ORIGINAL

In the

Supreme Court of the United States

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR,

PETITIONER

V.

UTAH.

RESPONDENT.

No. 78-1522

Washington, D. C.
December 5, 1979

Pages 1 thru 46

Hoover Reporting Co., Inc.
Official Reporters
Washington, D. C.
546-6666

IN THE SUPREME COURT OF THE UNITED STATES

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR, Petitioner,	:	
v.	:	No. 78-1522
UTAH, Respondent.	:	

Washington, D. C.,

Wednesday, December 5, 1979.

The above-entitled matter came on for oral argument at 10:45 o'clock a.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:

PETER BUSCEMI, ESQ., Office of the Solicitor General, Department of Justice, Washington, D. C.; on behalf of the Petitioner

RICHARD L. DEWSNUP, ESQ., Assistant Attorney General of Utah, Sale Lake City, Utah; on behalf of the Respondent

- - -

C O N T E N T S

- - -

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 78-]522, Andrus v. Utah.

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

ORAL ARGUMENT OF PETER BUSCEMI, ESQ.,

ON BEHALF OF THE PETITIONER

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

This case is on here on writ of certiorari to the United States Cout of Appeals for the Tenth Circuit and presents a question concerning the discretion to be exercised by the Secretary of the Interior in reviewing state applications for public lands to replace lost school lands and the roots of this controversy go back a long way.

As new states were created out of federal territories throughout the 19th Century, Congress granted the states one or more enumerated sections in each township for school purposes. When Ohio joined the union in 1803, it became the first state to receive such a grant. Throughout the first half of the 19th Century, most states received one section per township, section 16, and then beginning with California in 1853 the general rule was two sections of township, and Utah, Arizona, and New Mexico were the only states that upon joining the union received four school sections in every township throughout the state.

Now, the problem presented in this case arises from

the fact that the designated numbered sections specifically granted to the states by Congress were sometimes unavailable for any one of a variety of reasons. Sometimes a given section was homesteaded or it had been placed in a national park or a national forest, or perhaps an Indian reservation, and most obviously, sometimes a township was fractional and the enumerated section simply didn't exist.

So recognizing that possibility, Congress provided for it and said that states that receive school lands could, if any of the specifically enumerated sections were unavailable, select other unappropriated public lands as replacements for the lost sections. The selections authorized by Congress are called indemnity selections or in lieu selections.

Now, this case concerns a series of 194 such selections filed by the State of Utah between 1965 and 1971. The selections --

QUESTION: How many sections in a full township, 32?

MR. BUSCEMI: 36.

QUESTION: 36.

MR. BUSCEMI: That's right. The Utah selections cover about 194, 157,000 acres in the northeast portion of the state.

QUESTION: Why has it taken the secretary so long to pass on any of these selections?

MR. BUSCEMI: Well, Mr. Justice Rehnquist, there are

a variety of reasons which we've set out in some detail in the brief. In addition to the controversy over the grossly disparate value policy before the Court today, there has also been a delay associated with the actual appraisal in estimating the value of the base lands and the selective lands.

QUESTION: I can see where there could be a delay of several years, and I can see why there could be delays on particular sections, but to just have a complete blockage for a period of more than ten years strikes me as quite unusual.

MR. BUSCEMI: Well, I mean, for one thing this case has been in litigation now for five years, so that takes it back to 1974. Now, that's about nine years from the date of the beginning selection. But there was an intervening event, the passage of the National Environmental Policy Act in 1969 which raised the question about the applicability of the environmental impact statement requirement to a state indemnity selection.

Now, that question is not before the Court today. To some extent the resolution of the question may depend on the outcome of this case. If the secretary has the discretion that he contends he has, then his decision to approve or disapprove selection may involve a major federal action that would require an environmental impact statement. But that all is not here now because of the way the District Court and the Court of Appeals resolved this litigation. So --

QUESTION: There has also been a change in policy in the Department of the Interior, hasn't there? A change in position as to the secretary's right?

MR. BUSCEMI: Not to the best of my knowledge.

QUESTION: I thought there --

MR. BUSCEMI: -- the district value policy is still the policy of the Department of the Interior.

QUESTION: But I thought it had not been the -- the department did not follow that policy at an earlier date?

MR. BUSCEMI: Well, you have to understand the chronology here. I mean, in 1958, Congress for the first time provided that states could select mineral land as a replacement for lost school land. That provoked a ferment within the department and the question arose as to what, if any, discretion the secretary had when a state selected lands that were much more valuable than the lands that they lost.

Now, in 1963, the Attorney General rendered an opinion at the request of the Department of the Interior stating that he believed the secretary had discretion, for which he now argues, and then in 1965 the secretary did support proposed legislation that would have added the equal value concept to governing indemnity selection statutes. So it has been the department's policy for at least 14 years now, perhaps 15 or 16.

QUESTION: But he didn't get the legislation?

MR. BUSCEMI: No, he did not.

QUESTION: But then, how long has he been following formally the equal value concept?

MR. BUSCEMI: Well, the first statement signed by the Secretary of the Interior is dated January 16, I believe, 1967, but in answer to Mr. Justice Rehnquist's question, when I said he had been following it since '63, I was basing it on the fact that there was this series of communications between Representative Aspinall, the Chairman of the House Committee on the Interior, and the Attorney General and the Secretary of the Interior, which discussed the general question of his discretion under Section 7 of the Taylor Grazing Act and the applicability or the availability of that discretion as a means of importing this evaluation policy into the process of ruling on indemnity selections.

Now, as we pointed out in the brief, approximately 10,000 of the 157,000 acres at issue in this case are the subject of two prototype oil shale leases right now, but those aren't really involved in any direct sense in this case because Utah has agreed that it did not object to the leasing program, and it will regardless of the disposition in this case, it will honor the leases in the event that it prevails.

Now, Utah filed this suit in March 1974, challenging the propriety of the Secretary's grossly disparate value policy, and that policy appears in the memo signed by Secretary Udall to which I just referred in the appendix at pages 43 to 45.

Briefly stated, the Secretary's policy is that in most cases he'll refuse to approve state selections of public lands that are substantially more valuable than the lost school sections they are intended to replace. Now, the policy doesn't come into play at all unless the estimated value of the selected lands is more than $100 per acre. If it is, and if the selected lands have an estimated value per acre higher than the lost sections, the secretary will routinely approve otherwise acceptable selections only where the difference in value is $100 per acre or 25 percent of the value of the base, the lost lands, whichever is greater.

So for example, if the lost lands are worth $100 an acre, the Secretary would routinely approve an otherwise acceptable selection where the value was up to $200 an acre. On the other hand, if the lost lands were particularly valuable, say $1,000 an acre, the secretary would then routinely approve anything up to $1,250.

Now, Utah contends that the Secretary simply lacks the authority to apply this grossly disparate value standard to state indemnity selections. In the state's view, the only legitimate criteria for evaluating a proposed selection are found in the statute generally authorizing such selections. Now, that statute traces its origin to two laws enacted in 1826 and 1859. The laws were revised and consolidated in Sections 2275 and 2276 of the revised statutes in 1874, and then amended

again in 1891 and again in 1958. They are now in 43 USC 851 and 852.

The Secretary's position is that in addition to those provisions, another statute is highly relevant to his action on state applications. That statute is the Taylor Grazing Act of 1934, and in particular Section 1 of the act and Section 7, as amended two years later in 1936.

QUESTION: Now, as you understand your brother's position, is that position that the Taylor Grazing Act, particularly Section 7 thereof, is wholly inapplicable?

MR. BUSCEMI: Yes. At least that's part of his position.

QUESTION: That's what I thought.

QUESTION: Mr. Buscemi, you referred to Secretary Udall's approval of the memorandum on pages 43 through 45 of the appendix. Do you think there is any inconsistency between that memorandum and the opinion of the solicitor of the department on page 41 of the appendix?

MR. BUSCEMI: Yes.

QUESTION: The department has, then, changed policy?

MR. BUSCEMI: Well, the date of the solicitor's opinion is September 1962. Now, that was a date earlier than any I discussed before in answer to your question. It may have been that there were some lower officials in the Interior Department who thought in 1962 that the equal value concept was

simply inapplicable. I don't deny that. We discussed that memorandum briefly in Note 26 of our brief on page 61.

If that ever did represent the policy of the secretary and the department as a whole, it no longer does. And to that extent there has been a change.

QUESTION: And to that extent the present policy does not stand on quite the same footing as if it had been contemporaneous and consistently followed under the traditional rules we've applied in giving validity to administrative interpretation of congressional acts?

MR. BUSCEMI: Well, that is right to a limited extent. You have to talk about it in two parts, I think. The secretary's assertion of discretion under the Taylor Grazing Act has been a consistent policy since 1935, and that is the main and the broad issue that is before the Court today. The subsidiary question, and the one on which there may have been this change, is the question of the validity of the grossly disparate value policy as an exercise of that discretion.

QUESTION: With respect to mineral lands?

MR. BUSCEMI: Well, the grossly disparate value policy as it is stated in that memorandum applies to all lands, and there is no limitation to mineral lands. Now, it is of course --

QUESTION: So to that extent the policy, one way or another, would predate the statute permitting mineral lands to

be selected?

MR. BUSCEMI: I am sorry, I don't think I understand your question.

QUESTION: Well, the first time the disparate value issue might have come up, wouldn't be when the mineral lands were approved as open to selection? It's older than that.

MR. BUSCEMI: Well, the possibility for it is older than that, certainly, but I think the point is that the likelihood that such a problem would arise was substantially increased in 1958 with the congressional decision to allow states to select mineral lands.

Now, whether in the period between 1936 and 1958 the secretary approved a lot of selections --

QUESTION: Well, are you saying that if there ever was a policy the other way, that's contrary to what you're now pushing, it was only between '58 and '62?

MR. BUSCEMI: Well --

QUESTION: Only then, because that's when they first began hassling about it?

MR. BUSCEMI: Well, Mr. Justice White, my point is that between '36 and 1958, I don't know what every approval of indemnity selection involved. There may have been some --

QUESTION: Well, was there a policy during that time that you can point to, or not?

MR. BUSCEMI: I cannot point to any statement of a

grossly disparate value policy between '36 --

QUESTION: Well, the solicitor in 1962 stated a position that you don't now agree with?

MR. BUSCEMI: That's right.

QUESTION: Well, had that been a policy of the department?

MR. BUSCEMI: Not as far as I know. I think that the solicitor's opinion in 1962 reflected the general --

QUESTION: That's the first time that anybody in the department had really said anything about it?

MR. BUSCEMI: I think that that's basically true. I don't think that there had ever been an active consideration of this equal value question --

QUESTION: So there wasn't any policy in the department prior to then?

MR. BUSCEMI: Well, to the extent that the department had to act on individual state selections, they obviously had a method of determining whether to approve or disapprove.

QUESTION: You think there was a practice which reflected such a policy, even though the policy itself was inarticulated?

MR. BUSCEMI: Well, I simply don't know, because in the indemnity selection rulings, I don't think that there is any discussion of the --

QUESTION: You can't tell.

MR. BUSCEMI: -- values. That's right.

QUESTION: Maybe I misunderstood. I thought you -- oh, I'm sorry.

I thought you were saying that there was no occasion for a policy to be formulated until 1958 when mineral lands could first be used in the in lieu of selection.

MR. BUSCEMI: Well, that certainly provided the major impetus, but I can't deny that there may have been some indemnity selection before 1958 that for timber or other reasons involved lands that were substantially more valuable than the lost land.

QUESTION: Should be the fertility of the land; I mean desert land against very fertile farmland.

MR. BUSCEMI: Precisely.

QUESTION: It was never formalized, whatever the policy was, if there was one.

MR. BUSCEMI: That's right.

QUESTION: Do you know the length of Congressman Aspinall's tenure as chairman of this House Interior Subcommittee?

MR. BUSCEMI: No, I don't.

QUESTION: Well, you shouldn't be blamed for not remembering that long.

I am sure it began well before your birth.

(Laughter.)

MR. BUSCEMI: Now, the critical issue in this case, I think, as we have seen, is the relationship between the indemnity selection statute and the Taylor Grazing Act. I would like to demonstrate why we think the District Court and Court of Appeals were wrong about that, but I would like to just make a few quick preliminary points to eliminate some extraneous possible questions and issues in the case.

First of all, the Utah Enabling Act is not directly involved here any more because in 1902 Congress provided that the indemnity selections should take place under the General Indemnity Selection Statute, notwithstanding the -- anything to the contrary that may have been in the enabling act. Except of course for the grant of the original school sections, the Utah Enabling Act really isn't a problem here.

Now, secondly I'd like to say that under the original indemnity selection statutes in 1926 and 1859, there is very little question from the language of the statute that the secretary, originally the Secretary of the Treasury and then the Secretary of the Interior, had complete control over the indemnity selection process. I am not saying that those old statutes are dispositive now. A lot has happened since then. But I just think that it is important to keep that in mind in interpreting the subsequent congressional action.

Now, third, there --

QUESTION: When you say he had complete control, you

don't mean that he could simply flatly refuse to allow a newly admitted state any sections?

MR. BUSCEMI: Not at all.

QUESTION: Well --

MR. BUSCEMI: What I mean to say, Mr. Justice Rehnquist, is that the 1826 statute said in I think so many words, the Secretary of the Treasury, because there was no Secretary of the Interior then, "shall select the lands for the state."

Now, the third point that I want to make as a preliminary matter is that when Utah joined the Union in 1896, the selection statute on which the state now relies provided that no mineral lands could be selected. For 62 years after Utah joined the Union they simply had no right to select any mineral lands and indeed, as a result of this Court's decision in Sweet in 1918, even the original grants in place that may have contained mineral lands did not go to the state -- that may have contained minerals did not go to the state if they did. Because the Court ruled in Sweet that Congress simply did not intend to give the states mineral lands even if they fell within the numbered sections.

So the state's discussion of the bilateral compact between the Federal Government and the state, as if that's some sort of binding contract that gives the state a right to mineral lands, is simply inaccurate on the historical records. There was no right to mineral lands when Utah joined the Union.

Now, finally, I just want to repeat once more that the primary question in this case is the secretary's discretion. Even if for some reason the mostly disparate value policy is deemed to be an abuse of that discretion, which we think it's not, the major issue of importance here is that the secretary does have some discretion under Section 7 of the Taylor Grazing Act to manage the public lands that have been placed in grazing districts, and that we think is the most important point.

QUESTION: You think the secretary is under any duty to act within any time limit or reasonable time on a state's request for lieu lands or state selection of lieu lands, assuming that he does have discretion?

MR. BUSCEMI: Well, I think it's certainly true that the secretary should act as expeditiously as possible. I think that in the past few years there have been a number of developments that have prevented him from acting quickly. In the past, I think if you look at some of the older indemnity selection decisions by the Interior Department that were cited, you'll see that the selections were approved more quickly, but there have been some special problems in the recent years.

Now, as the indemnity selection statute stood after the 1891 amendment, it authorized the states to select lands from any unappropriated surveyed public lands not mineral in character within the state where the loss of school sections had occurred. Now, it didn't say anything about the Secretary of

the Interior's role, but it certainly didn't purport to change that role in any way.

Now, it is not entirely clear from looking back at the old Interior Department decisions what the prevailing assumption was about the extent of the secretary's control over selections around the turn of the century, but the Court settled that matter in Payne v. New Mexico and Wyoming v. United States. Those cases held that once that indemnity selection had been filed, the secretary could not refuse to approve it because he had returned the base lands to the public domain, and thereby given them back to the state, or because in the intermin, while the selection was pending, the President decided he wanted to withdraw the selected lands. Payne and Wyoming said that the secretary could not do that.

Now, it is not necessary, we think, to reconsider Payne or Wyoming. We can accept them as correctly decided, and we don't have to argue about whether there was an error there because the Court did not consider the meaning of the 1826 and 1859 predecessors to the 1891 statute, not to mention --

QUESTION: Don't you have to accept them?

MR. BUSCEMI: Yes. Well, we could argue that they were incorrectly decided and they should be, the Court should not follow them now, but we don't need to because of the intervening act, or the passage of the Taylor Grazing Act in Section 7.

QUESTION: Can you point to anything on the, in the debates or in the committee reports, which looks unfavorably on Payne-Wyoming?

MR. BUSCEMI: You mean to say the debates in the --

QUESTION: Anything in the legislative history. Anything.

MR. BUSCEMI: No.

But I do want to point out, Mr. Justice Blackmun, that it is clear from the legislative history of the Taylor Grazing Act that the act was designed to create a new system for controlling the public lands and to insure the orderly improvement and development of those lands under the supervision of the Secretary of the Interior.

QUESTION: But its basic thrust was to open up more public lands, wasn't it? To private development?

MR. BUSCEMI: I don't believe that's so, Mr. Justice Rehnquist. I don't see any evidence of that in the Taylor Grazing Act. The point was that Congress was concerned that this land not be let alone out there without any person looking after it and watching out for what kind of entries were made on it. So it authorized the secretary in his discretion to establish grazing districts and thereby to withdraw the federal land included, placed in those grazing districts, from all forms of entry or settlement.

QUESTION: But the grazing districts themselves would

then be subject to Taylor Grazing Act leases to private individuals?

MR. BUSCEMI: Well --

QUESTION: I mean, you don't have a grazing district, and the idea wasn't the government was going to graze cattle on those grazing districts.

MR. BUSCEMI: No, that's not what I mean to say. All I mean to say is the secretary, the placement of the land in the grazing district was designed to enable the secretary to supervise and watch over the usage of that land, and to allow entries of a private nature or the state indemnity selection statutes or state indemnity selection applications or anything else, only when he deemed it proper.

Now, Section 1 of the act makes it absolutely plain in the language of the statute, without any reference to the legislative history, that that's what Congress had in mind. Congress said that the creation of the districts withdrew all the affected lands from all forms of entry or settlement.

Now, Utah contends that state indemnity selection is not a form of entry or settlement. But that can't be, because we know from this Court's decisions in Wyoming v. United States and the later case, United States v. Wyoming, that a Pickett Act withdrawal by the president, which withdraws public lands from, quote, "settlement, location, sale or entry," can defeat a state indemnity selection.

The Pickett Act says nothing about indemnity selection, nor do most executive orders withdrawing public lands under the authority of the act. But nonetheless, the Court has recognized that a state indemnity selection, indeed even the original grant which was involved in United States v. Wyoming, the 1947 case, is defeated if the Pickett Act withdrawal occurs before the selection or, in the case of the original section, before it has been surveyed.

QUESTION: Did the 1947 case distinguish between the various four nouns, settlement, location, entry, or --

MR. BUSCEMI: Not that I remember, Mr. Justice Rehnquist.

Now, Utah complains that we haven't cited any legislative history of the kind that Mr. Justice Blackmun suggests, that placement of public lands in a grazing district specifically renders them unavailable for school selection. But in light of the structure and the purpose of the act and its wording, it should be incumbent on the state to demonstrate that a particular form of entry was deliberately exempted from the withdrawal effected by the creation of a grazing district.

It is hardly surprising that when Congress said "all forms of entry or settlement," it didn't stop to specify each kind of entry that was covered. They are all covered.

Now, moreover --

QUESTION: What's wrong with the House report you

cite on page 55 and 56 of your brief? Is that not in point, or not?

MR. BUSCEMI: Well --

QUESTION: You certainly think that there is congressional affirmation of the secretary's role in selecting lieu lands?

MR. BUSCEMI: Yes, I agree, Mr. Justice White, but I understood Mr. Justice Blackmun's question to concern the legislative history of the '34 act at the time it was adopted. The 1958 report to which you refer on page 55 comes considerably thereafter, although we definitely argue and think that it reflects congressional approval of the secretary's discretion.

QUESTION: Well, this was in connection with amendments.

MR. BUSCEMI: Yes, that's true.

Now, this brings us to Section 7 of the act, which I just want to address briefly before reserving the remainder of my time.

Now, we say that when Congress saw what it had done in 1934 and realized that all of the land placed in a grazing district had been withdrawn from all forms of entry or settlement, when it looked at that in combination with the executive order of November 1934, withdrawing all public lands in 12 of the Western states from settlement, location, sale or entry under the Pickett Act, it realized that this public land was

simply unavailable.

Now, the Senate hearings on the amendment of Section 7 in 1936 make this absolutely plain that this is what they were concerned about. They knew that they had simply precluded all forms of entry, and that's why they amended Section 7. And in the amendment -- before, in the original statute, Section 7 had allowed the secretary to open grazing district lands to homesteading. So in the amendment, Congress simply expanded the secretary's discretion and said, "Now you can open them to any form of entry if you find that the particular land is proper for acquisition in satisfaction of an outstanding lieu right or land grant or any one of a number of other things that are listed in Section 7."

Now, Section 7 as it stands today makes it absolutely clear. It says that the grazing district lands should not be subject to disposition, settlement, or occupation until classified and open to entry. And it authorizes the secretary to make those classifications.

Now, we have canvassed the legislative history in our brief and I don't want to repeat it here, but it demonstrates that this sort of entry is precisely what Congress had in mind, and the 1958 amendment didn't do anything to change that. It simply said that mineral lands are now available on the same terms that other lands would have been available, and that meant that Congress had to classify them for entry, excuse me, that

the secretary had to classify them under Section 7.

Unless the Court has further questions, I would like to reserve the remainder of my time.

MR. CHIEF JUSTICE BURGER: Mr. Dewsnup.

ORAL ARGUMENT OF RICHARD L. DEWSNUP, ESQ.,

ON BEHALF OF UTAH

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

One or two responses I would like to make briefly to some of the questions that have been raised, before I move into my argument.

I think Mr. Justice Rehnquist asked whether Wyoming v. United States in 1921 or United States v. Wyoming in 1947 had made any distinction between the type of reservation withdrawal. The Court didn't, but the Court had before it withdrawal for federal purpose in putting it in federal forest reserve for use as a federal purpose. While the government consistently states it is absolutely clear that any withdrawal will be sufficient to defeat a state indemnity selection, that is not true. There is not one word anywhere in any decided case that we're aware of or any implication or suggestion that lands not withdrawn for federal use, that is land simply withdrawn for classification without any determination as to what uses they would be put to, because the 1930 withdrawal order, Executive Order 1532, I believe it was, in 1930, withdrew every

inch of the land in seven or eight Western states, including all of Utah, for classification.

I am sorry: That was the oil shale withdrawal. But in 1935 withdrew every acre for classification and since 1935, that executive order has continuously been in effect, and today every inch of the State of Utah is in a Taylor grazing district. My house is in a Taylor grazing district. The Utah State Capitol is in a Taylor grazing district.

So that about one-half of Utah is unreserved public domain for no particular public use, whereas the forests, the parks, and areas reserved for public use, we admit we can't select that.

QUESTION: Well, you describe Utah as though it were like some other states I can think of.

MR. DEWSNUP: I think it is, but I think Utah had a particular problem in that Utah was settled 50 years before statehood was granted because of polygamy and other problems that delayed it. The practical effect of this is that the homestead laws and other laws caused the farms to be established where water was available, forests were reserved. The only things that were left by 1896 basically were the wastelands where water wasn't available, the Alpine forests weren't there, and that meant we not only didn't get our original grants in place, these more desirable areas, but the lands from which we could select were likewise limited to the wastelands.

Now, it happens that we believe that there are oil shale deposits in part of the barren desert out in Uwinah County and we've made filings on those.

But I simply want to repeat that despite the government's claims, and maybe Mr. Buscemi will come up with something he hasn't done yet, there is no indication that federal lands, the unreserved public domain withdrawn simply for classification will defeat school indemnity selection.

Then, in response to a question or comment from Mr. Justice White about congressional acquiescence, my comment is, to the extent there was congressional acquiescence in the secretary's classification procedure, it was a perfunctory thing. There wasn't a word of debate during the amendments of 43 USC 852.

QUESTION: Do you think the House Interior Committee knew what the secretary was doing, for example?

MR. DEWSNUP: I doubt it. There was no amplification within the secretary's report. Roger Ernst from Arizona wrote one of those reports.

QUESTION: You don't think the staff and the chairman of the committee, for example, knew how this was being administered?

MR. DEWSNUP: With respect to school indemnity selection, there is not any kind of explanation or amplification at all, and if they did, there is no indication, not one word of

debate or discussion that Congress focused on that issue, that was not an issue of the legislation. But more importantly, classification was not controversial. Despite what's been said, it was always on acre for acre basis, and there has not to this day -- and we repeatedly for the last five years have asked Interior -- has there ever been an instance where there's been an equal value criterion applied to school indemnity selection, and there has not.

In fact, on February 14, 1974, when Secretary Morton wrote to Governor Ramp and he said, "One of my main problems in that I haven't acted on these indemnity selections is that I don't know whether or not I can use the equal value criterion, but that was a policy established by Secretary Udall in 1967, and when I get around to doing something about your school indemnity selection, I intend to apply that policy."

QUESTION: When you say "that policy," the equal value policy?

MR. DEWSNUP: The equal value policy. That's why I think its highly misleading for this 40 years of continuous administrative practice. It was relatively noncontroversial because whatever classification might have consisted of, it was essentially applying the criteria of Section 852 of Title 43, which is the applicable public land for school indemnity selections.

So if there has been any congressional acquiescence

that's relevant, it is acquiescence in a classification process which utilized the criteria of Section 852.

Now, I would like to begin my argument. Very briefly, I would like to mention that the 11 Western states, Continental Western states, are all before the Court. Utah, of course, the primary party; the State of Idaho filed a separate amicus brief; the State of California with eight other states also filed an amicus brief jointly. All 11 states present a uniform position before this Court in accordance with the position of the State of Utah and the unanimous decision of the Court of Appeals of the 10th Circuit below.

Secondly, I would like to mention very briefly that the solicitor of the Interior of the United States gives too short a shrift of the purpose of the school indemnity land grants. In the Western states, and the State of Utah is still 67 percent owned by the United States, the property tax is a basic tax for supporting fundamental governmental purposes and the most important, dollar-wise, is support of the public schools.

The State of Virginia or Maryland as original states could tax virtually 100 percent of the property. The State of Utah couldn't. It had to forego as a condition of statehood any taxation of federal or Indian lands. As a quid pro quo created by bilateral compact, the United States agreed to grant to the State of Utah for the support of the common schools

certain lands in consideration for the state not taxing federal and Indian lands.

And so this is one of the most fundamental governmental purposes. The state is to derive from this school land grant revenues to compensate it for the tax it otherwise would have received from the general property taxing power over federal and Indian lands. And that's why in Section 6 of the Utah Enabling Act, Congress says, "Whenever you don't get these original sections in place" -- and the reason Utah and Arizona and New Mexico got for section is because they're desert states and so much of the area was marginal or wasteland -- "other lands equivalent thereto to the original sections in place could be selected," and said, "Other lands appointed thereto are hereby appropriated for the state to select in such manner as the state legislature may direct, subject to the approval of the secretary." And as the Wyoming and New Mexico cases pointed out, that approval is a ministerial function to see whether or not the statutory criteria that Congress set up in Section 852 of Title 43 have been satisfied. That is, have you identified appropriate base lands? If you're selecting mineral lands, the base land is mineral in character. If you're selecting lands on a producing oil and gas field, were your lands in place similarly producing oil and gas.

In that connection, I'd like to observe that with respect to this equal value, Congress has made the determination

as to what is fair and what is not fair. Congress in about two pages that we have cited, Section 852, has carefully laid out the balances of what it considered to be a fair compensation in school indemnity selections, and there is no way that Utah, speaking of fairness, it's unlikely that Utah will ever get a true cross section of land within its borders as was originally envisioned.

Nor will this case have any great substantial adverse impact in any way upon federal lands of the Secretary of the Interior's management; if all seven states still having indemnity selection rights left exercise those rights, a totality combined acreage of all seven states would amount to less than one percent of the federal land in Utah alone.

And even on the oil shale resources we pointed out, the land that Utah's applied for here are only a fraction of one percent of that resource, so it's not as though Utah would in any event obtain some lion's share or even significant part of that resource.

With respect to the equal value concept further, I have said that the Secretary of Interior has never to our knowledge, or he has not disclosed at any time despite requests, that this equal value concept has ever been applied in any particular case or instance.

I mention briefly the Utah Enabling Act said other lands of equal acreage, Title 43 USC Section 851, making the

general appropriation of lands for indemnity selection says that lands of equal acreage are hereby appropriated. Congress made it very clear that the discussion of equal acreage is not equal value, and it was not until 1967 this doctrine or policy of Secretary Udall finally was formulated and even then, it was very strange that it was never really promulgated. It wasn't published anywhere. It wasn't in the Federal Register. It wasn't sent out by way of instruction sheets, and in 1976 the Interior Board of Land Appeals decided New Mexico decision and some reference to that Udall memorandum had been made and the Interior Board of Land Appeals said that this so-called memorandum we've never heard of and we haven't even been able to find it.

So it wasn't very well known in the Interior Department itself. We've cited that case in our brief.

Now, I think that New Mexico and Wyoming decisions which came along in 1921 are so clear and so dispositive, I'm sure the Court through reading of the brief and reading of the 10th Circuit Court opinion below are just absolutely on point, and the government concedes that but claims that somehow this Taylor Grazing Act enacted in 1934 and invented in 1936, without saying one word about it, emasculated this whole school indemnity land grant, this sole and bilateral compact, as this Court has said and the 10th Circuit Court has said, between two sovereigns to permit the public land states to carry on

fundamental and essential governmental purposes.

I would like briefly to run through, simply by identification, a few of the arguments that we made in a brief that the government has criticized as being too long. We don't think any parts of the brief are unnecessary. We think there is just so much evidence in support of our position that it took 100 pages to say it.

First of all, Section 1 of the Taylor Grazing Act contains an express exemption that the act will not apply to any part of any grant to any state. The government's response to that is that was intended to apply only to the original grants in place of the school land grant, Section 216 32 and 36 in the case of Utah, but not to indemnity selection.

There is no legislative history to justify any such intent to make such a limited exception, and besides the land grant, it seems to me, is a unity, it's indivisible. If Utah is granted Section 2, and that's a land grant to the state, and we don't get a part of that grant as our indemnity selection, we get Section 2 or we get to select land and that satisfies our Section 2 school land grant. And I think that is a fanciful argument. In fact, I admire the way the government at this juncture, and their theory has evolved during the five years we've been litigating, they have now sutured together a rather plausible superficial case of what might have happened in the past.

But I submit that the arguments are constructed after the fact and ignore the basic nature and purpose and importance of the school land grants.

Second, when the Taylor Grazing Act was amended in 1936, the discussion in the Senate Committee Report clearly said that we're doing this to facilitate private entries, classification for disposition of the public domain through private entries. This is entirely consistent with the exemption in Section 1 that any part of any grant to any state is not included, and the amendment in 1936 was identified as applying to private entries.

QUESTION: Ordinarily you don't call a Taylor Grazing Act lease an entry, do you?

MR. DEWSNUP: A Taylor Grazing lease an entry?

QUESTION: Yes.

MR. DEWSNUP: No. I think that would not be an entry. A typical entry I think would be under homestead laws, under mining laws, those kinds of -- I am not sure I fully appreciate the question. The administration of the act and the granting of grazing allotments, they are tantamount to leasing, if you're talking about the grazing uses as certain allotments are made to certain users within a particular grazing district to graze so many cattle during so many periods of time.

I would not refer to that as an entry, because these entries were to be compared with the alternative entry use. If

someone made an entry and that entry was more valuable for the purpose of the entry than for grazing native forage, then the secretary would dispose, or was authorized to dispose of the land for purposes of the entry, to classify that for disposition.

I would like to mention at this juncture that the Taylor Grazing Act sets forth specific criteria for a particular type of entry. If you make a homestead entry, you're entitled to complete the entry, if you can prove that the agricultural use of the land is more valuable than the grazing. If someone wants to make a private trade of land, even if there's to be a state trade as distinguished from indemnity selection -- I'm going to elaborate on that a little bit more in just a second -- then there are elaborate criteria.

But if school indemnity selection were to be included, they're exempt from the act, there is no indication they're included, there's not one word about it. This would be the only kind of classification under the Taylor Grazing Act where the secretary would be free of any guiding criteria.

The most fundamental important use of the land, the exercise by the state of that indemnity right, the secretary would be totally free. We've said that there would be no judicial review because that would be under the secretary view agency discretion committed by law to the agency, which under Overton Park is not subject to judicial review.

The solicitor responded in a reply brief we just got last night, delivered to our hotel -- we're thankful for that -- saying yes, there would, but he cites no authority for that proposition. I think that's highly unlikely.

Very briefly, the cases that have been decided that come anywhere near having relevance are discussed beginning on page 93 of our brief, and I think the significant thing is, in every case they have distinguished the Wyoming and Payne cases, because none of the cases decided have dealt with school indemnity selections, as having been decided under other statutes. There is not the slighest word or suggestion in any of these cases that Payne and Wyoming are no longer good law, and while these are lower court decisions, none of those cases were decided by this Court, none of the cases subsequent to Payne and Wyoming.

I would like to make a brief comparison to exchanges. Now, an exchange of course is when the state simply wants to make a trade. It has a right of selection when it doesn't get its original grants in place. But if it does get its original grants in place, it can still ask the Federal Government to trade, and those trades are covered under Section 8 of the Taylor Grazing Act, and they are discussed separately, and there the secretary is given authority to approve an exchange either on the basis of equal acreage or equal value.

Now, it doesn't make much sense for just land trades

to be exempt from classification, and under the secretary's own regulation, exchanges are clearly exempt. He does not classify under Section 7, and yet to draw a school indemnity selection in by the heels and claim that they have to be classified and under the guise of the classification, the secretary can reject the selection for whatever reason he might think is in the public interest.

And another interesting thing about exchanges is, Section 8(c) of the Taylor Grazing Act makes it mandatory. The secretary is told when the state selects land for an exchange, the secretary will proceed forthwith and accomplish the exchange. The school indemnity selection which the secretary again tries to drag in by the heels in the classification process, he says he not only doesn't have to approve the exchange, he doesn't have to proceed with all reasonable dispatch. The whole thing just doesn't make any sense that exchanges somehow would receive such careful treatment and consideration by Congress while indemnity selection wouldn't.

And the reason for that, of course, is indemnity selections were exempt, exchanges were not, because they're not a part of a grant to any state. They are simply a request by a state for a trade, and even there, the 1935 Act which received a pocket veto, and the legislative history of which is discussed at some length, because the government brought it up -- the only legislative history they could find is in an

act that didn't become law -- we responded to it that states were really upset because under the 1934 Act, while there was an exemption for any grant to any state, it did not appear to exempt exchanges or trades that the state wanted to make, so in 1936 Congress did that. It made exchanges exempt, told the secretary to get off his tail and accomplish the exchanges, and let him do it either on the basis of equal acreage or equal value.

Briefly, we've said that the statute should be construed to avoid doubt as to its constitutionality because of the implication of this bilateral compact. In the brief we received last night the secretary said that's not so because at the time of the bilateral compact, the state was not entitled to mineral lands, but it has been brought out in this discussion, this Udall memorandum policy is not limited to mineral lands. What he is trying to do on the basis of equal value would apply whether or not the selections were mineral or non-mineral lands. So that doesn't make much sense.

And another significant and telling point, and I think almost as conclusive as the other arguments, is under the Taylor Taylor Grazing Act the secretary has no authority at all to classify the mineral estate for disposition. And I would like to hear an argument to that. We can make the argument; we never get a response to it.

That's limited exclusively to surface uses, and the

mineral estate, except for private entries under the hard rock minerals, the hydrocarbons, were reserved from any kind of disposition in 1920 under the Mineral Leasing Act and are subject to mineral leases.

QUESTION: As a matter of fact, it took an act of Congress in the 1960's in order to prevent mineral usage from being allowed on areas in some of the Western states where homes had been built, did it not?

MR. DEWSNUP: Yes. And the executive order of 1930 which withdrew oil shale from leasing, that's the only way it could be disposed of, in 1958 was liftel and Congress specifically said that the states can now select lands containing oil shale, and the United States has contrived a fantastically sophisticated argument here that I don't have a lot of time to identify, but the gist of it would be that Congress was so perceptive that it decided to say that the states could select oil shale lands but Congress really didn't mean that because in removing, eliminating the effect of the 1930 executive order, Congress without saying so intended to leave two other barriers, and one was the withdrawal of Executive Order 6910 in 1934, which withdrew all the lands for classification, but then that was amended so that any land within a grazing district, so long as it remained within a grazing district, would be exempt from that withdrawal, so the only hurdle we have left is Section 7 requiring classification, and so the

secretary first can decide whether or not he classifies, and if he doesn't classify for school indemnity selection, the express mandate of Congress is cut off at the pass.

Congress didn't say a word about it, but the government has sutured together this theory that Congress really intended exactly the reverse of what it said.

A final point we make, well, a final point I'm going to comment on for this brief, as the Court said in Wyoming v. United States, ordinarily public land grant statutes are strictly construed in favor of the government. You don't grant anything, you don't approve anything that Congress didn't specifically declare, but in the case of school indemnity selection grants, the reverse is true. This is such a fundamental trust program created by bilateral compact that the intent is to do everything you can to give reasonable substance and support and effect to the creation of the public trust, and therefore you construe the grant liberally, construe any question, statutes questions of grants liberally for the purpose of fulfilling the public trust.

Now, as I say, last night I got a 12-page brief. We filed our hundred page brief, which we hope is not too repetitious, about two months ago. Last night we got a 12-page response --

QUESTION: Is that the one dated December first, or at least filed here on December first?

MR. DEWSNUP: October 9. Maybe this is on December first, we received it yesterday; it's undated. But it raises seven --

QUESTION: It was filed here in the Court on December first, according to the stamp here.

MR. DEWSNUP: Oh, fine; I appreciate that for clarification and identification.

But the thing that pleases me is that the government hasn't laid a glove on us, in my judgment, in the seven points that they have picked and choose to respond to in the 60-day interim since we filed our brief.

I have about four minutes left. I have a white light here. I have a timekeeper here. I want to mention these seven points that are shots at what are presumed to be the vulnerable points of our position.

Number one, the government says that Utah argues that the exemption of Section 1 of the Taylor Grazing Act applies only to grants in place, and I have already -- but there is no discussion at all as to how you can sever or distinguish the indemnity right to replace the lost land with indemnity selection, nor is there any legislative history purporting to make that distinction.

Number two, the government criticizes Utah for discussing the legislative history of the 1935 statute that passed but did not become law because it had a pocket veto.

We admit that that had marginal or no relevance, but we responded only to the fact that the United States raised that for the first time ever in this litigation in their appellant's brief.

The third argument, the government argues that the use of the word "private entries" in the legislative history of the 1936 amendment really can be construed to include state indemnity selections as well. And there is a reference to the word "selected" or school selection by Senatory Hayden in the 1935 Act. But a careful reading of that indicates that the probability that he was talking about a selection for exchange, when the state decides it wants to trade this piece for that, it's selecting the piece it wants to trade for. You've got to be careful -- selection can mean either a selection for a trade or a selection for school indemnity.

QUESTION: When you say a reference in the act, do you mean in the text of the act enacted by Congress or in the legislative discussion?

MR. DEWSNUP: I am referring here simply to a response by Senator Hayden to attorney Richard Page in the June 35 19 hearings, to a statute that received a pocket veto and never became law. That's pretty far out, but it's as close as the government's been able to come on any legislative history.

Point four, and this is a very important point that

I should have emphasized in my argument; I didn't. If there is to be classification, then it should be limited to the kind of classification the secretaries always perform, and that is the criterion, Section 852. Now, in response to that argument the government simply says Utah ignores the secretary's independent classification authority under Section 7. That just simply begs the question that he's got independent classification authority, and even if he does, there is no response here as to why that, the exercise of that discretion, is not limited to the criteria Congress has set forth in Section 853.

Number five, and I mentioned this before, the secretary, or the government, argues that there would in fact be judicial review of classification decisions if it were arbitrary, unreasonable. We've said Overton Park -- that's just inconsistent with Overton Park.

I see the red and I'm in the process of sitting down.

Number six says there's no constitutional issue because we did not get minerals at the time of the bilateral compact, but the government's new value policy is not limited to mineral exchanges.

And Section 7 simply attempts to rehabilitate the origin of the comparative value criterion. And I think we have shown that that is a very murky strange legislative history.

I thank you very much. I am sorry for the extra 15

seconds.

MR. CHIEF JUSTICE BURGER: Well, we've given you that extra minute because of the lateness of the filing of this brief.

MR. DEWSNUP: That's an adequate quid pro quo. Thank you.

MR. CHIEF JUSTICE BURGER: Do you have anything further, Mr. Buscemi?

ORAL ARGUMENT OF PETER BUSCEMI, ESQ.,

ON BEHALF OF THE PETITIONER -- REBUTTAL

MR. BUSCEMI: Thank you, Mr. Chief Justice. I just have two quick points.

The first is that the State of Utah relies heavily on the language of Section 1 of the act to demonstrate, as Mr. Justice Stewart said before in the question he asked me, that the act is simply not applicable to school indemnity selections. That language is reprinted on page 35 of our brief. It says that the secretary's establishment of grazing districts shall not affect any land heretofore or hereafter surveyed which except for the provisions of this act would be a part of any grant to any state.

Mr. Dewsnup has suggested that the school indemnity selection would be a part of the grant to a state and therefore this act does not apply, but it is absolutely clear that that provision in Section 1 was added to indicate that Utah

would retain its unsurveyed but enumerated school sections, notwithstanding the creation of a grazing district.

Senator Wagner said to the assistant solicitor of the department, "Mr. Poole, we'd like to have to give us a detailed explanation of the bill," and then Mr. Poole started going through the bill, and he said, "Now, on page 2, referring to this provision, protection is given to prior valid rights of private individuals or entries such as grants to railroads, unperfected homestead entries, and settlement rights, and also unsurveyed school sections." That is stated generally.

And the land commissioner of Arizona who testified later in the same Senate hearing said the same thing. "In the State of Arizona we have approximately six and a half million acres of unsurveyed land and 750,000 acres of those are school sections which under the terms of the Enabling Act should, when and if surveyed, become the property of the State of Arizona."

"I notice that the House bill has been amended in an attempt to safeguard and to finally bring to the state those particular sections."

And then he goes on to say, "But I think the amendment has been inadequate," because he wants to be protected for the school indemnity selections as well. But no further change was made.

The only other point I'd like to make, Your Honors, is that Section 8 of the Taylor Grazing Act which counsel has relied on, as just purely a point of information for the Court, has now been repealed by the Federal Land Policy and Management Act of 1976. That's found at 90 stat 2792.

For the reasons I've stated here and in the brief, we think the judgment of the Court of Appeals should be reversed.

QUESTION: Mr. Buscemi, I have a question or two I'd like to ask you.

Do you think that the Taylor Grazing Act impliedly repealed any earlier federal statutes relating to federal lands?

MR. BUSCEMI: Well, I don't think so. I'm not sure exactly what Your Honor's question is leading to.

QUESTION: Well, provisions relating to allocation of lieu lands to the states, the Western states, and that sort of thing.

MR. BUSCEMI: Oh. There is, as we have said in the reply brief, there is no question in this case of the secretary trying to extinguish the state's rights to indemnity selections. I mean, that is purely a red herring.

QUESTION: Well, after the enactment of the Taylor Grazing Act, do you think the president could, or the secretary acting for the president, could have withdrawn all public land in any state for the purposes of classification, even against

a request by the state for lieu lands?

MR. BUSCEMI: Well, the withdrawal has occurred. But the question is, could the secretary refuse to classify any lands and thereby defeat all of the indemnity selection rights --

QUESTION: Yes.

MR. BUSCEMI: -- and we have never argued that he could.

QUESTION: Well, what remedy did the state have in a case where the secretary for 15 years has refused to approve a request for lieu land?

MR. BUSCEMI: Well, Mr. Justice Rehnquist, I mean, I've stated before, and I think that delay is a bit overstated here, but in any event, the state, if the secretary simply refused to act on an application, which is not the allegation in this case and the state is not complaining about the secretary's refusal to act, it's complaining about the basis, the stated basis for the secretary's action when it comes. But if there is a problem with unnecessary delay, I presume that there could be a lawsuit to mandamus the secretary to perform his classification duty, in the same way that there had been a series of lawsuits under the Social Security Act, for example, to compel the secretary of Health, Education, and Welfare to act on Social Security applications.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you.

Gentlemen, the case is submitted.

(Whereupon, at 11:48 o'clock a.m., the case in the above-entitled matter was submitted.)

- - -