*BEDROC LTD. V. UNITED STATES**

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Beginning with the Land Ordinance of 1785, the federal government has transferred vast amounts of public land into private hands.[1] One common device for accomplishing this transfer was the land patent, which granted a settler title to a land parcel after a statutory period of continuous homesteading on the land. Patented lands were normally divided into two "estates"—surface and mineral—with the patentee receiving title to the surface, while the government reserved ownership of all valuable "minerals."[2] When construing the scope of the government's mineral reservation, courts have typically relied on a canon of construction resolving any ambiguity in favor of the government.[3] Last Term, in *BedRoc Ltd. v. United States*,[4] the Court revisited its contentious *Watt v. Western Nuclear, Inc.*[5] decision, which found that the federal government reserved rights to gravel on lands issued under the Stock-Raising Homestead Act of 1916.[6] In *BedRoc*, the Court held that sand and gravel do not fall within the mineral reservation of the Pittman Underground Water Act of 1919 ("Pittman Act").[7] In doing so, the Court did not find use for the canon of construction favoring government in land grants, and thus took a tentative step toward abandoning the misguided application of this presumption to homesteading patent acts.

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[1] As of 2003, 287,500,000 acres of the public domain had been granted to homesteaders, and over 160,000,000 acres transferred to commercial interests. BUREAU OF LAND MANAGEMENT, PUBLIC LAND STATISTICS 2003 tbl. 1-2 (2003), *available at* www.blm.gov/natacq/pls03/pls1-2_03.pdf (last visited Apr. 27, 2004).

[2] *See infra* note 5.

[3] *See infra* note 46 and accompanying text.

[4] 124 S. Ct. 1587 (2004).

[5] 462 U.S. 36 (1983). Justice Marshall delivered the opinion of the Court, joined by Chief Justice Burger and Justices Brennan, White, and Blackmun. Justice Powell filed a dissenting opinion, joined by Justices Rehnquist, Stevens, and O'Connor. Justice Stevens also filed a separate dissent. In *United States v. Hess*, 348 F.3d 1237 (10th Cir. 2003), the Tenth Circuit distinguished *Western Nuclear* and determined that gravel was not reserved to the federal government on lands granted under the Indian Reorganization Act of 1934, 25 U.S.C. §§ 461–479 (2000). *See also* Miller Land & Mineral Co. v. State Highway Comm'n, 757 P.2d 1001 (Wyo. 1988) ("If there is any confusion, we suspect that the Watt case is the culprit as the vast majority of courts have held for various reasons that gravel is not a mineral estate in general private grants or reservations of minerals") (citation omitted); Champlin Petroleum Co. v. Lyman, 708 P.2d 319, 321 (N.M. 1985) (holding that caliche *was* reserved to the government under the Stock-Raising Homestead Act, but sharing "the reservations of the [Western Nuclear] dissenters that the majority's definition of a reserved mineral may be overly broad.").

[6] Stock-Raising Homestead Act, 43 U.S.C. § 291 (1916) (repealed 1976) ("SRHA"). The SRHA reserved "all the coal and other minerals in the lands" to the United States. *Id.* § 299(a).

[7] Pittman Underground Water Act, ch. 77, 41 Stat. 293 (1919) (repealed 1964).

BACKGROUND

In 1919, Congress passed the Pittman Act, responding to the failure of previous homesteading acts to produce substantial settlement in Nevada.[8] The Act gave a prospective patentee two years to develop underground water resources capable of supporting a twenty-acre crop on an initial land grant of 2560 acres.[9] If successful, the prospector received a patent of up to 640 contiguous acres,[10] with all "coal and other valuable minerals" reserved to the United States.[11] To qualify for distribution under the Pittman Act, lands had to be certified nonmineral and nontimbered by the Secretary of the Interior.[12]

On March 12, 1940, Newton and Mabel Butler acquired a Pittman Act patent of 560 acres in Nevada, approximately sixty-five miles north of Las Vegas.[13] Although the land was certified nonmineral, it contained large quantities of visible sand and gravel.[14] By 1993, the land had passed to Earl and Ruth Williams, who began mining the sand and gravel.[15] The Bureau of Land Management ("BLM"), which administers the government's mineral estates, served a trespass notice against the Williamses, asserting that the sand and gravel were included in the Pittman Act's federal mineral reservation.[16] In 1995, while an appeal was pending with the Department of Interior Board of Land Appeals, the Williamses sold the land to BedRoc Ltd. ("BedRoc"), a mining company which continued removing sand and gravel under an escrow agreement with the Department of Interior.[17] The Interior Board of Land Appeals subsequently affirmed BLM's decision.[18]

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[8] 53 CONG. REC. 705, 706 (1916). The Pittman Act was repealed in 1964 after only fifty-four patents had been issued. Pub. L. No. 88-417, § 1, 78 Stat. 389 (1964).

[9] Pittman Act §§ 1, 5.

[10] *Id.* § 1. The remaining acreage was distributed to other settlers under the Homestead Act of 1862. *Id.* § 6.

[11] *Id.* § 8.

[12] *Id.* § 1. The nonmineral and nontimbered classifications represented the land's most valuable use. If a parcel's mineral or timber deposits were more valuable than its potential agricultural output, the land was considered mineral or timbered. But even nonmineral lands could still contain some valuable minerals. If the value of a parcel's silver deposit was ten, but the value of its crops was fifteen, the land was classified as nonmineral. Since it was difficult for the government to ascertain definitively the extent of a parcel's mineral deposits, the system was widely abused by private parties with more information than the government. Due to these abuses, the split surface and mineral estate system was incorporated to prevent gaming and abuse of the land grants. *See* Amoco Prod. Co. v. S. Ute Indian Tribe, 526 U.S. 865, 868–70 (1999).

[13] BedRoc Ltd. v. United States, 124 S. Ct. 1587, 1591 (2004).

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] *Id.* at 1592.

[18] Earl Williams, 140 I.B.L.A. 295 (1997).

BedRoc appealed to the United States District Court for the District of Nevada under the Administrative Procedure Act,[19] arguing that even if sand and gravel were considered minerals within the statutory definition, they were not "valuable" at the time of the patent.[20] Finding that "valuable minerals merely implicates substances with desirable uses,"[21] the court rejected this argument and granted summary judgment to the government declaring sand and gravel were valuable minerals under the Pittman Act.[22] The court's analysis closely tracked *Western Nuclear* by looking to Congressional intent and the "established rule" that, when in doubt, land grants are "construed favorably to the Government."[23] Rejecting BedRoc's request that this canon not be applied strictly, the court determined that a "looser standard [of application] may apply only to federal inducements to 'undertake and accomplish great and expensive enterprises or works of a quasi public character,'" such as railroad construction.[24]

BedRoc appealed to the Ninth Circuit Court of Appeals, and a unanimous panel affirmed the District Court's ruling.[25] After finding the statutory language ambiguous, the court determined that the Congressional purpose of the patents was to "promote agriculture."[26] Partially based on Senator Key Pittman's statement that Congress intended to foreclose any acquisition of minerals through an agricultural patent,[27] the court found that the government intended to reserve all minerals not useful for agricultural endeavors.[28] Troubled by the modifier "valuable," the court examined contemporaneous Department of the Interior reports on national sales of sand and gravel and determined that sand and gravel were indeed "valuable."[29] Responding to BedRoc's claim that, notwithstanding composite

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[19] 5 U.S.C. §§ 551–559 (2000).

[20] BedRoc Ltd. v. United States, 50 F. Supp. 2d 1001, 1005 (D.N.V. 1999). *Watt v. W. Nuclear, Inc.*, 462 U.S. 36 (1983), determined the meaning of "minerals" under the SRHA. *See supra* notes 5–6 and accompanying text. The Pittman Act appears to be the only land-grant act to reserve "valuable" minerals.

[21] *BedRoc*, 50 F. Supp. 2d at 1007. This reading expanded *Western Nuclear*'s definition of "minerals." Under *Western Nuclear*, a reserved mineral is a substance that is (1) mineral in character, (2) removable from the soil, (3) commercially useful, and (4) not intended to be included in the surface estate. 462 U.S. at 53. For a general discussion of tests and underlying policies used to define a mineral see Edward Amestoy, *Is Gravel a Mineral? The Impact of Western Nuclear on Lands Patented Under the Stock Raising Homestead Act*, 5 PUB. LAND L. REV. 171 (1984) and Michael Braunstein, *All that Glitters; Discovering the Meaning of Mineral in the Mining Law of 1872*, 21 LAND & WATER L. REV. 297 (1986).

[22] *BedRoc*, 50 F. Supp. 2d at 1008.

[23] *Id.* (*quoting Western Nuclear*, 462 U.S. at 59).

[24] *BedRoc*, 50 F. Supp. 2d at 1008 (*quoting* Leo Sheep Co. v. United States, 440 U.S. 668 (1979)).

[25] BedRoc Ltd. v. United States, 314 F.3d 1080 (9th Cir. 2002).

[26] *Id.*

[27] *Id.* at 1087. Congress was acutely aware of prior instances where valuable minerals were acquired under entries permitted for agricultural purposes on lands deemed nonmineral by cursory inspection. *See Western Nuclear*, 462 U.S. at 48–49.

[28] *BedRoc*, 314 F.3d at 1087.

[29] *Id.* at 1088–89.

national sales figures, the instant patent could not have been valuable at the time of the grant, the court rejected the application of a "prudent-man" test used to define "valuable mineral deposits" under the General Mining Act of 1872.[30] The Ninth Circuit echoed *Western Nuclear* in deciding that the issue was a simple exercise in statutory construction to determine whether Congress intended generally to include sand and gravel in the mineral reservation.[31] While not directly applying the canon of resolving ambiguity in the government's favor, the court did approve the "usual tools of statutory construction" set out in *Western Nuclear*.[32]

The Supreme Court granted certiorari and reversed.[33] Writing for a plurality, Chief Justice Rehnquist found that the term "valuable" sufficiently limited the scope of the Pittman Act mineral reservation and that the Court's decision could thus be determined by the "preeminent canon of statutory interpretation . . . to 'presume that [the] legislature says in a statute what it means and means in a statute what it says there.'"[34] Determining that sand and gravel in Nevada were not commonly considered "valuable minerals" in 1919, the plurality found the Pittman Act's language unambiguous.[35] Thus, it did not need to examine legislative history or apply the canon favoring government in resolving ambiguous land grants.[36] Though questioning the *Western Nuclear* decision, the plurality decided against overruling this "recent precedent."[37]

In his concurrence, Justice Thomas argued that there is no meaningful distinction between the mineral reservations in the Pittman Act and *Western Nuclear*'s SRHA.[38] Thomas disagreed with the plurality's view that Pittman's added term "valuable" distinguished it from the SRHA, since the *Western Nuclear* Court had already found a "commercial purpose requirement" in the term "mineral."[39] Concluding that *Western Nuclear*

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[30] *Id.* at 1089. The *Western Nuclear* Court also rejected this argument under the SRHA. *See* 462 U.S. at 58 n.18. The "prudent-man" test asks whether an ordinary person would deem a deposit worth the costs of developing. *Id.* The Department of Interior applied this test to sand and gravel in 1910, determining the materials were not locatable under mining laws absent a property granting them "special value." Zimmerman v. Brunson, 39 Pub. Lands Dec. 310, 312 (1910). In 1929, the Department reversed this decision in Layman v. Ellis, 52 Pub. Lands Dec. 467 (1929). After abuses of this decision, ordinary sand and gravel were specifically excluded from location by the Common Varieties Act, 30 U.S.C. § 611 (1982). For a discussion of the effects of this Act, see Braunstein, *supra* note 21.

[31] *BedRoc*, 314 F.3d at 1090.

[32] *Id.*

[33] BedRoc Ltd. v. United States, 124 S. Ct. 1587 (2004). Chief Justice Rehnquist delivered the opinion of the Court with Justices O'Connor, Scalia, and Kennedy joining. Justice Thomas wrote a concurrence, joined by Justice Breyer. Justice Stevens dissented, joined by Justices Souter and Ginsburg.

[34] *Id.* at 1593. (quoting Connecticut Nat'l Bank v. Germain, 503 U.S. 249, 253–54 (1992)).

[35] *Id.* at 1593–95.

[36] *Id.* at 1594–95.

[37] *Id.* at 1593.

[38] *Id.* at 1596 (Thomas, J., concurring).

[39] *BedRoc Ltd.*, 124 S. Ct. at 1596 (Thomas, J., concurring).

was incorrectly decided, since gravel was not commercially valuable when the SRHA was enacted, the concurring justices invoked *stare decisis* concerns based upon reliance interests in property and contract rights nevertheless to recommend against overruling the decision.[40] They found no similar reliance concerns with the Pittman Act.[41]

Justice Stevens, writing for the dissent, also faulted the plurality for relying on the modifier "valuable," since *Western Nuclear* had previously crafted a definition of a "mineral" requiring it to be valuable.[42] Pointing to the fact that the Pittman Act includes the adjective "valuable" only two of the eight times it discusses the "minerals" to be reserved, the dissent found the terms "valuable minerals" and "minerals" synonymous.[43] While admitting that the *Western Nuclear* decision was probably incorrect, Justice Stevens chided the plurality for substituting its view over one "that has been settled law for two decades."[44] Finding the plurality's decision not to consider legislative history based on the purported clarity of the Pittman Act's text "deliberately uninformed . . . and unconstrained," the dissent argued that the policy questions at stake were best determined by Congress or the appropriate administrative agency.[45]

ANALYSIS

Courts interpret federal land grant legislation by employing a canon of statutory construction resolving all ambiguities in the express language of the act in favor of the sovereign.[46] The premise of strict construction[47] underlying this canon—that the government grants only what is necessary to fulfill the surface use specified in the land-grant—permeates public land-grant jurisprudence. In *Western Nuclear*, the Court interpreted the mineral reservation of the SRHA to include gravel, since the purpose of the Act was to promote "stockraising and raising crops."[48] Thus, any inorganic substances which are extractable from the soil and possess commercial value apart from their use in ranching or farming fell within the govern-

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[40] *Id.* at 1596–97.

[41] *Id.* at 1597.

[42] *Id.* at 1597–98 (Stevens, J., dissenting).

[43] *Id.*

[44] *Id.* at 1598.

[45] *Id.*

[46] *See, e.g.*, Watt v. W. Nuclear, 462 U.S. 36, 59–60 (1983); Andrus v. Charlestone Stone Prods. Co., 436 U.S. 604, 617 (1978); United States v. Union Pac. R.R. Co., 353 U.S. 112, 116 (1957).

[47] "The rule of construction in this class of cases is that it shall be most strongly against the corporation . . . . Nothing is to be taken as conceded but what is given in unmistakable terms, or by an implication equally clear . . . . Silence is negation, and doubt is fatal to the claim. This doctrine is vital to the public welfare." N.W. Fertilizing Co. v. Vill. of Hyde Park, 97 U.S. 659, 666 (1878).

[48] 462 U.S. at 53.

ment's mineral reservation.[49] The majority concluded that the canon required this finding, as another interpretation would have "[turned] the principle of construction in favor of the sovereign on its head."[50] The history of the canon reveals that such a dizzying prospect may have been in order.

In its original context, the presumption in favor of the government provided desirable limitations on charters creating corporations which could meet the burgeoning industrial and transportation needs of nineteenth-century America.[51] Seeking to induce large-scale private investment, state and federal governments chartered corporations to operate railroads, canals, banks, and other enterprises. The canon was applied to these companies' attempts to assert rights beyond the express terms of their charters, including attempts to avoid tax increases,[52] prevent competition,[53] and claim public lands.[54] Throughout the nineteenth century courts justified the presumption by pointing to the bargaining posture of the companies receiving public grants: "[P]arties seeking grants for private purposes usually draw the bills making them. If they do not make the language sufficiently explicit and clear to pass everything that is intended to be passed, it is their own fault . . . ."[55] Courts also thought the presumption for the sovereign prevented a company from designing ambiguous grant language that might conceal benefits apart from those the legislature had intended, subsequently realized through a favorable interpretation.[56] Facing the need for

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[49] *Id.* at 53–54. *See supra* note 20 for the Court's complete definition of a "mineral." *See also* United States v. Union Oil Co., 549 F.2d 1271, 1279 (9th Cir. 1977) (holding that geothermal steam, while not specifically included in the mineral reservation of the SRHA, was nevertheless reserved to the government since it did not "contribute . . . to the capacity of the surface estate to sustain livestock.").

[50] *Western Nuclear*, 462 U.S. at 61.

[51] *See, e.g.*, Minturn v. Larue, 64 U.S. 435, 436 (1859) ("Any ambiguity or doubt arising out of the terms used by the Legislature must be resolved in favor of the public. This principle has been so often applied in the *construction of corporate powers*, that we need not stop to refer to authorities.") (emphasis added).

[52] *See* Ohio Life Ins. & Trust Co. v. Debolt, 57 U.S. 416 (1850) (stating that Petitioner sought to maintain a five percent tax on its dividends, rather than pay six percent after an increase was enacted by the state legislature).

[53] *See* Charles River Bridge v. Warren Bridge, 36 U.S. 420 (1837) (holding that operators of a chartered toll bridge were not entitled to prevent competition created by a separate charter authorizing a free bridge next to their toll bridge).

[54] *See* Leavenworth, L. & G. R.R. Co. v. United States, 92 U.S. 733 (1875) (holding that a grant did not explicitly give a right to any land the railroad claimed, and hence that the railroad was not entitled to reserved Indian lands).

[55] Dubuque & P. R. Co. v. Litchfield, 64 U.S. 66, 88–89 (1859) (quoting Gildart v. Gladstone, 103 Eng. Rep. 1167 (1809)). *See also* Slidell v. Grandjean, 111 U.S. 412, 437–38 (1883) ("As a reason for this rule it is often stated that such acts are usually drawn by interested parties; and they are presumed to claim all they are entitled to."); *Ohio Life Ins. & Trust Co.*, 57 U.S. at 435–37; Oregon Ry. and Navigation Co. v. Oregonian Ry. Co., 130 U.S. 26 (1889); Coosaw Mining Co. v. S.C., 144 U.S. 550 (1892).

[56] *Grandjean*, 111 U.S. at 437–38 ("The rule is a wise one; it serves to defeat any purpose concealed by the skilful [sic] use of terms, to accomplish something not apparent on the face of the act, and thus sanctions only open dealing with legislative bodies.").

large-scale public projects requiring significant public contracting with private corporate entities, legislatures were often exposed to potential abuses of a system in which the private entity typically possessed more information about the land or franchise being granted.[57] The presumption for the government encouraged *ex ante* honesty and induced companies to state expressly their expectations and interests, knowing that they could not anticipate any benefits aside from those clearly stated.

While the rationales behind the strong presumption for the government were seemingly well-suited to prevent surreptitious corporate misbehavior, they do not apply to the land-grant acts designed to encourage individual settlement on public lands. These rationales—the relative bargaining power between the government and grantee, and the need to avoid underhanded acquisition of valuable minerals—fail when applied to patent acts. The typical homesteader neither solicited the patent-act legislation nor had any ability to influence the conditions under which it was offered. Under the bargaining power analysis, the equation points toward ambiguity being resolved in favor of the *patentee*. As a comparison, ambiguities arising from grants to Indian tribes are typically decided in favor of the tribe, given its perceived lack of stature in the bargaining process.[58] Further, the normal standard of grant construction between private parties resolves ambiguities in favor of the grantee, following the basic contract principle of construction against the drafter.[59]

The canon's second function of preventing surreptitious gain by misleading or ambiguous legislative wording is already achieved by the severance of the surface and mineral estates.[60] Since the government controlled the drafting of a land-patent act, the concern that patentees might insert ambiguous wording, in order to acquire more than was being expressly granted, does not apply. Congress had the ability to specifically control the content of the reservation, and the large majority of valuable

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[57] *See supra* note 12.

[58] *See* Worcester v. Georgia, 31 U.S. 515, 582 (1832); Carpenter v. Shaw, 280 U.S. 363, 367 (1930) ("Doubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith").

[59] "'The construction prevails which is most favorable to the grantee, i.e., the language of the deed is construed against the grantor.' This canon is based on the standard principle of contractual construction which states that, in the event of an ambiguity, a contract will be construed more vigorously against the person who drafted it. Since most deeds are drafted by the grantor, it follows that they will be construed against the grantor." RICHARD R. POWELL & PATRICK J. ROHAN, POWELL ON REAL PROPERTY § 14-81A.05 (Michael Allan Wolf ed., 2004).

[60] Responding to repeated incidents of "land fraud" under early land-grant statutes, whereby grantees fraudulently acquired complete title to lands containing valuable mineral deposits, President Roosevelt implemented a system granting only the "surface estate" to an entryman, while reserving the minerals to the government as a "mineral estate." Watt v. Western Nuclear, 462 U.S. 36, 48 (1983). The mineral reservations took various forms, starting by reserving only specifically enumerated minerals (i.e., coal), and eventually reserving all "minerals" to the government. *See* Brief for Respondents at 28–29, BedRoc v. United States, 124 S. Ct. 1587 (2004).

minerals (i.e., gold, silver, coal) are undisputedly included in the reservation. In cases involving marginal aggregate materials such as sand and gravel,[61] invoking the presumption for the government in the context of land-grant legislation does not flow from the same rationales applicable to corporate charters. Since the prophylactic functions of the canon are accomplished through the severed-estate structure of the land grants, a separate rationale must be extended to support application of the canon.

Despite this lack of rationale for extending the canon to homesteading legislation, the *Western Nuclear* Court applied it to SRHA.[62] Finding that the legislature limited the grant to the surface of the patented land, the majority thought that the presumption applied with "particular force,"[63] apparently by reinforcing the effectiveness of the split-estate regime. As the dissent noted,[64] this strong application seemingly disregarded the Court's relaxation of the presumption in *United States v. Denver & R.G. Ry. Co.*[65] and *Leo Sheep Co. v. United States*.[66] In *Denver*, the Court held that the canon should not be applied so as "to withhold what is given, either expressly or by necessary or fair implication," given the great benefit to the public and large expenses incurred by a railroad company challenging strict interpretation of its charter.[67] *Leo Sheep* followed this reasoning, finding that grants for "*quasi*-public" works (i.e., railroads) stood on a "different footing from merely a private grant," and refused to apply the canon to construe an implied government easement across railroad company land.[68] The irony of *Leo Sheep* is that the canon was relaxed when applied to a corporate charter[69]—the specific type of grant for which the canon is designed. In contrast, the *Western Nuclear* homesteader—who had a stronger argument in her favor under normal grant construction principles, and even the rationales advanced for the canon—was subject to a strict construction favoring the government. As the rationales behind the presumption do not apply to homesteaders, relaxation of the presumption for the government is appropriate primarily in construing homesteading acts, such as the Pittman Act addressed in *BedRoc*.

The *BedRoc* decision exemplifies one negative effect of the canon, independent of the type of act to which it is applied: it forces a court to manufacture clarity in the face of an ambiguous statute when it seeks to find in

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[61] "Aggregate" is a collective term for sand, gravel, and crushed stone materials. Manitoba Ministry of Industry, Economic Development & Mines, The Aggregate Industry in Manitoba, *at* http://www.gov.mb.ca/itm/mrd/mtf/mintaskforce-a.html (last visited Apr. 27, 2004).

[62] 462 U.S. at 36.

[63] *Id.* at 59–60.

[64] *Id.* at 70 n.17 (Powell, J., dissenting).

[65] 150 U.S. 1, 14–15 (1893).

[66] 440 U.S. 668 (1979).

[67] 150 U.S. at 14. This case involved a railroad that wanted to use timber to build business-related structures that were not specifically named in the charter act. *Id.* at 4–5.

[68] 440 U.S. at 683.

[69] *Leo Sheep* construed the public land grant contained in Section 3 of the Union Pacific Railroad Charter of 1862. Union Pac. R.R. Charter, ch. 120, 12 Stat. 489 (1862).

a grantee's favor. Faced with the *Western Nuclear* precedent, conflicting agency decisions,[70] and the distinguishing modifier "valuable" used only two of eight times in its discussion of reserved "minerals,"[71] the Pittman Act is not a model of unambiguous statutory composition. The plurality avoided coming to terms with the traditional presumption for the sovereign by employing an alternative way to make the ambiguity unambiguous—by looking to the "'most natural interpretation' of the mineral reservation."[72] By resting on this singular interpretation, the Court willed away other viable interpretations, based perhaps on the thorough legislative history surrounding the Pittman Act, and found a lack of ambiguity.

While continued use of this approach may relegate the canon to the annals of statutory construction, a better approach would be to discard the presumption in favor of the sovereign outright. Courts are best able to determine legislative intent when not forced to circumvent outmoded and misapplied forms of statutory construction. The canon contributed to the decision in *Western Nuclear*, and while this decision was questioned by all sides in *BedRoc*,[73] it remains an isolated pillar casting a long shadow over any future certainty in determining the scope of federal mineral reservations. At a time when questions concerning the blend of development and conservation on public lands grow in importance, such uncertainty is disconcerting. As the days of federal patent act legislation continue to fade into distant memory, their legacy should not be determined by continued reliance on a questionable canon, but rather by a balanced and honest judicial approach squarely addressing the difficult questions of who controls the mineral rights on vast amounts of publicly distributed lands.

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[70] *Western Nuclear*, 462 U.S. at 56–57 (quoting Amoco Prod. Co. v. S. Ute Indian Tribe, 526 U.S. 865 (1999) (finding that coalbed methane gas was not included in a federal reservation of "coal," since the mineral reservation was unambiguous, though the Tenth Circuit had specifically found it ambiguous. S. Ute Indian Tribe v. Amoco Prod. Co., 151 F.3d 1251, 1267 (10th Cir. 1998)).

[71] Pittman Act § 8.

[72] BedRoc Ltd. v. United States, 124 S. Ct. 1587, 1594 (2004) (quoting *Amoco Prod. Co.*, 526 U.S. at 880).

[73] *Id.* at 1593, 1596–97, 1598.