Department quite  
21 clearly between 1901 and 1919 that made it very clear that  
22 -- that common, widespread sand and gravel was not what  
23 the -- was not what was considered to be a valuable  
24 mineral at that time.

25 QUESTION: Well, if it wouldn't be considered a

1 valuable -- I mean, that -- that does bring you into --  
2 into contradiction of our prior cases because if that --  
3 if that were so, it wouldn't have been considered a  
4 mineral either, it seems to me.

5 MR. McCRUM That's correct, Justice Scalia, but  
6 we -- we -- in this case we do have the further express  
7 language of -- of valuable.

8 QUESTION: Yes, the problem is you have Western  
9 Nuclear, which said that gravel was a mineral. Now you've  
10 got a statute in the Pittman Act that says valuable  
11 minerals, which brings you to your fall-back position  
12 which is that if at the time of patenting the land it  
13 wasn't valuable commercially, then it isn't covered. Is  
14 that right?

15 MR. McCRUM Yes, Justice O'Connor. If -- if  
16 the Western Nuclear precedent is followed and applied to  
17 the 1919 Pittman Act, then our -- our primary position is  
18 that the material was not valuable at the time of patent.

19 QUESTION: It's a little odd in this Pittman Act  
20 because it -- it does in section 8 refer to valuable  
21 minerals, but at various other times in the act, it just  
22 says minerals.

23 MR. McCRUM In -- in section 8 of the Pittman  
24 Act, it -- the statute makes it quite clear that only  
25 valuable minerals are reserved. And then it -- in -- in

1 later parts of that section, it refers to, and the mineral  
2 so reserved shall be disposed in accordance with law. I  
3 don't think that changes the -- the meaning of the  
4 reservation, and it's further confirmed here by the actual  
5 patent issued by the Interior Department in the joint  
6 appendix where only valuable minerals are reserved in the  
7 patent.

8 QUESTION: Suppose --

9 QUESTION: Is that term used in any other act  
10 that we'd be concerned with the term, valuable minerals,  
11 as a reservation?

12 MR. McCURM Not as a reservation that I'm aware  
13 of, Your Honor, but it is -- is, of course, quite similar  
14 to the language used in the 1872 Mining Law which  
15 described what -- what -- how -- what would be done with  
16 the reserved mineral estate.

17 QUESTION: Suppose -- and -- and it's only a  
18 supposition -- that we were to reconsider our -- our  
19 earlier case, Western Nuclear, and -- and overrule it. It  
20 -- it seems to me that then -- then there would be chaotic  
21 lawsuits to follow because there would not -- not have  
22 been intentional trespasses but the wrong people would  
23 have been extracting the minerals if there had ever been a  
24 -- a grant by the Government to -- to a person other than  
25 the owner of the fee. Is there any precedent in the Court

1 for how we unwind the -- the clock, or whatever the  
2 metaphor is?

3 MR. McCRUM Well, as we -- as we point out in  
4 our reply brief, Justice Kennedy, the amount of land that  
5 is potentially subject to contract issued by the  
6 Government for gravel on reserved mineral estates appears  
7 to be on the order of less than two-tenths of 1 percent of  
8 the lands patented under the Stock-Raising Homestead Act.  
9 So the vast majority of private lands at stake would --  
10 would not be affected by a ruling except to the extent  
11 that it would confirm that the landowner has the common  
12 sand and gravel that -- that was part of the land  
13 conveyed.

14 QUESTION: But your fall -- your fall-back  
15 position would extend only to Nevada, I take it, and the  
16 fact that it was valuable would be distinguishing from the  
17 Western Nuclear case.

18 MR. McCRUM Yes, Mr. Chief Justice. The -- the  
19 Pittman Act itself applies solely in Nevada and regardless  
20 of whether the Court were to reconsider Western Nuclear,  
21 we think that Western Nuclear should certainly not be  
22 extended to this act which has the term, valuable  
23 minerals, express in the statute and where the time of  
24 patenting issue was not addressed by Western Nuclear, as  
25 the Government acknowledges. There's no issue of stare

1    decisis if -- if the Court is to say the time of patent is  
2    paramount, as the Interior Department itself has held in  
3    the 1956 solicitor's opinion and as the Tenth Circuit  
4    ruled in the Hess case only last fall.

5                   QUESTION: Mr. McCrum, I don't understand what  
6    your response to Justice Ginsburg's question is under your  
7    fall-back position. That is to say, what do you do with  
8    uranium which was not regarded as a valuable mineral when  
9    the patent was issued and nowadays is regarded as a very  
10   valuable mineral? What happens to uranium under your  
11   fall-back position?

12                  MR. McCRUM Yes, Justice Scalia. Uranium is  
13   clearly a rare, valuable mineral. Whether or not it  
14   was --

15                  QUESTION: Oh, it is now. It wasn't then.

16                  MR. McCRUM Yes.

17                  QUESTION: I mean, it was rare but not valuable.

18                  MR. McCRUM Yes, and -- and therefore, it is --  
19   it is clearly within the class of minerals that the --  
20   that the 1872 Mining Law applied. It has --

21                  QUESTION: Well, why is it if it's not valuable?  
22   I mean, that -- that's the problem. If it wasn't valuable  
23   at the time of patenting, what do you do with it? It  
24   seems to me that if -- if your argument is going to be  
25   consistent, you're going to say the -- the Government



1 hasn't reserved the right to uranium

2 MR. McCRUM Justice Souter, the -- uranium is  
3 clearly of a -- a valuable, rare nature.

4 QUESTION: No, but you're changing the  
5 hypothesis. Justice Scalia's question was, if it wasn't  
6 valuable at the time of the patent, but we have now  
7 discovered uses for it so that it is valuable, what do you  
8 do with uranium? And I would have thought that your  
9 position would be the Government loses on uranium too.

10 MR. McCRUM Of course, the Court may -- may  
11 view it that way, Justice Souter. The -- the way I would  
12 view it is that uranium is a rare, valuable mineral,  
13 similar to gold, silver, lead, and zinc, and it's very  
14 different --

15 QUESTION: Well, I guess you could take the  
16 position that a mineral like uranium has some intrinsic  
17 value, very little as of 1919 and more today, but that  
18 sand and gravel neither in 1919 nor today has any  
19 intrinsic value as a mineral. It is only when it is  
20 located near an urban center and therefore has value as a  
21 convenience. I suppose that would be your argument.

22 MR. McCRUM Yes, Justice O'Connor. Thank you.  
23 That -- that is -- that is precisely the distinction.

24 (Laughter.)

25 MR. McCRUM That is precisely the distinction.

1                   QUESTION: Well, I mean, you -- you could say  
2 uranium only has -- only -- has no intrinsic value. It  
3 only has value if you're splitting atoms. I mean, you can  
4 make the same -- the same argument about uranium

5                   MR. McCRUM But uranium is -- is not dependent  
6 upon local transportation costs in the way that sand and  
7 gravel was, and that is the fundamental distinction --

8                   QUESTION: This must have come up under -- under  
9 -- it has nothing to do with -- I don't think, with the  
10 word valuable. It has to do with the word minerals  
11 covered in leases all over the country. So it must have  
12 come up in this other context too. Western Nuclear,  
13 putting that aside, that somebody looks at titanium or  
14 some -- something. Maybe it's never come up, but I would  
15 think it would be true of every mineral lease, that --  
16 that you have some kind of a mineral that had no value in  
17 1500 or 1919 and today it's fabulous. And -- and does --  
18 are they -- do they cover them or don't they cover them?  
19 Maybe you don't know. I don't know, but I don't see that  
20 the word value has much to do with it.

21                  MR. McCRUM The -- the way that it has come up  
22 is -- would be in the -- the most analogous way that I can  
23 think of is in the context of the 1872 Mining Law where,  
24 although that language was enacted in 1872, the Interior  
25 Department has had no trouble with the administration of

1 that law determining that -- that uranium is subject to  
2 location as a mining claim under the 1872 --

3 QUESTION: It was a mineral in 1500. I mean,  
4 nobody --

5 QUESTION: Yes, but everything was.

6 QUESTION: -- nobody disputes that it was a  
7 mineral, which is what the -- what the mining act says.  
8 The -- the issue is whether it's a valuable mineral. In  
9 your fall-back position, you're placing a lot of weight on  
10 the adjective valuable, and that -- that created problems  
11 with -- with uranium

12 QUESTION: Didn't we have a case that involved,  
13 was it methane, that was thought not only did it have no  
14 value, but it was a positive detriment to have it? And  
15 then years later it turned out to be something very  
16 valuable.

17 MR. McCURM Yes, Justice Ginsburg, that would  
18 have been the Amoco v. Southern Ute case in 1999. There  
19 the question is -- was whether under the contemporaneous  
20 understanding in 1909 and 1910 did coal include coal bed  
21 methane. The Court looked to that common understanding  
22 and common meaning and said, no, it didn't. And that's  
23 precisely the same approach we're asking the Court to  
24 follow here.

25 QUESTION: So who had the reserve? Didn't

1 somebody have reserved rights in it?

2 MR. McCRUM Yes. The -- the Government had  
3 initially reserved coal and -- and the question was  
4 whether that pure coal reservation extended to the coal  
5 bed methane within the coal, and the -- and the Court  
6 concluded no. So it -- it is -- it is a case that we rely  
7 on to look to the contemporaneous interpretation and  
8 understanding at the time.

9 And here, sand and gravel was well known. It  
10 was widespread, and there were repeated Interior  
11 Department decisions that said this is not the type of  
12 mineral that is subject to the 1872 Mining Law as a -- as  
13 a valuable mineral.

14 QUESTION: May I ask you a question about an --  
15 an argument that hasn't specifically come up this morning?  
16 And, first, I just want to tell you what my -- my  
17 understanding of the argument is and -- and you tell me if  
18 I've got it wrong.

19 I thought one of your arguments was that it was  
20 important to know whether the mineral was valuable or not  
21 at the time of the patent or the deed because the -- the  
22 grantee, the patentee, ought to know, in effect, the  
23 extent to which his -- his land grant is -- is jeopardized  
24 by the Government's right to come in. He ought to be able  
25 make a rough judgment as to whether at some point they're

1 going to come in and start extracting things. Is -- is  
2 that a fair statement?

3 MR. McCRUM Yes, Justice Souter. Correct.

4 QUESTION: My -- my question is this. If -- if  
5 that is the reason for saying we should look to value at  
6 the time of the patent, isn't that an argument that is at  
7 odds with your position that if the mineral is valuable at  
8 the time, it is reserved? Because -- the reason I say  
9 that is this. There may be gold under the land, but the  
10 patentee doesn't know it and the Government doesn't know  
11 it. So that there is no way, at the time the deed passes,  
12 that the person taking that deed is going to be able to  
13 know whether, at some point in the future, the Government  
14 is going to come in and -- and start drilling a mining  
15 shaft in the land.

16 So my question is, regardless of what the date  
17 at -- at which value is established, isn't it the case  
18 that these patentees never really know whether at some  
19 future time the Government is going to come in and start  
20 drilling? And if that is so, why should the patent date  
21 be important?

22 MR. McCRUM Justice Souter, you're -- you're  
23 correct that there is -- there's always some level of  
24 uncertainty when a party takes land subject to a mineral  
25 reservation. But the distinction that is important that

1 the Interior Department has long recognized and -- and  
2 that the Federal and State courts have recognized is that  
3 in the case of a common, widespread material such as  
4 gravel, it is -- it is the value at the time of patent  
5 which needs to be looked to. And that's what --

6 QUESTION: So are you saying basically, look,  
7 that's the way we've done it and you ought to defer to the  
8 practice? Is that -- I mean --

9 MR. McCURUM We are -- we are --

10 QUESTION: -- is that the foundation for your  
11 argument?

12 MR. McCURUM We are saying that this is the way  
13 the Interior Department itself has done it, and this --  
14 and this is the Interior Department that here is asserting  
15 a different rule today. And the Interior Department and  
16 the decisions of this Court have recognized a distinction  
17 between common material such as sand and gravel and  
18 precious metals and other materials that have intrinsic  
19 value and recognized a distinction to look to  
20 marketability and local, site-specific factors.

21 QUESTION: When -- when you say today about --  
22 and you cite the opinion of the solicitor from 1956, but  
23 the position that the Government is arguing today in this  
24 Court is not new. This is hardly the first time the  
25 Government has taken the position that sand and gravel can

1 be valuable minerals.

2 MR. McCRUM Justice Ginsburg, the -- the  
3 position -- the litigation position which the Government  
4 is taking here today that value does not matter at the  
5 time of patenting actually has -- is not supported by  
6 Interior Department decisions. We are relying on the 1956  
7 solicitor's opinion. This Court referred approvingly to  
8 the opinion in -- in Western Nuclear. That opinion has  
9 never been overruled by the Interior Department and the --  
10 and the Interior Department offers no other interpretation  
11 of -- on that issue as -- as something that this Court  
12 should rely on.

13 A further reason that we think that -- that  
14 these issues should be resolved in a -- in a fair manner  
15 is the application of the Leo Sheep precedent of this  
16 Court which recognizes the sacrifice and -- and -- that  
17 have been made by the private individuals in obtaining  
18 these patents and the inducement that the Government  
19 carried out in encouraging parties to make these  
20 sacrifices to obtain these lands. And the purpose of the  
21 act would be defeated to -- if -- if the Government is  
22 able to later reserve common sand and gravel.

23 QUESTION: But they didn't -- they didn't make  
24 sacrifices to get the sand and gravel.

25 MR. McCRUM Justice Stevens, they made

1 sacrifices to get the land, and the sand and gravel makes  
2 up the bulk of the land. And if the Government can later  
3 come back and say, that sand and gravel is ours now that  
4 it has acquired some economic worth, it really defeats the  
5 purpose of putting the lands into -- into private  
6 ownership.

7 QUESTION: You're saying it makes up the bulk of  
8 the land? I mean, I can understand that you would have an  
9 argument maybe for -- for limiting what the government can  
10 take if out of your, whatever it is, 600 acres, you know,  
11 590 are gravel and the Government says, too bad, we're  
12 taking it all. But as I understand it, we -- we have not  
13 gotten any issue in this case or in other cases about an  
14 inequitable enforcement of the -- of the extraction  
15 condition. Am I wrong about that?

16 MR. McCURM Justice Souter, the Government's  
17 position is that they own all the common sand and gravel  
18 that makes up this entire parcel of land. As -- as much  
19 as the extraction operations may continue, the Government  
20 would continue to take the view that they own every bit of  
21 it based upon the decision of the -- of the Ninth Circuit  
22 below.

23 QUESTION: Well, you'd have an argument on the  
24 first prong of Western Nuclear if they took that position  
25 in fact, wouldn't you?



1                   MR. McCrum   Well --

2                   QUESTION:   I mean, that -- that would be  
3   inconsistent with the -- with the purpose of the grant in  
4   the first place I suppose.

5                   MR. McCrum   We do -- we do believe that -- that  
6   we -- that the Government's position is -- is contrary to  
7   Western Nuclear in the sense that it is not -- that it --  
8   that it is relying on the value of the sand and gravel  
9   today without regard to what the value was in --

10                  QUESTION:   No, no, but I'm talking about the  
11   extent of it.   Does -- does the record indicate that the  
12   -- that the -- that you have claimed that -- that one  
13   basis for -- that you should win this case is that the  
14   Government, in effect, will take, as you put it, the bulk  
15   of the property if they win?  Is -- is that in the record?

16                  MR. McCrum   What is in the record is that -- is  
17   that this sand and gravel deposit is extracted from the  
18   surface, that the -- that the character of the land is  
19   widespread, abundant common sand and gravel.  The -- the  
20   photographs in the record show that the land is of the  
21   same character.  The Government's position in this case is  
22   that they own the sand and gravel wherever it may be on  
23   that property.  And -- and I think there's no question  
24   that it comprises the bulk of the land, and -- and I  
25   wouldn't expect the Government to dispute that here today.

1                   QUESTION: You wish to reserve the balance of  
2 your time, Mr. McCrum?

3                   MR. McCRUM Yes, Mr. Chief Justice.

4                   QUESTION: Very well.

5                   We'll hear from you, Mr. Sansonetti.

6                   ORAL ARGUMENT OF THOMAS L. SANSONETTI

7                   ON BEHALF OF THE RESPONDENTS

8                   MR. SANSONETTI: Mr. Chief Justice, and may it  
9 please the Court:

10                  QUESTION: Mr. Sansonetti, I looked in the -- to  
11 get some statistics about what Nevada was like in 1940,  
12 and it had a -- a total population of 110,000. It has an  
13 area of 100,000 square miles, which is about 1 person per  
14 square mile. Las Vegas had a population of 8,000. This  
15 property is 65 miles away from Las Vegas.

16                  Does the Government say that it -- that this was  
17 a valuable mineral in 1940 when the patent was issued?  
18 And if not, when did it become valuable?

19                  MR. SANSONETTI: The United States is saying  
20 that the sand and gravel was, indeed, valuable as a matter  
21 of a category of minerals. In other words, the category  
22 of sand and gravel was valuable actually, we're saying, as  
23 far back as 1919, that the actual passage date of the  
24 Pittman Act in 1919 was the exact time that sand and  
25 gravel was valuable.

1                   QUESTION: Well, dirt is valuable on that basis.  
2 I mean, people buy topsoil. And, you know, if you're in  
3 an area where -- where a lot of people need topsoil, I  
4 suppose you'd say dirt is valuable.

5                   MR. SANSONETTI: In that case I wouldn't,  
6 though, Your Honor, because topsoil also mixes both  
7 organic and inorganic materials. And the test that the --  
8 that the Court set out in Western Nuclear was four-legged,  
9 and the four-part test for a mineral was that it be  
10 inorganic. Extractable from the soil was the second leg.  
11 Third one was usable for a commercial purpose, and the  
12 fourth one was that the -- the mineral was not somehow to  
13 be included in the use of the surface estate.

14                  QUESTION: What if -- what if you had only sand,  
15 which wasn't covered by Western Nuclear?

16                  MR. SANSONETTI: That would not be a problem in  
17 this particular instance, Mr. Chief Justice, because sand  
18 and the gravel are really just a matter of size. In  
19 order, they go silt, sand, gravel, cobble, building stone.

20                  QUESTION: So you say that's no problem for the  
21 Government. The Government gets the sand too?

22                  MR. SANSONETTI: Oh, yes, because sand is a  
23 mineral.

24                  QUESTION: It's a problem for me, even if it's  
25 not for you.

1                   MR. SANSONETTI: Yes, yes.

2                   QUESTION: Doesn't the Government get -- I mean,  
3 it gets everything. I mean, what -- what is it -- I mean,  
4 you -- mud is made into adobe bricks. I mean, and -- so  
5 it gets absolutely everything except for the 6 inches or  
6 so that maybe was mixed up that you could grow corn in.  
7 And I don't even understand why they wouldn't get that too  
8 if they wanted it.

9                   MR. SANSONETTI: Now, I think that the first  
10 thing we have to do is take a look at the purposes of the  
11 passage of both the Stock-Raising Homestead Act and the  
12 Pittman Act.

13                  QUESTION: Am I right in thinking the Government  
14 gets absolutely everything with the possible exception  
15 because of the fourth point of Western Nuclear that I'm  
16 not sure why it even came in, but that if it's mixed with  
17 something you could grow something in, then they don't get  
18 it. But everything else is the Government's.

19                  MR. SANSONETTI: Surface, yes. Minerals, no.  
20 The -- the Justice is -- Justice Breyer is -- is correct.  
21 The degree that the surface has been given to the  
22 patentee, the patentee has total control of the surface --

23                  QUESTION: So and then -- if it's so, then at  
24 this time what this amounted to what seemed to be giving  
25 the land away -- it amounted to a lease or a right to use

1 a piece of land to grow crops. And that's all these great  
2 giveaways were. They were simply a right to use land to  
3 grow crops and nothing else.

4 MR. SANSONETTI: Initially the answer to that --  
5 that question is yes because if you look at section 3 of  
6 the Pittman Act, it refers to an affidavit that must be  
7 signed by the patentee coming onto the land, and that  
8 affidavit states that they are applying for this patent  
9 for the purposes of reclamation and cultivation and it  
10 states that they are not there as an agent for any other  
11 corporation, mining company, or anything like that. They  
12 are there for the surface. Basically --

13 QUESTION: All right. Then that whole argument  
14 would be that's certainly a possible reading of the lease.  
15 That's certainly a possible way to look at it, but it  
16 would have come as a great surprise to Senator Pittman and  
17 everybody else at the time in the Interior Department and  
18 elsewhere. That's why, to make their argument, they say  
19 that Western Nuclear was certainly wrong and therefore  
20 what we should do is limit it by turning everything on the  
21 word valuable. All right. That I think is their whole  
22 argument and you don't want to --

23 MR. SANSONETTI: And -- and let me -- if I may  
24 shorten our own then, let me say that Congress, in looking  
25 at both the Stock-Raising Homestead Act and the Pittman

1 Act, was basically saying to the patentees through the  
2 mineral reservation, you could have the surface of the  
3 land -- initially the thought was, of course, farming.

4 QUESTION: Well, what if -- what if the surface  
5 had -- what if the gravel was on the surface?

6 MR. SANSONETTI: Okay. At -- the -- the gravel  
7 on the surface that is usable for commercial purposes  
8 belongs to the United States.

9 QUESTION: So they didn't even get that part of  
10 the surface.

11 MR. SANSONETTI: If they wanted to use the sand  
12 and gravel as part of their surface operation as in the  
13 farming where you want to gravel a road, when you turn it  
14 into cement, as was done in this case -- the farmer Butler  
15 that obtained the patent in 1940 used some of the sand and  
16 gravel to make concrete to provide patios, et cetera. As  
17 long as it is linked to the purpose of the surface, it  
18 belongs to the farmer, but if it's not, it belongs to the  
19 United States.

20 QUESTION: Why is that? Why is that? Why is  
21 that? Why is that? Is it the same with gold?

22 MR. SANSONETTI: The -- the --

23 QUESTION: So long as he uses the gold in his  
24 house, it's okay?

25 MR. SANSONETTI: Well, I think that it --

1 QUESTION: Or his teeth.

2 QUESTION: Or his teeth, yes.

3 (Laughter.)

4 MR. SANSONETTI: Or his teeth, yes.

5 For -- the long-term policy of the Department of

6 Interior and the Bureau of Land Management, as is spelled

7 out in great length in footnotes 3 and 14 of Western

8 Nuclear, is that it's always been okay for the owner of a

9 surface estate to go ahead and utilize a mineral so long

10 as it is incident to the purposes --

11 QUESTION: Can I ask --

12 MR. SANSONETTI: -- ordinary farming.

13 QUESTION: -- what -- what are his surface

14 rights? Can -- can the -- can the Government do whatever

15 it takes in order to get at these minerals?

16 MR. SANSONETTI: The --

17 QUESTION: I mean --

18 MR. SANSONETTI: The answer is yes.

19 QUESTION: -- he -- he supposedly has surface

20 rights. Don't -- don't they have to preserve his surface

21 rights when they do this?

22 MR. SANSONETTI: The -- the answer is --

23 QUESTION: But they can just go -- go in and rip

24 up the whole -- the whole acreage in order to --

25 MR. SANSONETTI: The -- the mineral estate is

1 indeed dominant, Justice Scalia, and in fact, the Congress  
2 already thought ahead about what would happen if the  
3 entire surface did need to get destroyed to go into a very  
4 valuable mineral. And that is -- and that thought by  
5 Congress is included in sentences 3 and 4 of section 8 of  
6 the Pittman Act where they make provisions for exactly  
7 what to do if you have to come in and locate a mineral or  
8 today you actually contract or sale your -- your sand and  
9 gravel.

10 Here's what it said. It said that that person  
11 may come on the land provided he shall not injure, damage,  
12 or destroy the permanent improvements of the entryman or  
13 patentee and shall be liable and shall compensate the  
14 entryman or patentee for all damages to the crops by  
15 reason of such prospecting. And that covers those that  
16 locate under sentence 3, and under sentence 4 it covers  
17 those that acquire a right to obtain the mineral through a  
18 contract.

19 QUESTION: Is it -- is it true? I -- I suppose  
20 there's -- there's placer mining even for gold and I -- I  
21 guess in some instances for coal. But I -- I must tell  
22 you my -- my assumption is that most mineral easements can  
23 be exploited without undue disturbance of the surface. Do  
24 you want to tell me that that's just wrong empirically,  
25 factually? Other than gravel. Other than gravel.



1                   MR. SANSONETTI: The fact here, though -- I  
2 mean, the -- the answer is, is that some minerals can be  
3 extracted without much harm to the surface. A lot of them  
4 do require it, though.

5                   QUESTION: How about coal? How about coal and  
6 how about copper --

7                   MR. SANSONETTI: Of course --

8                   QUESTION: -- where you destroy huge areas of  
9 the surface? Do you know?

10                  MR. SANSONETTI: You certainly do, Justice  
11 O'Connor. And -- and the fact is that that is exactly  
12 what was contemplated ahead of time when this particular  
13 act was passed. The minerals belong to the United States.  
14 And if it was copper and you needed a gigantic pit, so be  
15 it.

16                  In this case, we have a gigantic pit. Let's not  
17 -- you know, if you take a look at the joint appendix  
18 picture 15, you actually see what we're talking about  
19 there. This is not just a -- a surface operation. It's a  
20 huge pit.

21                  QUESTION: Well, that's the whole problem  
22 because they say a person who went out to Nevada and  
23 invested his time in this knew perfectly well that they  
24 weren't going to find copper. But if you had told him  
25 that the Government might come in and take all the dirt

1 out and take all the gravel out and take all the sand out,  
2 he would have said this is ridiculous. I'm not going to  
3 go out there and invest my time to -- to graze a cow when  
4 the Government can come along and build a copper mine not  
5 for copper but for dirt. I mean, really.

6               So that's -- that's why he says they've made  
7 this historical distinction between something that has  
8 intrinsic value, a precious metal then or now, uranium or  
9 gold, and something that's widespread and commonly found,  
10 dirt, copper -- dirt or gravel or sand. And when you're  
11 in that second category, I'm sorry, you just can't dig  
12 these -- these great big holes.

13              MR. SANSONETTI: And that's -- that's what we  
14 have here. We have got a gigantic hole. And you have to  
15 keep in mind the difference between the dirt and the  
16 topsoil which goes to the farming element of all this and  
17 the sand and gravel which may be a humble mineral compared  
18 to gold or silver. Maybe the sand and gravel are the --  
19 the poor stepchildren to brother gold and -- and sister  
20 silver, but they're just as valuable as a member of the  
21 mineral family. Let me note that --

22              QUESTION: May -- may I just interrupt to ask?  
23 I thought that you -- we weren't going to talk about dirt  
24 because dirt is part animal, part vegetable, so it's not  
25 mineral.

1                   MR. SANSONETTI: Right, but I brought that up  
2 because the question about topsoil. I wanted to make sure  
3 that I was distinguishing what is part of the surface  
4 versus sand and gravel which is not part of the --

5                   QUESTION: How about clay? Is -- is clay like  
6 dirt or is clay like sand?

7                   MR. SANSONETTI: Clay can -- clay is like sand  
8 in there.

9                   But the point is is that sand and gravel, as far  
10 back in the 1800's, much less at the point that I want to  
11 bring our -- the -- the Court's attention to, which is  
12 1919 where the Pittman Act is passed --

13                  QUESTION: I guess granite --

14                  MR. SANSONETTI: -- sand and gravel -- I'm  
15 sorry.

16                  QUESTION: So granite -- I mean, I'm thinking of  
17 granite. On our -- we have some granite. Somebody can  
18 come in and dig up all the granite?

19                  MR. SANSONETTI: Yes, because actually this  
20 Court in 1903 in the Soderberg case said gravel is a  
21 mineral. Sand and gravel is a mineral.

22                  QUESTION: And the -- and the same way with  
23 decorative rocks which are a big thing in northern  
24 California now? People are selling decorative rocks off  
25 their -- off their property. That's -- that's a mineral.

1 It belongs to the Government under these patents.

2 MR. SANSONETTI: Actually in that particular  
3 case, you would look at quartz. If it was something that  
4 they were using as part of their surface -- they may have  
5 a greenhouse or whatever -- then obviously the Bureau of  
6 Land Management is not interested in -- in taking the  
7 person's cactus or whatever.

8 QUESTION: The -- the holding -- the holding in  
9 Soderberg was that granite outcroppings were reserved.  
10 That -- it didn't talk about -- it didn't hold as to  
11 gravel, did it?

12 MR. SANSONETTI: No, not -- not as to gravel. I  
13 said granite. He asked about granite. Granite.  
14 Soderberg said granite is a mineral. Now, there was dicta  
15 in Soderberg, though, that quoted that -- favorably that  
16 gravel was also a mineral.

17 QUESTION: At what -- at what point did the  
18 Department of Interior take the position that you could  
19 get a mining claim under the mining act for sand and  
20 gravel claims?

21 MR. SANSONETTI: As of 1872, as I understand it,  
22 Justice O'Connor.

23 And -- and now to the 1919 part --

24 QUESTION: You -- you think you can show that  
25 patented mining claims were allowed for sand and gravel on

1 public lands that early?

2 MR. SANSONETTI: In -- in fact, with the passage  
3 of the 1872 Mining Act, that was the first opportunity  
4 under that law for people go after sand and gravel. It  
5 was not until 1947 with the passage of the Mineral  
6 Materials Act that you could obtain sand and gravel either  
7 by locating it through the 1872 Mining Act or obtaining a  
8 contract for lease. That changed. That contract for  
9 sale. Excuse me.

10 And that changed in 1955 with the passage of the  
11 Common Varietals Act where the only way you could obtain  
12 sand and gravel today -- well, ever since 1955 -- is by  
13 sale contract. You go to the Bureau of Land Management  
14 and you say you want 10,000 cubic yards of sand and  
15 gravel. You pay 35 cents or something like that that you  
16 bid to take each cubic yard out, and once that is out, of  
17 course, the 35 cents goes to the United States Government,  
18 Treasury, and the remainder, of course, goes for the sale  
19 of the sand and gravel.

20 But while it is valuable, obviously, in 1993  
21 when the petitioners were so interested in coming into the  
22 farmer's shoes -- this is a mining operator BedRoc  
23 stepping into the shoes of a farmer, those that had gone  
24 ahead and stayed on the surface of the land from 1940 to  
25 1993, now wanting to produce sand and gravel.

1                   QUESTION: Are you -- are you suggesting that  
2 because the grantee in this case was -- was a commercial  
3 operation, somehow the -- the value of the grant or the  
4 terms of the grant had changed?

5                   MR. SANSONETTI: Well, the -- the terms of the  
6 grant did not change, but I think we have to keep in mind  
7 exactly what the purpose of the statute was. And here it  
8 was Congress' intent to concurrently develop the surface  
9 of these lands and the mineral estates. The goal was to  
10 get new farmers to farm, new ranchers to ranch, while  
11 leaving the mineral estate to those that would be able to  
12 exploit that mineral and were after the mineral because  
13 they wanted to be mineral operators, not because they came  
14 on the land as farmers.

15                   This was the problem with all the fraud that was  
16 going on under the old land classification system where  
17 people would come onto the land saying this is non-  
18 mineral. I want it to be an agriculturalist, and then as  
19 soon as they'd get the patent to everything, including the  
20 surface and -- and the minerals, they were selling out to  
21 the coal companies.

22                   And that's what brought out the 1906 reservation  
23 of the coal, and then you have the 1909 act which says the  
24 patentee gets everything but the coal. And then in 1916  
25 and 1919 we have these two acts that say, nope, we're now

1 going, Congress says, to a split estate system where the  
2 surface goes to the surface grantee, the patentee, and a  
3 mineral operator must come to the United States to get any  
4 type of mineral.

5 QUESTION: Let me get something clear about the  
6 -- the Department of Interior's position. You said that  
7 ever since 1872 they had taken the position that sand and  
8 gravel was -- was mineral. But isn't it the case that  
9 they had taken that position only with respect to sand and  
10 gravel that was removable in -- in commercial quantities?

11 MR. SANSONETTI: That is correct.

12 QUESTION: Not all sand and gravel was minerals.

13 MR. SANSONETTI: That -- that is correct. And  
14 that's where the test of Western Nuclear comes in. If you  
15 want to know whether something is a mineral or not, you  
16 apply the test.

17 QUESTION: Let's -- let's go back before Western  
18 -- I think Justice Scalia's question -- I don't think your  
19 answer is consistent with what the Government did in the  
20 Zimmerman case, the Department, which was questioned  
21 later. But certainly at the time of Zimmerman, it -- it  
22 was not a -- it was not regarded as a mineral, was it?

23 MR. SANSONETTI: Well, Zimmerman in -- the  
24 Zimmerman case was -- was the Department of the Interior  
25 case that counsel has been referring to, Zimmerman, which

1 was in 1910, that said that sand and gravel did not equal  
2 mineral lands. So up until 1910, the question was, yes,  
3 it was -- it was a mineral. And the things -- things to  
4 note about this.

5 First of all, Zimmerman was specifically part of  
6 the Western Nuclear case and is rejected at pages 45 and  
7 46 of that opinion.

8 The second thing is is that that opinion, issued  
9 by the Department of the Interior, was never tested in the  
10 courts. It is certainly --

11 QUESTION: Well, wait a minute. Does that mean  
12 an opinion -- say, an agency opinion -- has no value if  
13 it's never been tested in the courts?

14 MR. SANSONETTI: No, but it does mean that  
15 there's a difference between the Department of the  
16 Interior's ability to inform the Congress at the time that  
17 this act passed in 1919 and their ability to bind the  
18 Congress. The solicitor's opinion is not binding on the  
19 Congress that that meant that sand and gravel fell out  
20 from the definition of valuable minerals in 1919,  
21 particularly since in 1919 sand and gravel was the fifth  
22 largest value of minerals produced in the United States  
23 that were nonmetallic.

24 QUESTION: Yes, and where -- where was that sand  
25 and gravel value concentrated? It was concentrated on the



1 east coast because of World War I, wasn't it?

2 MR. SANSONETTI: No. Actually as -- as you can  
3 see in the joint appendix, pages 56 through 118, there are  
4 a series of annual mineral reports that were utilized in  
5 both of the -- the district court case and the appellate  
6 court case in -- in BedRoc, that spell out that by 1911,  
7 there was already a national association of sand and  
8 gravel producers, including associations of State sand and  
9 gravel producers, in 14 different States.

10 QUESTION: Where --

11 MR. SANSONETTI: And -- and Nevada is included.

12 QUESTION: And where -- and where else were the  
13 14 States? If you don't have it handy, don't --

14 MR. SANSONETTI: Michigan, Texas, California,  
15 and I would note, I believe, it is at joint appendix -- I  
16 believe the page is 56 that shows that sand used for the  
17 making of glass had already been discovered in Nevada as  
18 of 1918. So -- and --

19 QUESTION: Well, that just -- that just proves  
20 that sand and gravel in certain places is valuable.  
21 That's conceded by the other side. Right? The issue was  
22 that -- is whether sand in the Gobi Desert is -- is  
23 something that's worth anything. And the fact is that the  
24 Interior Department never took the position that all sand  
25 and gravel is -- is minerals under the Mineral Act until

1     when?

2                   MR. SANSONETTI:   The -- the --

3                   QUESTION:   When was the first time it came up  
4     with the notion that whether it's commercially extractable  
5     or not at -- you know, at a profit, it is all minerals  
6     under -- under the mineral laws?

7                   MR. SANSONETTI:   You could locate sand and  
8     gravel from 1872 up to 1910.

9                   QUESTION:   You could locate it if it was  
10    commercially valuable, yes.

11                  MR. SANSONETTI:   That is correct.

12                  QUESTION:   That's not the question I asked.  
13    When is it that the Department first came up with the  
14    position that all sand and gravel, no matter where it is,  
15    is covered by the mining laws?

16                  MR. SANSONETTI:   I don't know the exact answer  
17    to your question, but I can say in regard to this --

18                  QUESTION:   Is it after -- is it after 1940?

19                  MR. SANSONETTI:   It's before 1940 because in  
20    1919 the Department of the -- as of 1919, the Congress had  
21    stated that sand and gravel is a valuable mineral.

22                  QUESTION:   Then how do you explain the 1956  
23    solicitor letter -- opinion -- the DOI solicitor who said  
24    that -- that there's a reservation only if the gravel had  
25    a definite economic value because of the proximity of a

1 market at the date of the patent?

2 MR. SANSONETTI: It was that -- okay, first of  
3 all, the 1956 solicitor's opinion was also reviewed by  
4 this Court in Western Nuclear. And the only portion of  
5 the solicitor's opinion that was approved by this Court  
6 was the finding that gravel was a mineral. The -- this  
7 Court in --

8 QUESTION: Well, did this Court disapprove of a  
9 portion that Justice Ginsburg just referred to? I don't  
10 remember.

11 MR. SANSONETTI: It did not adopt it. In other  
12 words, it was considered, but not adopted.

13 QUESTION: Did it say it was wrong? Did it say  
14 that was wrong?

15 MR. SANSONETTI: It did not, but then that's  
16 because Western Nuclear didn't answer this precise  
17 question of site-specific.

18 QUESTION: We're not talking for the moment  
19 about what the Court adopted. We're talking about what  
20 the Interior Department adopted. What is there in the  
21 Interior Department that would have contradicted its  
22 solicitor's opinion?

23 MR. SANSONETTI: Well, for one, it's the  
24 practice that has been followed since that time. Since  
25 site-specific is what's being mentioned in the solicitor's

1 opinion -- and frankly, it's an issue that related to an  
2 Indian reservation -- has absolutely no basis with the  
3 Stock-Raising Homestead Act grants or the Pittman Act  
4 grants. The statute at issue there related to an Indian  
5 reservation. It continued to grant United States control  
6 over all the minerals on that reservation, considered the  
7 trust responsibility. There were other elements being  
8 considered there rather than whether or not site  
9 specificity should be what the BLM follows all across the  
10 board. Note that we are here --

11 QUESTION: There's -- there's another -- there's  
12 another piece from the Department of the Interior that Mr.  
13 McCrum emphasized in addition to the 1956 opinion letter,  
14 and it was a heading or a sentence in the Western Nuclear  
15 brief, in the SG's brief, stating that the reservation  
16 embraces only gravel deposits that are economically  
17 exploitable and would justify an entry under the 1872  
18 Mining Act. So in Western Nuclear, according to Mr.  
19 McCrum, that issue wasn't before the Court and the  
20 Government said, indeed, the issue is it has to be  
21 economically exploitable at the time of the patent.

22 MR. SANSONETTI: Your Honor, we're mixing up two  
23 things. The 1872 Mining Act is an act that -- that tells  
24 you how to obtain a mineral. The reservation we're  
25 talking about today is describing what is covered by the

1 mineral. Once you've got the what, then you can decide  
2 the how, whether it's the 1872 act which has these deposit  
3 references and -- and the like, or whether something is  
4 saleable under contract. That -- those are the hows.

5 Today we're talking about the what, what is  
6 covered by the reservation. And the Pittman Act House  
7 report notes that the reservations in both the SRHA, the  
8 Stock-Raising Homestead Act, and the Pittman Act are  
9 identical.

10 QUESTION: Well, but that -- that can't be  
11 correct, can it, because one uses the term valuable and  
12 the other doesn't? And the House report certainly doesn't  
13 prevail over the statute.

14 MR. SANSONETTI: It does not prevail over the  
15 statute except let me come back to the question about the  
16 two words being -- the two phrases being different because  
17 section 8 of the bill -- again, Pittman was passed after  
18 the Stock-Raising Homestead Act, and the actual quote is  
19 that section 8 of the Pittman Act contains the same  
20 reservations of minerals which was passed by Congress in  
21 the Stock-Raising Homestead Act.

22 Now --

23 QUESTION: Well, that's not a quote from the  
24 statute. That's a quote from the report.

25 MR. SANSONETTI: And now as to the quotes from

1 the statute.

2 QUESTION: Will you -- will you answer my  
3 question?

4 MR. SANSONETTI: The answer is yes.

5 QUESTION: Okay.

6 MR. SANSONETTI: Okay. Now as to the actual  
7 statutes. In the Stock-Raising Homestead Act, it is all  
8 the coal and other minerals. That's section 9. In  
9 section 8 of the Pittman Act, it is all the coal and other  
10 valuable minerals.

11 QUESTION: Right. So -- so can I -- can you  
12 deal with this --

13 MR. SANSONETTI: Yes.

14 QUESTION: -- problem that's in the back of my  
15 mind? Okay? All right.

16 You wanted to finish what you were saying.

17 MR. SANSONETTI: If -- if I may, the position of  
18 the United States is that those two phrases, valuable  
19 minerals and minerals, are synonymous. The word valuable  
20 definitely has a meaning. That meaning was set out in  
21 Western Nuclear as being used for commercial purposes. So  
22 used for commercial purposes, the concept of value is  
23 definitely part of the Stock-Raising Homestead Act, and  
24 consequently, it means the mineral must be valuable.

25 In Pittman, you've got again the exact same

1 language of section 8 and section 9 with the addition of  
2 the word valuable. It appears eight times in both of --  
3 of those sections, and it is our -- our position then that  
4 they are interchangeable. Minerals sometimes, valuable  
5 mineral other times. So it's a distinction without a  
6 difference and valuable is definitely not a word of  
7 surplus.

8           QUESTION: Okay. What's bothering me in the  
9 back of my mind, assuming all the opinion letters and  
10 everything are sort of a wash, is that we don't ranch all  
11 -- as much as we used to and we don't farm as much as we  
12 used to. And therefore, what's really at stake is the  
13 ability to transfer title.

14           And once I begin to think in that way, I think  
15 that whoever might want to sell or buy some of this land,  
16 which now might be used for a city or a town or who knows  
17 what, might think to himself, well, I can deal with the  
18 reservation of, let's say, a specific precious mineral  
19 right like gold or even tungsten or even uranium. But if  
20 there's a possibility here that the Government can come in  
21 and start digging, because the mixture of organic only  
22 goes down about 6 inches, and if everything below that 6  
23 inches potentially belongs to the Government, and the  
24 Government can come in and tear up even that 6 inches to  
25 look for rocks or look for sand or look for gravel or

1 granite or all that stuff, which is undoubtedly there, I  
2 just don't know what I'm getting into. And therefore, I  
3 would be pretty reluctant to buy this piece of land, or at  
4 least not for much of a price.

5 Now, it's that kind of uncertainty in land  
6 transfer title that is coming on 100 years after the event  
7 that's worrying me. So I would like you to reply and tell  
8 me what you think of that.

9 MR. SANSONETTI: Let -- let me try it in -- in  
10 this fashion because we're talking about expectations here  
11 and what the patentee, the surface owner, is obtaining and  
12 how it passes that on to successors.

13 The United States was saying through the  
14 Congress through both of these acts that the mineral --  
15 through the mineral reservations that you, the patentee,  
16 can come onto the surface of this land, use it as you  
17 will. We, the citizens of the United States, keep  
18 anything that may be found on or underneath that land that  
19 has mineral value. The patentee gets to use the surface  
20 as his benefit of the bargain and should not expect  
21 anything else. If there are windfalls -- if there are  
22 windfalls of valuable minerals that no one knew were under  
23 these lands in Nevada, if any, they should belong to the  
24 citizens of the United States and --

25 QUESTION: Most of the States that have ruled on



1 this subject -- most of the State courts that have ruled  
2 on this subject, have come out the other way from Western  
3 Nuclear. Do they have a different perspective or  
4 different concerns?

5 MR. SANSONETTI: They -- they do -- they do  
6 because there's no congressional mandate in those -- in  
7 those State court cases. Those State court cases  
8 invariably have situations where the reservations may or  
9 may not be applied by the Secretary of the Interior, in  
10 reference to the Hess case for instance.

11 QUESTION: No, but the practical problems and  
12 the -- and -- and the likely expectations and  
13 understanding of the purchasers would be the same.

14 MR. SANSONETTI: They -- they would be the same  
15 except in our instance, they're much more clearly laid out  
16 because once that affidavit is signed under section 3,  
17 then you have the person coming onto the land  
18 contemplating cultivation. They are signing an affidavit  
19 saying they want the free land, and it's free land. For  
20 20 acres of crops, they get up to 640 acres of free land.  
21 And they get the appreciation of that land. This  
22 particular plot happens to be just north of Las Vegas. If  
23 it appreciates --

24 QUESTION: If they find -- if they find water.  
25 They have to come in --

1                   MR. SANSONETTI: They have to --

2                   QUESTION: -- and expend a certain amount of

3 money --

4                   MR. SANSONETTI: Yes, they did.

5                   QUESTION: -- considerable money sometimes, to

6 find water. And if they find it, then they have the right

7 to -- to farm And, you know, I don't think that's a --

8 such a terrific deal if they can be just dug out of their

9 -- of their homestead by the Government.

10                  MR. SANSONETTI: But the fact is is at the point

11 where they did find water, they applied for the patent.

12 They get their 640 acres. In this case it was 560. They

13 acknowledge that they are getting this free land for

14 crops. They grew the crops, the 20 acres' worth of crops

15 that had been grown that got them the opportunity to file

16 their final certificate and obtain that patent.

17                  Now, remember, if this land appreciates, they

18 get the benefit of that bargain, the same way as if the

19 United States happens to find that there is a valuable

20 mineral underneath, they happen to benefit from it. This

21 could be a golf course or a WalMart or anything in a few

22 years north of Las Vegas.

23                  QUESTION: If -- if the --

24                  MR. SANSONETTI: The United States is not asking

25 for that appreciation.

1                   QUESTION: If the property owner had exported --  
2 transported the water to Las Vegas for a municipal water  
3 supply, would that be consistent with reclamation?

4                   MR. SANSONETTI: Any -- as I understand it, that  
5 under Nevada State law, the water actually that was found  
6 by Farmer Butler in this case is -- is dealt with by the  
7 Nevada State water engineer. So long as he uses it for  
8 beneficial uses, the permission to take it off premises or  
9 on premises has nothing to do with this reservation. It  
10 has to do with Farmer Butler and Nevada State law.

11                  But I would like to note a couple quick things  
12 in regard to the bad consequences of a site-specific test  
13 because it does place the ownership of other minerals into  
14 doubt. It's not just gold or silver that we're dealing  
15 with on one hand and sand and gravel or some ubiquitous  
16 common gravel over here. What happens? What's the test  
17 then for things like trona or bentonite or limestone or  
18 dolomite or any other thing. You mentioned uranium  
19 Uranium was used for watch dials way back in 1919, but of  
20 course, we now see it has a much more important purpose  
21 today.

22                  QUESTION: The -- the test, as I understand it,  
23 would be whether it was commercially worthwhile to extract  
24 it and transport it to wherever you'd have to take it to  
25 use it.

1                   MR. SANSONETTI: Ah, and if it was, it would be  
2 a mineral reserved to the United States. But if the site-  
3 specific test is put into place, imagine then the  
4 practical difficulties in trying to show that from the  
5 Bureau of Land Management's point of view going back in  
6 time --

7                   QUESTION: No, no. I mean, the -- the Bureau  
8 has always had a -- a doctrine of inherently valuable  
9 minerals, gold and silver. You don't have to show that it  
10 can be extracted at a commercial profit. And benthamite  
11 or kryptonite, which Superman uses --

12                   (Laughter.)

13                   QUESTION: -- whatever you want, all you have to  
14 do is say that that is an inherently valuable mineral.

15                   MR. SANSONETTI: Well, to the extent that  
16 there's any doubt on -- on the Court about whether or not  
17 gravel is a mineral reserved to the United States in the  
18 Pittman Act reservation, we feel it should be resolved in  
19 favor of the Government due to the old canon of  
20 construction that says that about the scope of land grants  
21 are construed favorably to the Government.

22                   Thank you.

23                   QUESTION: Thank you, Mr. Sansonetti.

24                   Mr. McCrum, you have 2 minutes remaining.

25                   REBUTTAL ARGUMENT OF R. TIMOTHY MCCRUM

1                               ON BEHALF OF THE PETITIONERS

2                               MR. McCRUM   Thank you.

3                               One point that I'd like to make as clear as I  
4 possibly could is that sand and gravel was not locatable  
5 under the Mining Law from 1872 onward. It -- it -- the  
6 Interior Department was as clear as could be in published  
7 decisions that common material like sand and gravel and  
8 clay were not subject to the 1872 Mining Law, not within  
9 the class of valuable minerals. The -- the first  
10 published decision we see on this is in the 1880's and we  
11 see a repeated line of cases from 1901 through 1919.  
12 They're all cited in our opening brief. We really  
13 shouldn't have an issue about that.

14                            It was not until 1929 --

15                            QUESTION: Well, your opponent flatly disagrees  
16 with you, doesn't he, on that?

17                            MR. McCRUM   I have great respect for my  
18 opponent, Mr. Sansonetti, but I -- I think that this point  
19 that I'm making is -- is as clear as could be in the  
20 record.

21                            And the Zimmerman case is not an isolated case.  
22 It's merely a case in 1910 that is stating this very  
23 explicitly in the case of sand and gravel that this was  
24 actually the general understanding and that the Department  
25 was not even receiving applications for sand and gravel

1     mining claims because this was so well known.

2                     It was not until 1929 in the Layman v. Ellis  
3     decision where the Department changed that rule, 10 years  
4     after the Pittman Act in this case. Then it was  
5     determined on a site-specific basis. That's the site-  
6     specific base -- basis argument that we are putting  
7     forward here, which then was adopted in the 1956  
8     solicitor's opinion in the context of mineral  
9     reservations.

10                    There was some reference to the Soderberg case  
11    of this Court in 1903. That involved valuable granite  
12    building stone of the type that we see here in the  
13    Jefferson Memorial and around this city. Not -- it was  
14    not a surprising ruling when this Court upheld the  
15    position of the Interior Department patent that valuable  
16    granite could be subject to the Mining Law within the  
17    class of valuable minerals.

18                    By then, in 1897, in the Pacific Coast Marble  
19    case, the Interior Department had already ruled that  
20    marble was a valuable mineral, which is an eminently sound  
21    ruling looking at the marble in this Court building, which  
22    is quite different from common sand and gravel.

23                    CHIEF JUSTICE REHNQUIST: Thank you, Mr. McCrum

24                    The case is submitted.

25                    (Whereupon, at 11:04 a.m., the case in the

1   above-entitled matter was submitted.)

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