ORIGINAL

In the

Supreme Court of the United States

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR,

PETITIONER,

V.

SHELL OIL COMPANY, ET AL.,

RESPONDENTS.

No. 78-1815

Washington, D. C.
January 15, 1980

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CECIL D. ANDRUS, SECRETARY OF THE INTERIOR, Petitioner,	:	
v.	:	No. 78-1815
SHELL OIL COMPANY, ET AL., Respondents.	:	

Washington, D. C.,

Tuesday, January 15, 1980.

The above-entitled matter came on for oral argument at 1:41 o'clock p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

LAWRENCE G. WALLACE, ESQ., Office of the Solicitor General, Department of Justice, Washington, D. C. 20530; on behalf of the Petitioner

FOWLER HAMILTON, ESQ., One State Street Plaza, New York, New York 10004; on behalf of the Respondents

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C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 78-1815, Andrus v. Shell Oil Company.

Mr. Wallace, you may proceed whenever you are ready.

ORAL ARGUMENT OF LAWRENCE G. WALLACE, ESQ.,

ON BEHALF OF THE PETITIONER

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

This case presents the question of whether claims to oil shale on federal lands made some sixty or more years ago under the mineral laws, the mining laws I should say, pardon me, of 1870 and 1872 are valid and entitle the claimant successors an interest to patents under those laws conveying title to these public lands to them.

Such unpatented oil shale claims are outstanding on an estimated five million acres of public lands in Colorado, Utah and Wyoming. All of the claims date from before February 25, 1920, which was the date of enactment of the Mineral Leasing Act which withdrew oil shale and other specified minerals from further location under the minin laws and provided for future access to these minerals only by leasing with the title to the lands remaining in the United States.

The law was part of the conservation movement

designed for ptoection of the public domain from what Congress considered to be unwarranted alienation by claims to widespread minerals specified in the act.

The particular claims at issue here date from 1917 and 1918, in the period this Court has characterized in Hickel v. Oil Shale Company is one of speculative fever in oil shale claims. And the precise question involved is whether the precise claims are invalid because of the failure of Oil Shale to meet the requirement of the mining law of discovery of a valuable mineral deposit.

In this case, the Administrative Law Judge, the Interior Board of Land Appeals, the District Court and the Court of Appeals all agreed that the claim did not meet the traditional discovery standard under the mining laws.

QUESTION: Well, do you think that is an issue here? Isn't that one of the issues?

MR. WALLACE: The issue tested --

QUESTION: So initially we must decide what how are the mining laws to be construed insofar as discovery is concerned.

MR. WALLACE: Well, this is far from a novel question in this Court, Mr. Justice White, and --

QUESTION: Well, it was a novel question in the Interior Department until recently.

MR. WALLACE: Well, I can't agree with that

proposition either.

QUESTION: Well, it had been decided forty years ago.

QUESTION: Certainly, Freeman v. Summers treat it differently than you do.

QUESTION: But this is a different issue.

MR. WALLACE: It treated it differently than other decisions of both the Interior Department and of this Court, which is what I wish to turn to --

QUESTION: That is of course the big issue, but as I understand it, what you were talking about with my brother White was this, that your opponent, despite all the findings to the contrary, argues that under the traditional normal criteria of valuable discovery, these discovery meet those criteria.

MR. WALLACE: That argument --

QUESTION: So that is an issue in this case.

MR. WALLACE: That is an issue --

QUESTION: And if that is true, if he is correct, then that is the end of the case, you don't get into anything else, do you?

MR. WALLACE: Well, that is correct, although our submission is that it is not correct. Of course, that would be dispositive of the case.

QUESTION: Right.

MR. WALLACE: But that is a factual issue but it is mixed up with an issue of law which I think has long been settled and let me turn to the considerations that bear on that and that bear on other aspects of the case as well.

The basis for the holding of the four tribunals below is set forth on page 24 of our brief. And on page 25 -- I am turning myself to page 24, the Administrative Law Judge based his holding on this aspect, if I may just read the bottom part of the quoted portion: "Until a research program had demonstrated that shale oil could be produced at a cost competitive with petroleum, no prudent person would attempt to develop an oil shale mine. He would have no market for his product. The very fact that, in the more than half a century of interest in oil shale claims of the Green River Formation, not one profitable mine has been developed is a compelling reason for concluding that expenditure of money to that end would be imprudent." And indeed the Board of Appeals pointed out that no profitable operation of any kind from oil shale has been developed in this country in a hundred years.

QUESTION: Would you concede that the Interior Department has changed its position over the years?

MR. WALLACE: It concluded in these very cases that Freeman v. Summers was incorrect and it changes its position in these cases.

QUESTION: Do you think it has the same latitude as we have held the NLRB has to change its position, or do you think it is bound to simply interpret the law?

MR. WALLACE: Well, it can only change its position in interpretation of the law, but as I am about to demonstrate to the Court, if I may, Freeman v. Summers was inconsistent with prior decisions of this Court construing the very law that Interior misconstrued in Freeman v. Summers. And if I can proceed to show that, I then would submit that the Interior Department had no choice but to conform its practices to this Court's interpretation of the mining law, that law has not been changed by Congress and this Court has not overruled, indeed it has reaffirmed those interpretations. So this is not really a question of the Interior Department's discretion to change its own interpretation of the law, it is really a matter of conforming its interpretation to this Court's authoritative interpretation.

QUESTION: But in so doing it did change its own interpretation?

MR. WALLACE: It certainly did. It corrected its error.

QUESTION: Mr. Wallace, just so I am sure I follow it as you get into the statutory argument, the ultimate question, is it not, is whether or not these were

"valuable mineral deposits" within the meaning of section 1 of the 1872 statute?

MR. WALLACE: That is correct, Mr. Justice, and that --

QUESTION: Mr. Wallace, don't I recall that sometimes here we have approved an administrative reading and then some years later approved a quite contrary one?

MR. WALLACE: It can happen within an area of an agency's discretion to construe terms of a statute which can fairly be construed in different ways.

QUESTION: Well, you don't think for example we would be free to having perhaps construed the law differently than Freeman did, to later say Freeman was correctly decided?

MR. WALLACE: Well, the difficulty is that Freeman never purported to apply a different standard to anything but oil shale and the Interior Department over the years adhered to this Court's interpretation of the mining laws for all other minerals and there is no statutory basis for treating oil shale differently from other minerals. There is no arguable interpretation of the statute that can support this disparity in administrative practice that the department has now corrected.

The customary standard has been articulated in a number of this Court's modern decisions as reflecting a

determination by Congress that public lands would be virtually free for the taking by private interests under the mining laws in return for the discovery of a commercially valuable mineral deposit that can enure to the public benefit by being introduced into the economy, and for that reason the profitability and marketability of a mining claim to exploit that resources has been the consistent standard. Rather than refer to the more familiar recent decisions, I would like, if I may, to turn to some of the earlier decisions in which this standard was established.

One that we have cited in our brief is Cameron v. United States, 252 U.S., which was decided in 1920, less than two months after the enactment of the Mineral Leasing Act, and there a unanimous opinion written by Mr. Justice Vander, whom the Court later recognized as having unique knowledge in this field, the Court articulated the meaning of a valuable mineral discovery in much the terms that the modern cases do.

And if I may support from page 459: "To support a mining location, discovery should be such as would justify a person of ordinary prudence in the further expenditure of his time and means in an effort to develop a paying mine." And then quite significantly this is not a novel or mistaken test but is one which the land department long has applied and this Court has approved, citing

Christman v. Miller, 197 U.S., a 1905 decision of this Court and also a unanimous decision.

The particular page reference in Christman v. Miller -- and this is also a case that is cited in brief, it is in 197 U.S. -- is page 322 which quoted with approval the classic statement reproduced on page 19 of our brief of the Interior Department in Castle v. Womble of the standard which is largely along the same lines as set forth on page 19 of our brief. But of perhaps even greater pertinence to the particular question before us now is the precise holding of Christman v. Miller, and I would like to quote two sentences from the concluding paragraph of this Court's opinion there, page 323 of 197 U.S. Referring to the claimant whose claims were rejected below and the judgment rejecting those claims was being affirmed, there was not enough in what he claims to have seen to have justified a prudent person in the expenditure of money and labor in exploitation for petroleum. It merely suggested a possibility that the ground contained oil sufficient to make it chiefly valuable therefore, and that was not enough under the mining law.

Now, if we turn from that to the Interior Department's opinion in 1927, 22 years later, in Freeman v. Summers, and this is on page 67 of the appendix in the case, I would like to call the Court's attention to the next to

the last paragraph of that opinion in which the rationale used by the Interior Department was precisely the rationale that this Court rejected in interpreting the same law in the Christman case: "There can be no question whatever as to the greater valuable the lands for their oil shale deposits than for other purposes. Their agricultural value is negligible; their value for grazing purposes is nominal, and the real and principal value is the mineral deposits," precisely what this Court held not to qualify as a basis for upholding a claim to a valuable mineral deposit under the mining law.

In retrospect, what started out in the early twenties, when the Interior Department first began patenting oil shale claims as predominantly in the state of fact that oil shale might be then meeting the standard under the mining law as interpreted in this Court's cases, because of optimistic predictions of the immience of marketability of oil shale, it started off in the initial patents as predominantly a mistake of fact and we noted incidentally in our brief on page 29 that the instructions of the Secretary under which these initial patents were granted did not say that oil shale could proceed to patent under any different standards and indeed said that the same standards must be applied.

QUESTION: Can a patent when it is finally issued be set aside for mistake of fact?

MR. WALLACE: It can be set aside only for six years. There is a statute of limitations, Mr. Justice. In the absence of raud, the six-year statute of limitations would be binding. And since no patents have been issued since 1960, none of them would now be subject to being set aside.

QUESTION: So if these had actually been patented rather than just unpatented locations, they could not be set aside?

MR. WALLACE: That is correct, so long as there was no fraud in failure to disclose.

QUESTION: And that would be patents if any that issued between 1954 and 1960?

MR. WALLACE: I am not aware of any effort to do so. It was not until 1974 that the Board of Land Appeals reversed the judgment of the Administrative Law Judge in this case. He said he was bound by Freeman v. Summers even though he thought the case was poorly conceived and that the established standards under the mining law would not support the issuance of a patent here.

QUESTION: May I ask you one other question about Freeman v. Summers. The briefs indicate that in the case there were draft opinions back and forth and the issue was actually fought out before the opinion was released, apparently some subordinates in the department thought the

decision should have gone the other way. Does the record tell us whether the decision in Christman v. Miller was called to anyone's attention and considered before the decision was made?

MR. WALLACE: I am not aware that it does show that. It does show that the Solicitor in the department and all of his subordinates refused to draft the opinion because they thought that it was reflecting an incorrect standard.

The point I was just making was that what started off in the early twenties as what seems to me in retrospect to be a predominantly mistake of fact was then perpetuated as an administrative practice through what is clearly a mistake of law in applying a standard that is contradictory to this Court's reading of the mining law to oil shale without any basis in the statute for singling out oil shale for different treatment.

So the background against which any action Congress has subsequently taken is to be judged at most as an element of ambiguity introduced by the administrative practice that coexisted with this Court's decisions looking the other way as to what the governing legal standard was under the mining law long before any of the developments with respect to oil shale that are put in issue here.

QUESTION: But the Interior Department's view was

expressed openly immediately after the passage in 1920, wasn't it, by a set of instructions?

MR. WALLACE: There were instructions that --

QUESTION: Which purported to be a construction of what the law required.

MR. WALLACE: Yes, but the instructions did not make a mistake of law. They noted that there was a great deal of development with respect to oil shale, a great deal of interest in it and said, as we quote on the top of page 29 of our brief, that the same legal standard should be applied. And under those instructions, the functionaries in the department then began issuing patents on oil shale which in retrospect, as I have said, looks like a mistake of fact but not a mistake of law predominantly. These things emerge with greater clarity in retrospect perhaps than at the time.

But I would say that when the basis for the mistake in fact, the mistake of fact began to dissipate, rather than change the practice, the practice was perpetuated in Freeman v. Summers by a mistake of law, adopted by the Assistant Secretary over the objection of the Solicitor's office.

So it isn't really accurate in our submission to judge any subsequent action has taken as if it were taken against a background of settled law in favor of these oil

shale claims as qualifying under the mining law when this Court's decisions looked the other way in construing the language of the act and the legal standard to be applied.

QUESTION: Mr. Wallace, on a factual aspect, you start out I think indicating five million acres were subject to claims that were during this time period.

MR. WALLACE: That is an estimate.

QUESTION: An estimate. Does that include those that went to patent or just those that are not?

MR. WALLACE: Not in patent.

QUESTION: How large is it?

MR. WALLACE: 349,000 acres have been patented.

QUESTION: The acreage patent was 349,000.

MR. WALLACE: Yes, Mr. Justice.

Now, in the actions that Congress has taken that were relied upon by the courts below and by the respondents as in some method having amended the standard of the mining law and setting a unique standard for oil shale, as the two courts below specified, the principal reliance is now placed, as I read respondent's brief, on the savings-provision of the mining law of 1920.

QUESTION: Can I ask you a question, Mr. Wallace, before you get to that point. You say that the decision in Freeman v. Summers is contrary to Justice Vander's opinion in Cameron v. United States, and you quoted the

language of Justice Vander in Cameron saying that justifying the expenditure of his time and means in an effort to develop a paying mine, and in Freeman v. Summers it says it doesn't have to be immediately disposed of at a profit. Doesn't "develop a paying mine" mean that there may be some period where you are not going to make a profit which will be ultimately be amortized by the sale of something that does become valuable?

MR. WALLACE: Well, there is some play in the question of imminence in the profitability of the mine, but the consistent course of interpretation has been that it has to be imminent rather than speculative.

QUESTION: I assume that wasn't the Court's interpretation in Freeman v. Summers.

MR. WALLACE: No, it wasn't, but Freeman v. Summers in our submission an aberration from the Womble standard which was the predominant view approved by the Court over and over again, expenditure of labor and means with a reasonable prospect of success in developing a valuable mine. Certainly no formulation that had ever been made contemplated holding of fallow claims and dealing in them for a period of more than sixty years while nothing could be returned to the public and then valud claims could be made for alienation of a large acreage of the public domains on the basis of that kind of holding.

I don't think there is any formulation which would look toward that kind of speculative interest. It is precisely what this Court said in Coleman was not authorized under the mining law.

I would like to make one basic point about the reading that is proposed of the savings clause in the Mineral Leasing Act, and that is the implausibility of that reading as a matter of the common sense of what Congress was doing.

The basic purpose of the Mineral Leasing Act was to put an end to alienation of the public lands through mining claims based on some of the more widespread mineral resources which it appeared would result in very widespread alienation of the public lands beyond what could be exploited in the near future because the minerals were so widespread. The ones that were singled out in that law, oil shale, coal, oil phosphate, were ones that were thought to exist in such great quantity as to endanger wholesale alienation of the public lands beyond the purposes for the original mining law of giving people a way to get title in return for commercial exploitation of valuable mineral resources.

There had to be some savings provision as Congress developed the law both because of Fifth Amendment problems with whatever rights people had in their claims under the

old mining law and to prevent unfairness. But it obviously would be contrary to the whole purpose of the legislation to read into the savings provision an intent to make further alienation of the public lands possible through claims on oil shale than had been authorized by the prior law when the whole purpose of the act was to curtail alienations of the public lands through such claims. It was dissatisfaction with the old system and the possibility that these wholesale alienations would occur through claims on the specified minerals that led to the passage of the act in the first place.

So it would take a compelling indication in the language or history of the statute to conclude that the savings clause should be interpreted at cross purposes with the basic thrust of the legislation and the thing that moved Congress to enact it. And far from that we have, as this Court recognized in the Hickel case, a carefully drafted provision in the savings clause that refers to the standards of the mining law having to be met.

The two subsequent developments in Congress referred to did not result in, in one case in any legislation and in the other case in anything that could conceivably be construed as affecting the standard of discovery because it was devoted to a discrete matter.

I would like to reserve the balance of my time, if I may.

Thank you.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Hamilton, you may proceed whenever you are ready.

ORAL ARGUMENT OF FOWLER HAMILTON, ESQ.,

ON BEHALF OF THE RESPONDENT

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

After a few preliminary observations by way of background, my discussion will present the law and the facts insofar as they relate to six points that in our view are relevant to the consideration of the case. The first will have to do with the problem that Congress and the Executive Branch faced in when in 1916 they discovered in consequence of work of the Geological Survey beginning in 1901 and extending down to 1916 that therey lay in the Green River Formation, which is located predominantly in northwestern Colorado but extends into Wyoming and Utah, the largest, richest reserve of energy in the world, and it still is the largest, richest reserve of energy in the world, holding according to the record in this case in the aggregate in oil of a richness, in shale of a richness of 30 gallons per ton and a thickness of 15 feet, a grand

total of 580 to 600 billion barrels of oil and having in its reserves capable of now being produced with mining and recording and refining methods now available an immediately available reserve, economics to one side, of 80 billion barrels of oil, which is three times the total reserves of the United States approximately, and larger than the total amount of oil that has been consumed in the United States since oil was discovered in 1859 in Titusville, Pennsylvania.

The second preliminary matter I should like to bring to your attention is that there is no disputed fact in this case which is not unusual in view of the circumstance that the hearings lasted over five months in Colorado, from June of 1967 until October of 1967, produced a transcript of 5,000 pages and more than 700 exhibits, and I think it is fair to say is one of the most extensive hearings ever held under the mining laws.

Further, it is undisputed that the six claims involved in these proceedings, each of 160 acres, or a total of 960 acres minus a small fraction of a claim that was found not to contain shale, are physicall indistinguishable from the 349 acres of oil shale claims that were patented during the forty yeasr from 1920 until 1961.

It is also conceded, I believe, that there is no other known firmity in these claims if oil shale is a patentable mineral. Indeed, inspectors of the department

approved all of the claims in this claim for patenting in 1958 and 1960 and all of the formalities have been done, a certificate had issued, had been sent to Washington for the pure ministerial act of issuing the patent when the order came down not to issue any more oil shale patents.

Now, before turning, I might here just list the six points that I shall address the Court on: One, is the nature of the problem that faced the Congress and the Executive Branch when they discovered this; secondly, what they did with the problem, how they solved it; thirdly, the application of the solution over a period of 41 years; fourth, the four principles that the attempt of the Department of the Interior to abolish that solution; fifth, the four independent alternative reasons we advance that prohibit the department from abolishing that solution; and, sixth, the immense benefits to the public that have resulted from the application of that solution.

But before doing that, I should like to respond to a point made by my opponent in response to a question from Mr. Justice Stevens. There is in a footnote in the case to which Your Honor referred the statement that there are 500,000 acres that are cluttered up by oil shale claims. There is no basis in the record for that statement.

The record shows in the transcript at page

3417 and 3744 that in fact in Colorado the government did a very thorough study of all of the counties. These claims have to be filed in counties or they lapse within thirty days of discovery. They made a very thorough survey of all of the counties in which the preponderant part of the oil shale was located, the Piceance Basin, and their testimony was at that time -- of course that was in 1920 -- that at that time approximately 3.5 percent of those reserves had been patented, approximately 4.5 percent were claimed subject to whatever infirmities the claims might have, so that there was somewhere between 92 and 97 percent of this priceless reserve that is owned today by the government without any claims on it.

Now, I come to my first point and that is the problem that faced the Congress and the Executive Branch when they learned that they had this immense treasure on their hands back in 1916. It is necessary to touch briefly by way of background upon the general land law.

The problem the United States faced in connection with the public land was not how to keep it, the problem was how to get rid of it.

QUESTION: Mr. Hamilton, let me just be sure I understand.

MR. HAMILTON: Surely.

QUESTION: The figures are so widely different.

I just want to be sure I understand.

MR. HAMILTON: Yes.

QUESTION: I understood Mr. Wallace to say there are five million acres.

MR. HAMILTON: I'm sorry, I misspoke. He did say five million.

QUESTION: And you say that there is only roughly the same amount as the 349,000 that have been patented.

MR. HAMILTON: Roughly. That's right. That is in the record.

QUESTION: And does any neutral source enlighten us as to which of you is correct on this?

MR. HAMILTON: Well, the source that I was quoting was not a neutral source, it was the government source.

QUESTION: And that was as of what date?

MR. HAMILTON: 1967, the date of the hearing.

QUESTION: I see. And that is in the transcript?

MR. HAMILTON: That is the transcript, 3714 to 3744, testimony of one of their experts named Duncan based upon an extraordinary exhaustive study that had been made by the department of the claims in all of the counties in which the claims that had been filed.

QUESTION: What was that transcript page again?

MR. HAMILTON: Sir?

QUESTION: What was that transcript reference?

MR. HAMILTON: Transcript 3714-3744. It is also the source of my statement, it is the most valuable mineral reserve in the world.

QUESTION: More valuable than any of the Iranian ones?

MR. HAMILTON: Much larger.

QUESTION: What?

MR. HAMILTON: Much larger than Iran or Saudi Arabia. It is unbelievably large.

QUESTION: But true.

MR. HAMILTON: But true. Now, I said that the problem that faced the government in respect to the land laws was not how to keep the land but not how to get rid of it and that facts that show that are quite clear and simple.

When the Thirteen Colonies got their freedom from Britain, Britain agreed in the Treaty of Paris to give the colonies all of the land that lay between the western borders of the Thirteen Colonies and the Mississippi River. Maryland would not approve of the constitution because it didn't have any western boundaries that abutted on this land unless the new states agreed to cede it to the federal government which they did, and that doubled the land that the thirteen states had from about 230 million acres up to another 230 million acres.

Then when President Jefferson purchased the Louisiana Purchase, that again doubled the area of the United States and three-fourths of that was in the hands of the federal government. And then as we moved west -- the Manifest Destiny, the Mexican Cession, et cetera -- we finally exhausted the 2.5 billion acres of land that constitute the United States and about 2.1 billion acres the federal government has had on its hands, 1.8 billion, and it has been very difficult to get rid of it. It still holds roughly 650 to 700 million acres.

First they tried to sell it because Secretary Hamilton and Secretary Gallatin thought it was a wonderful way to pay the debt, so they started pricing it at $10 an acre. The only thing wrong with that was that there were a lot of people in Pennsylvania, Virginia, New York and other large states who had bought a lot of land from their states for about three, four or five cents an acre and they undercut the government price, so they couldn't do it. They tried selling it on credit and nobody paid. They all went bankrupt because they didn't have working capital.

So finally they had to go to a policy of free land, which they did. They tried it first in the Homestead Act of 1952, which curiously enough President Buchanan vetoed, but it was finally confirmed in the Homestead Act of 1862, with 160 acres you had yourself a farm and pay

$2.50 an acre for it if you lived on it for five years.

QUESTION: I thought President Filmore was President in '52.

MR. HAMILTON: Sir?

QUESTION: I thought Filmore was President in '52.

MR. HAMILTON: I meant '52. Did I say '62?

QUESTION: No, you said '52.

MR. HAMILTON: I said 1852.

QUESTION: Buchanan was President I thought from 1850 -- no, 1857.

MR. HAMILTON: I will defer to your greater knowledge, but I think it was vetoed.

Now, there was no mining law in effect during this point. When they had the Gold Rush, they were all treaspassers. People made fortunes treaspassing on the public domain. The first mining law came in in 1866 and it provided in general terms that the land should be given away. It applied only to vein or lode mines, where the miner discovered a vein and then was permitted to follow it as far as it went in the earth.

In 1870 it was provided that you could mine placer claims, placer claims being, as you know, detritus or eroded land that has gone down in a stream and then you pan it and get something out of it. Both of these -- in 1872 the law was codified, that is the mining law

was, and it is very interesting because we have to engage in a way in an act of historical imagination to get ourselves back to where we were in 1872 because that is still the law today and that is the law under which a lot of hard rock miners even as we are sitting here are going out with their burros and hammers and clamoring all over the public land, including the land that is reserved for parks in most cases, trying to find hard rock minerals, gold, silver, lead, et cetera, which haven't been held under this leasing act. That is the law.

The historical imagination parts come in in view of the circumstance that this was just -- this law was passed in 1972, just four years before the Sioux Indians, under Sitting Bull, had their fight with Col. Custer at the Battle of the Little Big Horn. That incidentally was occasioned by the circumstances that -- one of the factors was a mine strike up in the Black Hills and everybody was rushing up there and the whites very callously and senselessly slaughtered the buffalo and deprived the Indians of their food.

So that is the statute. Now, the statute has four very interesting parts. Here it is: Except as otherwise provided, all vaulable mineral --"valuable" wasn't in the '66 act, oddly enough -- all valuable mineral deposits in land belonging to the United States,

both surveyed and non-surveyed, shall be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention of becoming such, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable -- in other words, Congress adopted the standards of miners, whatever they were. There was no federal government for any practical purposes out in this part of the world, so that in order to maintain peace they simply said we will take over the customs of the miners.

Now, there are four aspects of that statute which I think are relevant for our discussion today. First, it says "valuable," for it says they shall be free, given away. Next it says that that shall be done under regulations prescribed by law and according to the local customs of miners.

Now, the Department of the Interior had occasion to consider that when Secretary Hoke Smith, twice governor of Georgia and several times a Senator, was Secretary of the Interior, and he wrote the famous Castle v. Womble case about which you have heard so much.

I should like to read the passage quoted in the government's brief and then I should like to read the

next passage that is not quoted in the government's brief. The passage quoted --

QUESTION: Where does it begin in the government's brief?

MR. HAMILTON: Sir?

QUESTION: Where does it begin in the government's brief?

MR. HAMILTON: Yes, it is in the government's brief, page 19. The part I quote, which is set forth says: "Where minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine, the requirements of the statute have been met."

But then it goes on, and this is not quoted: "For if as soon as minerals are shown to exist and at any time during exploration before the returns become remunerative, the lands are to be subject to other disposition, few would be found willing to risk time and capital in the attempt to bring to light and make available the mineral wealth which lies concealed in the bowels of the earth as Congress obviously must have intended the explorer should have had proper opportunity to do." In other words, they said go in, if it looks promising, have a claim and

then we will give you time to go on and see if there is anything there that is really valuable.

QUESTION: Do you have that supplement in your brief?

MR. HAMILTON: Yes, sir.

QUESTION: I don't recall it.

MR. HAMILTON: Now, it was against that background that Congress and the Executive Branch found themselves facing a very serious problem when this great valuable deposit of oil shale was discovered because it was not hard rock mineral and all of the minerals before that had been hard rock minerals, gold, silver, what have you, except for oil which had been made the subject of a special act in 1897.

Furthermore, the problem with this mineral wasn't to discover it, everybody knew it was there, the problem was in order to make it profitable to find a way to improve the existing devices so that you could market at a profit in competition with other forms of energy, notably oil.

So Congress addressed itself to that problem and tried to see how it could fit this non-metallic energy source into a law devised to take care of hard rock minerals running in veins and found in placers, and the conclusion that they came up with --

QUESTION: You have one mistake, Mr. Hamilton.

MR. HAMILTON: Yes?

QUESTION: If you pronounce placer that way out in our country, you get your claim cancelled.

MR. HAMILTON: Placer.

QUESTION: Placer.

MR. HAMILTON: Placer, I'm sorry. Thank you.

QUESTION: While you are stopped, is there any parallel here that you see between what happened with iron up in the iron range and the development of new methods to exploit taconite which reopened the whole mining industry?

MR. HAMILTON: Sir, it would be analogous, yes, sir.

The way the Congress and the way the Executive Branch solved the problem, they solved in 1916 when they made the first classification that related to oil shale. In 1897, Congress had given the Department of the Interior the power to make classifications of lands as mineral or non-mineral because the mineral lands took precedence over the agricultural lands because it was felt that it was more desirable to have the minerals developed in view of the small amount of the minerals than it was to have additional farms.

So in that classification, what happened was that when the Director of the Geological Survey had to come to

grips with this problem of whether or not stuff was a valuable mineral, he found that it was and he wrote a memorandum describing the basis for his reasoning and he wrote it to the Commissioner of the Land Office and here is what he said. He said, "The net result of oil" -- this was 1916 -- "The net result of oil shale investigations already made is that the oil-shale areas in Colorado, Utah, and Wyoming constitute a latent petroleum reserve whose possible yield is several times the estimated total remaining supply of petroleum in the United States." As I mentioned, that is still the case today.

"In view of the high prospective mineral value of lands underlain by oil-shale deposits it is, of course, apparent that they should not be permitted to be acquired under the nonmineral land laws. The lands have not been recommended for withdrawal" -- in those days, as now, the Geodetic Survey, when they classified lands as minerals, they could have withdrawn them from further location, as was done in the case of the minerals when they were made available under the Mineral Leasing Act, including oil shale, but it was decided here -- and this was an exception to the ordinary practice -- that they would find that they were mineral in character and valuable for mineral, but that they would not withdraw them, and the reasons why he asserts that the department decided not to withdraw them

was because the oil-shale industry is not yet developed in the United States, and as it is desired to give opportunity for the establishment of experimental plants, it is believed the lands should remain open for the present to acquisition under the mineral-land laws, even though they are ambiguous and but poorly adapted to deposits of this type -- referring to the hard rock deposits.

"Accordingly, I hereby classify the tracts listed below as mineral lands, valuable as a source of petroleum and nitrogen, and request that you make the proper notation of the classification upon your records."

Now, that brings me to my third point, which is the use that the government and Congress have made of that solution to classify them as minerals and leave them open. The first use, of course, was when they found the solution and stated it in the language which I have just read.

Next, between 1916 and 1920, the record is full of it, they notified Senators, Congressmen, people in the West, newspapers, that this language is valuable, go after it, the price of oil is going up. It was about $1.20 in 1916 and reaching a high of $3.48 in 1920. The war was over, people were concerned about it coming out and thousands of people went out and staked claims. It is all in the record.

The question of whether or not there should be

a patent on these lands had to be faced by the department in 1920, in the same year that the Mineral Leasing Act was passed. Now, the Minreal Leasing Act was passed for the purpose of making available the substances that it covered, petroleum, et cetera, which had been withdrawn as the department had classified these lands as mineral. So the purpose of the act was to make available lands that were not available at all theretofore except for oil shale. It had been available because, you recall, it was not withdrawn. These were withdrawn. The act was --

QUESTION: I hope you are going to save enough time to make your point on estoppel.

MR. HAMILTON: How much time do I have, Your Honor.

MR. CHIEF JUSTICE BURGER: You have about ten minutes left.

MR. HAMILTON: Anyway, it is in the brief. I can summarize it this way: The Mineral Leasing Act came into public notice in 1916. There was four yeasr of activity about it. The oil shale people went to the Department of the Interior and said, look here, if you put our oil shale into this, which you plan to do, for gosh sakes, leave us some claims, be sure that we've got the claims.

There were no claims for these other minerals

so the exception didn't have to apply to them, so they had had a big meeting at the Department of the Interior, the Department of the Interior said fine, they went down to Congress and said the Department of the Interior and the claimants agree on the statute, they went to Congress, Congress approved it and that was that.

Then the question came up as to whether or not an oil shale should be patented. It was patented the same year. It was very carefully considered. The lawyers in the Department of the Interior came to the conclusion that they had to patent it. The instructions were issued following Castle v. Womble. Then there were four other incidents in which the department and Congress had to consider this matter, each of which they confirmed Castle v. Wombler as a --

QUESTION: I'm sorry, I don't mean to cause you to lose the thread of your argument. I really didn't understand the point you were making about the 1920 act. I would like to be sure I -- you said the purpose of the statute was to make available mineral lands which had previously been classified and withdrawn?

MR. HAMILTON: Except oil shale.

QUESTION: Except oil shale. Now, how does that --

MR. HAMILTON: What happened was the act provided that none of these minerals should be available for patent

but should only be available under lease, and it included oil shale.

QUESTION: Right.

MR. HAMILTON: The oil shale people said that is going to kill our claims if it goes in like that because we've got these claims and we haven't got patents. So they came down to Washington and went to Interior with their Congressmen and Senators and Interior said, yes, that's right, therefore we will put in a clause to save the oil shale claims located before 1920.

QUESTION: Right.

MR. HAMILTON: Because had they not done that, they would have been wiped out. So the purpose of the saving clause was to save the oil shale claims. You didn't have that problem with the other --

QUESTION: Didn't they also save claims for other minerals as well?

MR. HAMILTON: As a practical matter, there weren't any of those because those minerals had all been withdrawn for years because as soon as they --

QUESTION: I see.

MR. HAMILTON: -- had been classified, they were withdrawn and you couldn't stake a claim.

QUESTION: All right.

MR. HAMILTON: So they filed the instructions

following the original decision based on the last paragraph of Castle v. Womble.

Now I had better turn promptly to my fourth point. I should mention that in 1960-61, for reasons that nobody knows because there was no hearing, nothing, word went out from Washington to the Department of the Interior, don't issue any more claims on oil shale. Thwere were 18 claims pending, of which those here are two and there are 16 others in another case that has been going on for the same 16 years. The 16 claims, they held them invalid because they hadn't done assessment work. In these two claims, there have been assessment work, the claims were otherwise perfect so they produced this argument that oil shale was not then and had never been valuable.

Now, the reasons we say that the law prohibits them from doing that are four: In the first place -- and I have tried to outline very sketchily the facts that are supplemented in our brief -- we say that the Congress has not just acquiesced or reacted something like the Internal Revenue Code and overlooked some order where there is some fine print, that the Congrsss was actively engaged indeed in the oil shale and the Leasing Act expressly provided that oil shale would be -- it is a valuable mineral and subject to patent because I submit that one cannot read that act and make any sense out of it unless one agrees

that oil shale is a valuable mineral.

The Congress by its other action at various times as late as 1955, they passed a Multiple Leasing Act which was introduced by Mr. Aspinall who was a Congressman for that part of the world, and the reason for it as the legislative history shows was that the Interior Department had adopted the principle that they would not patent minerals where there was a surface patent outstanding, for example, on a homestead patent where the minerals had been reserved as they were in the case of oil shale prior to 1920, unless the oil shale mineral claimant could get a deed from the surface owner and the surface owner, then the department would grant the patent because it gave you the fee and if you had a farmer that was going to hold you up you had great difficulty getting him to agree to convey to you so he could reconvey. So they passed this statute to deal expressly with oil shale, called the Multiple Leasing Act, so Interior could now go ahead and grant a patent on the mineral even though a homesteader owns the surface, because ordinarily a patent on a mineral patent takes the surface with it. But if the surface has been pre-patented it couldn't do that.

Now, I will turn to the four points: The first is that Congress has actually endorsed this rule that oil shale is a valuable mineral and so patented. The second

is that apart from that, the Department of the Interior in an independent ground has promulgated this rule, has had it in effect since 1920 at the very least in the instructions, that under those circumstances it cannot now in fairness reverse it retroactively, and in that connection I should, if I may, point to the Court's attention that neither one of those two bases for your decision will have the slightest prospective effect. They can only affect oil shale. They can only affect oil shale claims that were located before 1920. They can only affect oil shale claims that are proven to be valid to meet all the other tests besides discovery. So therefore it is not as though you were being asked to keep an agency from changing a rule prospectively that is going to affect the administration of some important branch of the government, where you are going to bind it to the past. Here all you are being asked to do is to make it stay with the past, as it were, what it did for 41 years. So this has no consequencial effect, precedential effect that will in any way impair Interior's administration of the mining laws on the public domain.

And as I have mentioned earlier, the total amount of claims that are available are only about equal to what they have already patented out of a total of 16,000 acres in this great formation, so that it will have no consequential economic effect that will be adverse.

Thirdly, I come to the point -- which I take it that already our position is clear -- that indeed this was a valuable mineral, that it was decided the only rational way they could have decided it was to say oil shale was a valuable mineral, and perhaps, if I may say so, the soundness of that position is illustrated by the circumstance that if this Court should hold that oil shale is not a valuable mineral, it will nullify 200,000 acres of reservations of oil shale that underlie homesteads where the Interior Department has granted the homestead and reserved the oil shale, but if oil shale is not a valuable mineral that reservation is invalid and therefore the farmers and the ranchers will pick up the oil shale which will be roughly about the amount of oil shale that is still being claimed.

Finally, we come to the estoppel argument. Our position on estoppel is, of course, the Court has never said the government could be estopped. It has come up to the brink and looked at it as in the Moser case but it has not decided it. The Ninth Circuit has taken the view that the government may be estopped.

QUESTION: Well, the Ninth Circuit was reversed in Hibi, which the government cites in its brief, because this Court said the government could not be estopped? You cite it in your brief at page 76.

MR. HAMILTON: With all respect, we do not read that as meaning that this Court has held that the government cannot be estopped. We read it as saying the government could not be estopped in that case. If I am wrong in that, if this Court has decided and is going to continue to hold that the government cannot be estopped, my argument is no good.

QUESTION: I agree.

MR. HAMILTON: Not at all. Our argument is that the estoppel cases where it has been held that the government could not be escopped fall in general into several categories and this is not one of them. They fall into cases where someone has acted outside the scope, some government agency has acted outside the scope of the authority that is given to it and here obviously we have the Secretary involved acting within the scope of his authority.

Two, where the estoppel is sought to achieve a result that has been expressly prohibited by statute, of course, we take the 180-degree position on that, but here the statutes are on our side.

Three, we take the position, of course, that the estoppel turns on its own facts and would argue that with the extension of government into the affairs of the citizens far beyond that contemplated, that estoppel in a

gross case of a responsible government agency, top government official such as a Secretary, acting within the scope of his authority even though, as we argue, acting incorrectly, that estoppel is proper but that is a question of policy.

QUESTION: Does that differ too much from an administrative construction, a long continuing administrative construction?

MR. HAMILTON: Yes, I think it does, because in the case of long administrative construction, one, it seems to me, is not dealing with equities so much -- in terms of dealing with the rights of a particular citizen, one is dealing with a principle of government. It doesn't just affect the parties in the case but it is a matter that affects the way the society operates and what the rule of law means as distinguished from what is equitable in a particular case. It seems to me that from the legal and perhaps the philosophical standpoint it is equite one thing for the Judicial Branch to say you must not be capricious in general, you must not come and go and change rules, people must be entitled to know what the law is as against saying in a particular case -- in this case, the conduct is so unfair, to use the language of the Moser case, so unfair and gross as in this case, where it has been relied on for years and millions of dollars have been

spent, in the case of this particular paty you may not do it.

QUESTION: But then you would have to show the reliance element.

MR. HAMILTON: That is correct and we argue in our briefs, absolutely, whereas if my philosophy is right one shouldn't.

QUESTION: Mr. Hamilton, before you sit down, I was going to ask you what is the difference between question two and question three which you listed among three additional questions on page three of your brief. But perhaps your answer to my brother Rehnquist now has answered that.

MR. HAMILTON: Yes.

QUESTION: Is that the difference?

MR. HAMILTON: That is the difference. We had a problem finding out what you meant by the cert petition, as you know.

QUESTION: Yes, I understand.

MR. HAMILTON: Yes, that is the difference and we --

QUESTION: So it wouldn't make --

MR. HAMILTON: The difference between the individual and --

QUESTION: It is the difference that you have just explained in your answer to Mr. Rehnquist.

MR. HAMILTON: Yes. If I may, I will just take

thirty seconds more. I would like to say that the benefits that have flowed from this solution are these: There are now -- our government has three processes in which we can make oil out of this material that are workable and practicable and will produce it in quantities that are significant in terms of a plant being 50,000 barrels a day. We have that.

The reason we -- we have 24 different corporations who are cited in the record who have twenty years of know-how and experience and research and development in this area. If we hadn't had this particular solution, we wouldn't have put those millions into this business and we wouldn't now be in a position where all the President has to do is decide to spend the money and we can start overcoming some of the problems that are obvious to all of us.

Thank you very much.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Hemilton.

Mr. Wallace.

ORAL ARGUMENT OF LAWRENCE G. WALLACE, ESQ.,

ON BEHALF OF THE PETITIONER -- REBUTTAL

MR. WALLACE: I would like to say first that there are an estimated five million acres which I have gotten from the Department of the Interior, is based on an extrapolation from the study that is in the record which relates to only one county in the area in Colorado, and that extrapolation

then would take in the other counties in Colorado and the areas in Wyoming and Utah which were not included in this study of court house filings. So it is an extrapoliation from that study on which we base an estimate not in the record of five million acres.

The difference between what is a valuable mineral resource for purposes of classification and what is a valuable mineral deposit within the meaning of the mining laws for purposes of giving someone a right to relinquishment of federal title to the lands is explained in detail by the Board of Appeals in Footnote 59 of its opinion starting on page 115a of the appendix to the petition. We don't believe that classification has anything to do with the problem in this case because, as this Court's opinion that I quoted to you, the 1905 opinion earlier held that land can be chiefly valuable for its mineral resources and still not qualify under the mining law as a valuable mineral deposit subject to current exploitation. The other authorities to the same effect are collected on page 21 of our brief, including in the footnote there an 1891 decision of this Court which we quote, stating that the existence of the mineral must be in such quantities as would justify expenditure and the effort to obtain it established as a present fact.

The standard under the mining law was well

established even before the 1905 decision to which I called the Court's attention because of the fact that the rationale of Freeman v. Summers was so contrary to it.

I would like to say a word about the estoppel question. The Court has never held the United States to be estopped by the acts of its agents and certainly in accordance with the cases that have been decided, the poorest context in which to start would be on a question of alienation of the lands in a manner not authorized by Congress.

The claims involved here were described, the kinds of claims involved here were described by this Court in Best v. Humboldt Mining as a unique form of property. They are conditional on annual assessment work. They are defeasible if the mineral resource ceases to be a valuable mineral deposit. Their validity is not administratively reviewed in any way until a patent application is filed with the department. Indeed, the claim needn't even specify what mineral it is that has been discovered. And Congress, by providing a six-year limitation period after the issuance of the patent for contesting the validity of the patent, has specified the only way in which the United States will be estopped by administrative error under the mining laws which would have the effect of alienating the public lands to private interests in a manner not authorized by the mining laws, are not authorized by Congress

itself, and I believe shows in detail why none of the other traditional tests for estoppel would apply here in any event.

Now, this doesn't mean that there is no recourse to --

QUESTION: Could I just ask you, if we agree with you on the only question you presented in your petition, should we remand on the estoppel --

MR. WALLACE: We are --

QUESTION: You are submitting it here and --

MR. WALLACE: We urge the Court to decide it because until it is decided, litigation about these claims will have to continue. Thre is related pending litigation about -- which has to go claim by claim about whether the requisite assessment work was done in this period annually over a period of more than sixty years, and it is better for the question to be settled.

QUESTION: Well, that is true if you had never petitioned for certiorari, too.

MR. WALLACE: We did and the Court granted the petition and -- the District Court passed on the question, we think the question is a clear one, that there is no basis for a holding of estoppel. The Court of Appeals did not reach it.

I would like to point out that this does not mean

that the respondents and others similarly situated are without any recourse. They would then be remitted to present their equities to Congress which would have the flexibility of making whatever adjustments it might think appropriate in response to the equities they show, such as a preference under the leasing law which is the way Congress since 1920 has said the access to this kind of mineral deposits should be restricted.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

(Whereupon, at 2:45 o'clock p.m., the case in the above-entitled matter was submitted.)

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