No. 07-44

In the Supreme Court of the United States

NEW WEST MATERIALS, LLC, ET AL.,
PETITIONERS

v.

INTERIOR BOARD OF LAND APPEALS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the reservation to the United States of "the oil, gas, and all other mineral deposits" in the Small Tract Act of 1938, ch. 317, 52 Stat. 609, as amended by Act of June 8, 1954, ch. 270, 68 Stat. 239, repealed by Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, § 702, 90 Stat. 2789, encompasses commercially valuable sand and gravel.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is not published in the *Federal Reporter* but is reprinted in 216 Fed. Appx. 385. The opinion of the district court (Pet. App. 14a-45a) is reported at 398 F. Supp. 2d 438. The decision of the Interior Board of Land Appeals (Pet. App. 46a-80a) is reported at 164 I.B.L.A. 126.

JURISDICTION

The judgment of the court of appeals was entered on February 8, 2007. A petition for rehearing was denied on April 13, 2007 (Pet. App. 12a-13a). The petition for a writ of certiorari was filed on July 11, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case concerns the scope of the reservation of "the oil, gas and all other mineral deposits"[1] in the patents to approximately 82 acres of land near Phoenix, Arizona. The United States issued the original patents to the property in 1959, pursuant to the Small Tract Act of 1938 (STA), ch. 317, 52 Stat. 609, amended by Act of June 8, 1954 (1954 Act), ch. 270, 68 Stat. 239, repealed by Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, § 702, 90 Stat. 2789. The STA authorized the Secretary of the Interior (Secretary) to sell or lease small tracts of vacant land, subject to the reservation to the United States of the mineral estate in the lands. After purchasing and consolidating several parcels, the current owner leased the property for the purpose of extracting commercially valuable sand and gravel. The Bureau of Land Management (BLM) determined that the sand and gravel deposits are reserved to the United States under the STA, and thus may not be removed without federal authorization. The Interior Board of Land Appeals (IBLA), the district court, and the court of appeals upheld BLM's determination.

1. The STA, enacted in 1938, authorized the Secretary to classify and sell or lease to individuals small tracts of vacant public land for home, health, business, or recreational sites. The STA permitted the Secretary to classify parcels of up to five acres as "chiefly valuable" for any of these specified uses, and to sell or lease

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[1] The Small Tract Act requires that the patents reserve "the oil, gas and all other mineral deposits." The reservation as it appears in the patents extends to "all oil, gas and other mineral deposits." Pet. App. 17a n.5; C.A. App. 24-38. It is undisputed that the patents properly effectuate the statutory reservation.

the tracts to qualified individuals at a price "no less than the cost of making any survey necessary to properly describe the land sold." 52 Stat. 609. The Secretary was to sell or lease no more than one tract to any person or organization, "except upon a showing of good faith and reasons satisfactory to the Secretary." *Ibid.*

As originally enacted, the STA required that all patents issued under the Act contain a reservation to the United States of "the oil, gas, and other mineral deposits, together with the right to prospect for, mine, and remove the same under applicable law and such regulations as the Secretary may prescribe." 52 Stat. 609. When Congress amended the STA in 1954, it expanded the categories of uses for which the tracts could be leased or sold. It also clarified that the mineral reservation to be included in all leases and patents under the Act encompassed "oil, gas, and *all* other mineral deposits." 1954 Act § 2, 68 Stat. 239 (emphasis added).

Although the STA was repealed by the Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, § 702, 90 Stat. 2789, that statute expressly preserved the United States' rights under the mineral reservation provision, § 701(c), 90 Stat. 2786. By the time the STA was repealed, approximately 450,000 acres in 14 Western States, from Alaska to Wyoming, were classified for small tract purposes. See BLM, U.S. Dep't of the Interior, *Instruction Memo No. 80-540*, *The Small Tract Act (Act of June 1, as Amended): Guide Book for Managing Existing Small Tract Areas* Encl. 1, at 27 (Apr. 1, 1980) (C.A. App. 94). Approximately 230,000 acres had been transferred into private ownership. *Ibid.*

2. Petitioner JWR, Inc. (JWR) is the current owner of property near Phoenix, Arizona, patented under the

STA to several private owners in 1959. The property remained vacant until 2000, when JWR purchased the parcels, each of which contained approximately 5 acres, and consolidated them into a single tract of approximately 82 acres. Pet. App. 4a; *id.* at 16a-17a. Shortly thereafter, JWR leased the property to petitioner New West Materials, LLC (New West), for the express purpose of mining sand and gravel. *Id.* at 4a.

In November 2001, BLM notified New West's operations manager that the sand and gravel were reserved to the United States under the STA, and that New West was not authorized to remove the sand and gravel without approval of the Department of the Interior. Pet. App. 47a. BLM then issued a decision finding that New West had "committed an act of nonwillful trespass by removing and selling mineral material" without the contractual right to do so. *Id.* at 4a.

New West continued to remove sand and gravel under an escrow arrangement with BLM, pending final resolution of the dispute. Between 2001, when BLM discovered that New West was mining sand and gravel on the property, and 2004, New West extracted more than 2.5 million tons of sand and gravel from two large mining pits approximately 20 to 28 feet deep and occupying approximately 268,000 square feet, or 6.5 acres. Pet. App. 17a, 19a & n.9.

3. Petitioners appealed BLM's trespass order to the IBLA. The IBLA affirmed BLM's order, concluding that the mineral reservation of the STA "cannot meaningfully be distinguished" from that in Section 9 of the Stock-Raising Homestead Act of 1916 (SRHA), 43 U.S.C. 299, which this Court had construed to include gravel deposits in *Watt* v. *Western Nuclear, Inc.*, 462

U.S. 36 (1983). Pet. App. 59a-61a. One IBLA member dissented. *Id.* at 64a-80a. The IBLA denied New West's request for rehearing. *Id.* at 81a-82a.

4. Petitioners sought review under the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*, in the United States District Court for the Eastern Dictrict of Virginia. On cross-motions for summary judgment, the district court upheld the decision of the IBLA. Concluding that the IBLA's construction of the STA was entitled to deference under *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984), the district court upheld the IBLA's interpretation of the statute as reasonable, in light of the statute's language, history, and purpose. Pet. App. 14a-45a.

5. The court of appeals affirmed in an unpublished per curiam opinion. Pet. App. 1a-11a. Although the court declined to address whether the IBLA's decision was entitled to *Chevron* deference, *id.* at 6a, it agreed with the IBLA that the STA's reservation of "the oil, gas and all other mineral deposits" encompassed sand and gravel deposits, *id.* at 11a. Guided by this Court's decisions in *Western Nuclear* and *BedRoc Limited, LLC* v. *United States*, 541 U.S. 176 (2004), the court concluded that the plain language of the reservation in the STA covered sand and gravel deposits. Pet. App. 8a-9a.[2] The court of appeals also found support for its ruling in contemporaneous judicial and administrative decisions.

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[2] The court of appeals' opinion as reproduced in the petition appendix omits a portion of the opinion. The last sentence of Section A should read: "In employing the Court's same plain *language approach to this case we find that the plain* meaning of the STA's reservation commands the most expansive interpretation available under existing law." See 216 Fed. Appx. 385, 389 (emphasis added); Pet. App. 9a.

Finally, the court of appeals noted that Congress's purpose in reserving mineral rights under the STA, as under the statute at issue in *Western Nuclear*, was to promote development of both the surface and mineral resources of the patented lands. The court held that, as in *Western Nuclear*, that purpose would be thwarted by interpreting the STA's mineral reservation to exclude sand and gravel, since Congress would not have expected persons residing or operating small businesses on five-acre plots to exploit the sand and gravel deposits. *Id.* at 10a.

ARGUMENT

The court of appeals' unpublished decision correctly applied this Court's precedents, and does not conflict with the decision of any other court of appeals. Further review is not warranted.

1. This Court has twice considered whether sand and gravel are reserved minerals under land-grant statutes administered by the Department of the Interior. In *Watt* v. *Western Nuclear, Inc.*, 462 U.S. 36 (1983), the Court held that a statutory reservation of "all the coal and other minerals" encompassed gravel. More recently, in *BedRoc Limited, LLC* v. *United States*, 541 U.S. 176 (2004), the Court interpreted a different statute's reservation of "valuable minerals" to exclude sand and gravel. Declining an invitation to overrule *Western Nuclear*, the plurality in *BedRoc* instead distinguished that case on the ground that Congress narrowed the scope of the reservation by using the modifier "valuable." *Id.* at 184. The plurality interpreted the statute's reservation of "valuable minerals" to encompass only minerals commonly regarded as valuable as of the date of the statute's passage. *Id.* at 184-185. In both cases,

the Court concluded that the scope of a statutorily mandated minerals reservation turns on the meaning of the terms of the statutory reservation at the time of enactment and on Congress's intent in reserving the mineral rights of the United States. See *Western Nuclear*, 462 U.S. at 47; see also *BedRoc*, 541 U.S. at 184 (plurality opinion) ("[T]he proper inquiry focuses on the ordinary meaning of the reservation at the time Congress enacted it.").

Petitioners contend (Pet. 13-19) that the Court should supplant the rule established in *Western Nuclear* and reaffirmed in *BedRoc* in favor of a different analysis. Specifically, petitioners assert that the scope of a statutory mineral reservation should be evaluated not according to the meaning of the text and Congress's intent at the time of the statute's passage, but according to the value of the mineral at the time the land was patented. Under petitioners' proposed "valuable-when-patented" test, the scope of each mineral reservation would depend on the market conditions present in the vicinity of the patented lands as of the date of the patent, with respect to each of the various individual mineral substances located on the lands. See Pet. 13. Petitioners' contention does not warrant this Court's review.

As a threshold matter, petitioners' proposed valuable-when-patented test is inconsistent with this Court's precedent. In *Western Nuclear*, this Court held that gravel is a reserved mineral under Section 9 of the SRHA, 43 U.S.C. 299. Looking to the purpose and history of the statute, the Court noted that the SRHA, like other land-grant statutes containing mineral reservations, was intended to "facilitate development of both surface and subsurface resources." *Western Nuclear*,

462 U.S. at 49-52; see *BedRoc*, 541 U.S. at 182 (plurality opinion). The Court concluded that Congress intended to achieve that goal by reserving the mineral estate and patenting only those interests necessary for the intended surface use. *Western Nuclear,* 462 U.S. at 56. The Court reasoned that to interpret the statute to include gravel in a surface estate intended to be used for stock-raising and raising crops would make exploitation of the mineral dependent on "the initiative of persons whose interests were known to lie elsewhere." *Ibid.* Petitioners' valuable-when-patented test would thwart Congress's intent by making the exploitation of any commercially valuable mineral whose value was unknown at the time of the patent dependent on the initiative of persons who bought the land for purposes unrelated to exploitation of the mineral estate. See *ibid.*[3]

Moreover, despite petitioners' claims, application of the valuable-when-patented test to statutorily mandated mineral reservations would not "settle this area of law."

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[3] Petitioners suggest that the plurality opinion in *BedRoc* implicitly undermined *Western Nuclear*'s approach by interpreting the phrase "valuable minerals" according to the meaning of the term as of the time of the act's passage, thereby establishing that "[v]alue attained later is beside the point." Pet. 18-19 n.4. *BedRoc*, however, declined to extend that rule beyond the wording of the statute at issue in that case. See 541 U.S. at 183 n.5 (plurality opinion) (distinguishing the SRHA on the ground that, as the Court held in *Western Nuclear*, use of the unmodified term "minerals" called for an inquiry "into whether a substance might at some point have separate value from the soil and might, in the abstract, be susceptible of commercial use"). In any event, this contention, if accepted, would undermine petitioners' own argument that no minerals except those that had local market value at the time of *patent issuance* should be deemed reserved, and would support the view that gravel, which was a locatable mineral when the STA was enacted, was reserved in this case.

Pet. 4. On the contrary, adoption of petitioners' proposed test would result in widespread uncertainty. Petitioners' proposed test calls for a fact-intensive, site-specific, case-by-case examination of the hypothetical profitability of extracting a mineral that may not even have been known to exist at the time of the patent. Even assuming that the historical facts necessary to conduct that burdensome analysis could be adequately established as a practical matter, subjecting federal patents to such an inquiry would result in differing interpretations of identical language in land patents issued under the same federal land-grant statute, and thus in differing sets of property rights accorded to similarly situated patentees, depending on the location of the land patented or the time of the patent. Petitioners offer no authority to suggest that Congress would have intended that result.

Petitioners imply (Pet. 10-11, 17) that the Tenth Circuit adopted their proposed test in construing a "similar federal mineral reservation" in *United States ex rel. S. Ute Indian Tribe* v. *Hess,* 348 F.3d 1237 (2003) (*Hess II*). That implication is incorrect. That case did not concern a statutory mineral reservation, but a reservation contained in an exchange patent issued pursuant to the Indian Reorganization Act, 25 U.S.C. 464. See *United States ex rel. S. Ute Indian Tribe* v. *Hess*, 194 F.3d 1164, 1171 (10th Cir. 1999) (*Hess I*). That statute did not require a mineral reservation. Because the case did not involve a statutory reservation, the Tenth Circuit held that the rules of construction set out in *Western Nuclear* did not apply. The Tenth Circuit instead "borrow[ed]" state law, which required that the patent be construed in accordance with the intent of the parties

at the time of the land exchange. *Hess II*, 348 F.3d at 1242-1243, 1250 (quoting *Hess I*, 194 F.3d at 1173). The court held that whether the parties considered gravel to be a commercially valuable mineral at the time of the exchange of the specific property at issue was relevant to the question of their intent. *Id.* at 1248. The court did not, however, hold that an identical inquiry would be appropriate when interpreting the meaning of a federal *statutory* reservation of mineral rights applicable to the conveyance of public lands.

Petitioners also purport (Pet. 16-17) to find support for their proposed test in an opinion of the Solicitor of the Department of the Interior concerning the mineral reservation to the Northern Cheyenne Indian Tribe under a special statute, Act of June 3, 1926, ch. 459, 44 Stat. 690. See Division of Pub. Lands, U.S. Dep't of the Interior, *Solicitor's Op. No. M-36379* (Oct. 3, 1956) (Pet. App. 94a-99a). That opinion was rendered more than 25 years before *Western Nuclear*, and insofar as it can be read to support petitioners' valuable-when-patented test, it has been undermined by this Court's decisions and should not be accorded any weight. See *Western Nuclear*, 462 U.S. at 68 n.11 (Powell, J., dissenting) (noting that the majority's decision took a broader view of the scope of the SRHA's mineral reservation than the 1956 Solicitor's opinion took of the mineral reservation under the special statute at issue there). This Court has never read mineral reservations in the public land statutes in the manner suggested in the Solicitor's opinion, and we are not aware of any other federal administrative or judicial decision that relies on the Solicitor's reasoning.

2. In the alternative, petitioners urge this Court to grant review to establish that *Western Nuclear* is an exception to a supposed "general rule * * * that a mineral reservation normally does not include sand and gravel." Pet. 19. Petitioners' premise is incorrect, and in any event, this case does not present an opportunity to entertain their suggestion.

Contrary to petitioners' contention (Pet. 21), there is no "general rule" that common materials such as sand and gravel are not "mineral." In *Northern Pacific Railway* v. *Soderberg*, 188 U.S. 526 (1903), the Court concluded that "mineral lands include not merely metalliferous lands, but all such as are chiefly valuable for their deposits of a mineral character, which are useful in the arts or valuable for purposes of manufacture," and quoted an English court's statement that the term "mineral" in a reservation includes "gravel." *Id.* at 536-537 (quoting *Midland Ry.* v. *Checkley*, 4 L.R.-Eq. 19, 25 (M.R. 1867)). Moreover, as both this Court and the courts below have noted, numerous judicial and administrative decisions have treated gravel as a "mineral" within the meaning of both land-grant statutes and federal mining laws. See *Western Nuclear*, 462 U.S. at 44-46, 56-59; Pet. App. 9a. That was especially so by 1938, when the STA was enacted. See *Western Nuclear*, 462 U.S. at 45-46 (discussing *Zimmerman*, 39 Pub. Lands Dec. 310 (Dep't of the Interior 1910), overruled by *Layman*, 52 Pub. Lands Dec. 714 (Dep't of the Interior 1929)). And in 1913, the Department of the Interior listed gravel as a mineral in its comprehensive study of the public lands. See *id.* at 46 n.7.

Nor have courts after *Western Nuclear* "largely confined [its holding] to its particulars," as petitioners

suggest. Pet. 21. The cases petitioners cite in support of that proposition (Pet. 21-23) all concerned a *non-statutory* mineral reservation, in which the critical inquiry was the intent of the parties with respect to a specific piece of land, not the intent of a Congress that enacted a *statutory* mineral reservation applicable to all tracts within a category of public lands. See Pet. App. 37a. The decisions themselves distinguish *Western Nuclear* on that basis. See *Miller Land & Mineral Co.* v. *State Highway Comm'n*, 757 P.2d 1001, 1003 (Wyo. 1988) (interpreting mineral reservation in land transfer between private parties); *Rysavy* v. *Novotny*, 401 N.W.2d 540, 542 (S.D. 1987) (same); *Downstate Stone Co.* v. *United States*, 712 F.2d 1215, 1219 (7th Cir. 1983) (interpreting mineral reservation in private conveyance to the United States); *Burkey* v. *United States*, 25 Cl. Ct. 566, 577 (1992) (same); *Hess II*, 348 F.3d at 1248 (interpreting mineral reservation in land exchange patent issued pursuant to a statute that did not require the reservation of mineral rights to the United States); *Poverty Flats Land & Cattle Co.* v. *United States*, 788 F.2d 676, 683 (10th Cir. 1986) (same).

In any event, this case provides no opportunity to consider whether *Western Nuclear* "should be recognized as the exception, not the rule." Pet. 19. Specifically applying the analysis of *Western Nuclear* to the particular statute in this case, the court of appeals correctly determined that deposits of sand and gravel are reserved to the United States under the STA. That determination was correct and raises no issue warranting the Court's review.

The court of appeals correctly relied on "contemporaneous judicial decisions, opinions of the Secretary of

the Interior, and IBLA decisions" in concluding that the STA's mineral reservation included sand and gravel when it was enacted in 1938. Pet. App. 9a. The court also determined that Congress "reduced any ambiguity on the question of what mineral deposits might be included under the reservation" when it amended the STA in 1954—five years before the patents in this case were issued—to provide that "*all* other mineral deposits" were reserved to the United States, 1954 Act § 2, 68 Stat. 239 (emphasis added). Pet App. 7a.

The court of appeals further reasoned, as this Court did in *Western Nuclear*, that the uses Congress contemplated for the surface estate of patented lands demonstrate that Congress did not intend to include sand and gravel deposits in the surface estate. The tracts patented under the STA were no more than five acres; Congress expected that patentees would use these small parcels for residence, recreation, small business, or community site purposes. 1954 Act § 1, 68 Stat. 239. Congress further stipulated that no patentee could receive more than one tract, except upon "a showing of good faith and reasons satisfactory to the Secretary." *Ibid.* As the court below held, Congress "could not have expected the homeowners or small business owners of five acre plots to exploit the subsurface estate." Pet. App. 10a (citation omitted). Finally, as in *Western Nuclear*, the court of appeals' holding that the reservation of minerals under the STA includes sand and gravel is "buttressed by 'the established rule that land grants are construed favorably to the Government, that nothing passes except what is conveyed in clear language, and that if there are doubts they are resolved for the Government,

not against it.'" 462 U.S. at 59 (quoting *United States* v. *Union Pac. R.R.*, 353 U.S. 112, 116 (1957)).

Petitioners contend (Pet. 24-27) that Congress could not have intended to enact a reservation of sand and gravel because Congress's purpose of settling the STA parcels "surely would have been frustrated if prospective purchasers knew that they were not receiving title to the materials that made up the bulk of the land they were buying," and "[e]xtraction of common materials from such small parcels is *not* concurrently compatible with the ordinary residential, business and civil developments contemplated by the STA on these small plots." This contention is flawed in at least three respects.

First, petitioners' argument assumes that the bulk of STA lands were comprised of sand and gravel. But unlike the Pittman Underground Water Act of 1919, ch. 77, 41 Stat. 293, which applied only to Nevada, where sand and gravel are abundant, see *BedRoc*, 541 U.S. at 178-179, 184 (plurality opinion), the STA provided for a reservation of mineral deposits in public lands across the country, see 1954 Act §§ 1-2, 68 Stat. 239. And as the district court noted, "while some of the surface estates sold or leased pursuant to the STA may have been comprised largely of sand and gravel, others certainly were not." Pet. App. 37a-38a. It is unlikely that Congress intended for the meaning of the STA's mineral reservation to change depending on the mineral content of the particular tract at issue. See *id.* at 38a.

Second, even as to those lands comprised largely of sand and gravel, it is undisputed that nothing in the STA or in this Court's precedents would prevent an STA patentee from making use of surface sand and gravel as necessary for engaging in the uses of the land that Con-

gress contemplated. See *Western Nuclear*, 462 U.S. at 54 n.14; see also Pet. App. 11a. The STA forbids only the extraction of sand and gravel deposits. As the court of appeals noted, there is a significant difference between the incidental use of sand and gravel to build a home or small business, and the "full-scale commercial mining" of sand and gravel deposits at issue in this case. *Ibid.*

Third, that the extraction of sand and gravel deposits would entail disruption to holders of the surface estate does not distinguish it from, for example, the extraction of gold or copper. See Pet. App. 38a ("[V]irtually any type of drilling or mining operation to exploit the mineral estate is likely to disrupt the five acres comprising a STA surface estate."). And although, as petitioners note (Pet. 25), the STA did not expressly provide for compensation to the surface owner for damages resulting from any mineral exploitation, such a provision would have been unnecessary with regard both to sand and gravel deposits and hardrock materials such as gold and copper. The Secretary's implementing regulations provided only for the disposition of "coal, oil, gas, or other minerals subject to the leasing laws,"[4] and prohibited the prospecting or disposition of the remainder of the reserved mineral estate. 43 C.F.R. 257.14 (Cum. Supp. 1943).

Petitioners also contend (Pet. 24-25) that Congress could not have intended to enact an expansive reservation of mineral rights because STA lands, unlike the SRHA lands at issue in *Western Nuclear*, were not

[4] The "minerals subject to the leasing laws" were coal, phosphate, sodium, potassium, oil, oil shale, and gas. Mineral Leasing Act, 30 U.S.C. 181 (1940).

"given away practically for free," but "*sold* at appraised value." *Id.* at 25. That contention is without merit. SRHA lands were not "free" in any practical sense; to obtain a patent, an entryman was required to reside on the land for three years and "to make permanent improvements upon the land . . . tending to increase the value of the land for stock-raising purposes of the value of not less than $1.25 per acre." *Western Nuclear*, 462 U.S. at 38 (brackets and citation omitted). In other words, SRHA patentees paid for the land with years of labor and land improvements. On the other hand, Congress attached no such conditions to STA patents, and instead gave the Secretary the discretion to set a price for land sales under the statute. 1954 Act § 2, 68 Stat. 239; see STA, 52 Stat. 609 ("[N]o tract shall be sold for less than the cost of making any survey necessary to properly describe the land sold."). To say that the Secretary ultimately sold the tracts "at appraised value" does not speak to Congress's intent in enacting the STA reservation, nor does it establish that the "appraised value" included the value of rights to sand and gravel deposits.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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