Supreme Court of the United States

OCTOBER TERM, 1970

In the Matter of:

Docket No. 25

WALTER J. HICKEL, SECRETARY OF THE INTERIOR,

Petitioner,

vs.

THE OIL SHALE CORPORATION, ET AL.

Respondents.

Place Washington, D. C.

Date October 22, 1970

ALDERSON REPORTING COMPANY, INC.

300 Seventh Street, S. W.

Washington, D. C.

NA 8-2345

C O N T E N T S

IN THE SUPREME COURT OF THE UNITED STATES

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Washington, D. C.,
Thursday, October 22, 1970.

The above-entitled matter came on for argument at 11:00 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice
HUGO L. BLACK, Associate Justice
WILLIAM O. DOUGLAS, Associate Justice
JOHN M. HARLAN, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HENRY BLACKMUN, Associate Justice

APPEARANCES:

PETER L. STRAUSS, ESQ.,
Assistant to the Solicitor General
Department of Justice
Counsel for the United States

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Counsel for Respondents

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments in No. 25, Hickel vs. The Oil Shale Corporation.

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

ARGUMENT OF PETER L. STRAUSS, ESQ.,

ON BEHALF OF THE SECRETARY OF THE INTERIOR

MR. STRAUSS: Thank you. Mr. Chief Justice, and may it please the Court, this case is here on a writ of certiorari from the United States Court of Appeals for the Tenth Circuit. That court decided that in passing on certain applications to purchase public lands containing oil shale, the Secretary of Interior must ignore administrative actions which became final almost forty years ago, actions which purported to cancel the claims to possession on which the applications were based.

If the claims were effectively cancelled, there could be no right to purchase these lands today. For fifty years the lands have been available to new claimants only by lease. The statute which made that change, the Mineral Leasing Act of 1920, provided, however, that existing valid claims could still qualify for purchase under the old law only if the claims were -- and I quote -- "thereafter maintained in compliance with the laws under which initiated."

The old law was the General Mining Act of 1872, and it conferred an exclusive possessory right on persons who made

a discovery of valuable minerals on the public domain and then performed certain technical functions on the land and at the local county court house. That claim remained valid for as long as the individual complied with the requirements of the United States law. In particular, the law required the annual performance of $100 worth of so-called assessment work every year. That requirement is the only one under the law that might be thought to have to do with maintaining the claim once it is made.

In terms, the statute states only that failure to do the work opens the land to relocation by another prospector. But in my argument I shall show that the government, too, often reacquired possessory rights in this land.

During the 1920's the Secretary discovered that assessment work was not being done on the vast bulk of oil shale claims. At first he sought to treat any failure to do the required work, however technical, as automatically cancelling the claims. And in a case which vividly illustrated the resulting inequity, Wilbur vs. Krushnic, this Court held that that drastic rule was improper. It left open, however, the possibility that claims could be cancelled by direct government action during the period while the assessment work had lapsed. The Secretary took that hint and during the following three years brought actions against over 20,000 of these claims, covering an area of over 2.8 million acres in

Colorado, Wyoming, and Utah, to cancel those claims for failure to do the required maintenance.

In each of these cases the Secretary was prepared to show that the assessment work was not being done up to the very moment when he acted, and that the government has physically inspected and posted the claims in reclamiming them, as much as a private individual might have done.

Many of the claimants didn't even respond to the Secretary's process, and that includes 75 percent of the lands at issue in this particular case. Other claimants responded to the process but permitted the proceedings against them to become final at the administrative level, thus the remainder of the land at issue in this case.

One set of claimants, however, had been doing their assessment work up to the very date of the Krushnic decision and promptly offered to resume doing that work. That case came to this court as Ickes vs. The Virginia-Colorado Development Corporation, and the Court decided that that offer was sufficient to show that the claimants were maintaining their claims as the statute requires.

In its opinion, at page 646, it asked how could the valid claims of the plaintiff be thereafter maintained in compliance with the law under which initiated manifestly by a resumption of work. Plaintiff was entitled to resume and the bill alleged that plaintiff had made arrangements for

resumption and that work would have been resumed if the Department of Interior had not intervened. To my knowledge, that fully distinguishes all the claims in this case.

Now, respondents would probably examine the subsequent history in much greater detail; but let me say this, in the ensuing twenty-five years few if any persons worked the claims, as few if any had worked them since 1920.

Q I ask, Mr. Strauss, is all that is required to do assessment work not less than $100 worth of labor shall be performed or improvements made during each year?

A That's right.

Q That is all that is required?

A That's it. While the Secretary did state, following Virginia-Colorado, on the basis of language appearing in that decision, that he felt constrained to regard his prior decisions as void. There were very few claimants who sought reopening or corresponded with him regarding this. There were 20,000 cancelled claims, in the first ten years following the decision in Virginia-Colorado, so far as the record in this case shows, five private claimants wrote to the Secretary inquiring about the status of their claim.

And it was not until 1950, fifteen years after Virginia-Colorado, that the first patent involving a cancelled claim was issued, and that appears from Exhibit 95, Plaintiff's Exhibit 95, at page 148 of the record. From that year until

1960, patents were issued on only 74,000 acres of the almost three million acres of land involved in these cancellations. In 1962, in the administrative proceedings challenged here, the Secretary decided that Virginia-Colorado did not require him to ignore cancellations which had become final before that case was decided.

Of respondent's numerous contentions, only one is properly here, that Virginia-Colorado held that the administrative cancellations of the 1930's were ultra vires the Secretary's authority and hence that their claims survived these proceedings unimpaired.

The district court and court of appeals agreed with that contention, is the only contention upon which those courts passed. It held that the old cancellations must be regarded as void. This Court granted certiorari in the case on October 13th of last year.

Thus we find ourselves in a situation where a claim to an exclusive possessory right -- that is the claim that was granted by the statute -- made in 1919 may have to be honored today, even though for thirty or forty years the claimants may never have set foot on the land. It is the United States which in fact has been the exclusive possessor of these premises for most of this time and which has used the land for many purposes, as is set out in our brief at page 43.

Indeed the government's effective possession of

these lands has been far in excess of the Colorado prescription period of 18 years, even if one starts to count in 1931 or 1932 when it asserted its right to proceed in these proceedings. The significance of the case is substantial. When Congress passed the Mineral Leasing Act in 1920, it chose leasing over private ownership as a preferable means of developing government land including these minerals. It did so in order to avoid monopolization and sequestration of fuel resources to assure a commensurate return to the government, or -- particularly important today -- to promote environmental interests.

Under a lease, the government can control the mode of production far more effectively than if this land were in private ownership. This factor, indeed all of these factors, remain relevant today.

The Mineral Leasing Act, as I said before, did provide as an exception that claims would be patented, could be reduced to private ownership if they had been maintained under the prior law. But, again, it is the only requirement under the 1872 act that had anything to do with maintaining the location. Once it was made, once the technical requirements of filing the location had been followed out, was the requirement that you do $100 worth of work a year on the claim.

The proponent of that requirement, Senator Cole, of California, told the Senate in 1872 -- and this is set out at

page 13 of our amended reply brief -- if the provision was intended, and I quote, "to insure good faith in the working of the mines, to prevent their being held by owners an indefinite length of time without working them, to require the miner to use some little diligence or exertion in the working of his mine or else leave it subject to beneficial use by some other party." Of course, if you did make a valuable discovery on the lands, you would want to do that work, otherwise somebody could come in and take it away from you.

The conceptual framework of that process, relocation, is interesting. As is shown by this Court's opinion in Belk vs. Meagher, in Volume 104 of the reports, which is cited in Respondent's brief at page 10, and which was a principal precedent in both the Krushnic and the Colorado decision, the interest which the relocator acquired, he acquired not from the previous possessor but from the United States, which had to receive it in some fashion. And as we note in our reply, at page 14, this Court has frequently equated failure to do assessment work, with abandonment of the claims. To this extent, the remark which appears in the Virginia-Colorado decision that failure to do assessment work gives the government no ground of forfeiture on abandonment grounds is plainly incorrect. It may have been correct in that case, where fifteen months after there was a failure to do assessment work, the claimants came forward and said we are going to start right up

again, but it certainly was not correct as a statement of general law.

Now, it is true that in general the maintenance requirements were privately in force, that was because in general the United States had no need for this land. But there are cases in which the government does want its land. It may want to create a national park or a fort or an irrigation project, and in cases like that there was an established body of law set out in our brief, beginning with page 52, to the effect that the Secretary could withdraw the land from further location and in that circumstance, if the assessment work was not done, the government could retrieve the land for its own use. This is not a small matter, either.

In the recent construction of the Glenn Canyon Dam, there were over 7,000 of these old claims on the land there, claims which had to be cleared off the land. It was necessary for the government to go to considerable expense, because this Court had said in Virginia-Colorado that it could place no reliance on the fact that the claimants of those lands hadn't been doing and recording their assessment work, as the statute requires, for many years since.

As I say, the Secretary did rule in a small but consistent body of law that in these situations where the government had a special use for land, private claims would remain valid only as long as they were maintained, and then

they would revert back to the public for the purpose for which the land around it had been withdrawn. Sometimes he used the word --

Q Can maintenance be carried out only by assessment?

A I am not quite sure how to respond to that. The only thing in the prior law that has to do with maintenance is the requirement of assessment work. There is no other provision of the prior law that says anything about continuing to work the claim.

Q So occupancy and continual prospecting would not be equivalent to maintenance?

A Well, I think occupancy and continued prospecting -- at least the continued prospecting part of it might very well be considered as maintenance or assessment work. As the Court is aware, from the Coleman case, there have been many situations where persons have taken the government's land ostensibly for mineral purposes and actually wanted it for a seaside resort or something of that sort.

Q Well, maintenance and assessment are synonymous, are they?

A That would be the government's position here, is that one can only understand the provision that these claims had to be maintained as referring to assessment work, because there is no other provision of the prior law that

gave any notion whatever about maintenance.

Q Do I understand that in the history of this actually some claims were patented even though they had previously been -- the claims had previously been cancelled for want of assessment work?

A Beginning in 1950, something in the neighborhood of two percent of the total amount of land were done that I think began perhaps almost inadvertently. The people in the Denver office saw these things coming in, they saw the situation in which the lands were being obtained, and there gradually came to be pressure, pressure on Washington from the district. Well, this is a terribly we are doing. Why do we have to give the land away like this and in these kinds of circumstances.

Q Well, in those circumstances, is there any invalidity to the patent?

A Whether -- there is a six-year statute of limitation on the patents, and that six years has long since passed. And unless there was some sort of fraud in the inducement or something of that sort, the government would take it over.

Q Mr. Strauss, perhaps you commented on this, but if so I missed it: Am I correct in understanding that there was a time when the Secretary issued an order voiding all prior cancellations?

A Well, that is respondent's contention. That is not actually what he said, Mr. Justice Blackmun. The opinion on which we rely is an opinion called the Shale Oil Company, which appears in Volume 55 of the department's report, and at page 290 is the language they are concerned with. They say the above-mentioned decision and instructions involved in Virginia-Colorado, that is, are hereby recalled and vacated. Two other specific decisions andother departmental decisions in conflict with this decision are hereby overruled. The commission's decision is reversed and the record in this case is remanded with instructions to reinstate the application. And there did follow from that -- we can't deny it -- there was a period of time when the Secretary used words like "void" in talking about his view of what this Court had done, but I think it is well established in the law that a mistake the Secretary may make in interpreting the provisions of the statute, and I would say as well of this Court's holdings, that he may make a legal mistake of that sort, can hardly forfeit for all time the government's interest in the land involved.

Q Well, there is law to that effect, I think. I have --

A Well, that is what is at issue in this case.

Q This is your interpretation then of that action on the part of the Secretary?

A That's right.

Q A legal mistake?

A That's right.

Q Is that 55 I.D. 287?

A Yes, that's right.

Q Well, apparently the court of appeals seemed to rely on that in its opinion, didn't they?

A The court of appeals did rely on it in its opinion. Of course, it does give some trouble, but as I have said before, I think Mr. Justice Black established for the Court, in United States vs. California and United States vs. San Francisco, that even where there may have been substantial investments made, and by and large that is not the case in these proceedings, individual secretaries by mistakes they may make in construing the law simply can't forfeit the government's right in the public land. We are dealing with three million acres of public land here. To date, only 74,000 acres of that land has been reduced to patent. The first of those patents was issued in 1950, and I really think that the Court would have no difficulty in dealing with that situation.

As I was saying, sometimes, in this body of law which permitted the government to retrieve land which it needed for specific purposes, sometimes the Secretary used the words "assessment work," sometimes he just talks about maintaining the claim. And respondents say, well, therefore those opinions didn't have anything to do with assessment work. But

again, the only provision in the statute which in any way relates to maintaining a claim is the provision for assessment work. There simply is nothing else in the statute relevant on that issue.

Now, in our view, the Leasing Act is just like a withdrawal for national parks or a fort, and it reflects the congressional judgment about how the public lands ought to be used. And so in our view it gives the government the same right.

Another significant aspect is that that Act ended, eliminated the possibility that some private individual could come into the lands that were affected and put a claim on them that would end these old claims, because the Act withdrew not only the minerals, not only the oil shale from location, it withdrew the lands themselves. Even if you found gold or copper on the land, you could get it only by lease, as we show in our amended reply brief at pages 9 to 10.

It seems to us that there are four ways that one could interpret this provision of the 1920 law. First, one could say that assessment work must be done and as soon as it is not done for any period of time, however brief, whether or not the government finds out about it at the time, the land is automatically retrieved for the government's use. That is what this Court rejected in Wilbur vs. Krushnic, and we don't urge it today.

The second possibility is the government's position in Virginia-Colorado that the Secretary could act as a private relocator could, where he has a specific need for the land, where it has been withdrawn for particular government purpose, he may go on and if he finds land where assessment work isn't being done at that time, he stakes it and brings an adversary proceeding to cancel the claim.

The third possibility is what we think this Court said in Virginia-Colorado, which is that the government can go around periodically and more or less make demands on the holders of these claims to come forward. That was what the claimants in Virginia-Colorado did. This Court said that they did it and relied on their having done it.

The Court said they wanted to resume their work, they would have resumed their work if the government hadn't been there. That is perhaps a very fine line to draw. It isn't fully adequate, but it is certainly better than the fourth interpretation of this statute, which is respondent's interpretation of the statute, and that is that there is no requirement of maintenance at all, that the government has no interest in whether a claimant develops this land or not.

When somebody went out in the winter of 1919 and staked 30,000 acres over a five-day period -- that is perhaps too large, but I think there were several that were 2,000, 3,000 or 4,000 acres over that period of time -- that that was

the end of the government's interest in the oil shale in that land and there is simply no way that the government can retrieve it.

The best short comment I know on that position was offered in the House by Representative Taylor, of Colorado, whose credentials on land issues are impeccable and are vouched for by respondents themselves. He made these remarks after Virginia-Colorado was decided and in evident disagreement with it. He said, "People have been holding it" -- that is, the oil shale lands -- "for years and years without complying with the law," that is the assessment work law, "and without being entitled to it. This is to require them to comply with the law" -- that is to maintain their claims -- "or else let the land revert back."

Respondents make section --

Q This is to require them to --

A He was at the time talking to a statute that was before the House that did not pass.

Q A bill?

A That's right.

Q It did not pass?

A That's right.

Q What did Congress do with it?

A It disappeared, that is to say it was not finally acted upon. There was no vote voting it down, but it

didn't pass. I might point out in that regard, if I may, that I think Congress has always labored in this area under a substantial difficulty. The Court's decision in Virginia-Colorado in a sense declared property rights. Congress would interfere with those rights if indeed those were the rights only at its constitutional peril, and in event Congress could hardly do anything about the period of non-work which had been observed prior to the Court's decision in Virginia-Colorado from 1920 to 1933. There is nothing that Congress could have done to revive the disuse or to revive the government proceedings if indeed, as was sometimes felt at the time, that they had been in a sense voided by this Court's decision.

Q Well, must we not reasonably assume that the sponsors of that bill thought that Congress had the power to take corrective action, corrective in the sense that you were discussing?

A Well, I think we point out in our reply brief there was an extraordinary -- in the legislative history of those bills, there is a rather extraordinary amount of care about their prospectivity. This particular bill was only a prospective bill that would only have acted for the future about the limitations on what the government could do. I don't believe that the bill said that in the future you must do assessment work, because I think Congress felt that would be changing the conditions of the property ownership. There was

something in there about, well, you have to come in and register the lands. They felt they could go that far.

Q Well, Virginia-Colorado, was it responsible for the introduction of that bill? Was the decision in Virginia-Colorado the reason the bill was introduced?

A I think in substantial part it is, Mr. Justice Brennan. We have set out in our brief on page 18 a number of remarks by Congressmen, all of them addressed to what they considered to be the error of this Court in that case and expressing surprise at the way it had interpreted the land law. And I think you will find in the legislative history of those bills some alarm about whether Congress could ever set it right. This Court clearly enough could do so.

Respondent's view of the bill makes it into a good deal more than a savings clause because in their view it creates an indefeasible possessory right in public land regarding which they have no effective obligation of care or maintenance or development; no such right ever existed under this Nation's mining laws and respondents can point to no statement in Congress or elsewhere suggesting that that would be a just or desirable way to dispose of our lands. Seventy-five percent of the lands involved in this case were never worked on, so far as the record shows, from 1920 until they were bought in 1954 for pennies an acre, and the Congress provided only five rent-free years of leasing oil shale lands

certainly did not entertain the notion that it was enabling persons simply to sit on existing claims for decade after decade without investment obligation or fear or loss. The entire lack of justification, either legal or equitable, for that position demonstrates the fallacy of the claim.

Now, whether or not this Court would overrule Virginia-Colorado, it seems indisputable to us that the Secretary had subject-matter jurisdiction over those old cancellation proceedings when they were brought, and that those which became final before Virginia-Colorado were decided can be given effect today.

Q Do you see that Virginia-Colorado has to be overruled?

A We would certainly prefer it, that it be overruled in the sense that it would remove what has been a substantial incubus on the administration of the public lands and would permit considerably a more rational approach to this issue of failure to do assessment work. In particular, I think -- the particular language which I find the most unfortunate is the Court's remark in the opinion that failure to do assessment work gave no ground for a holding of abandonment in the case.

Q Do you read that as an interpretation of the statute?

A It reads as if it were. I know the Tenth

Circuit believes that it is, and the other district judges believe that it is.

Q Where does that leave us overruling?

A Excuse me?

Q Where does that leave us overruling, the statutory interpretation? Don't we ordinarily leave Congress to correct those things?

A Yes, but as I was remarking to Justice -- to the Chief Justice, Mr. Justice, in this circumstance, because it is involved with property, because the Fifth Amendment inevitably gets in when you start changing the conditions of property, really that statutory holding has something of a constitutional character to it and I don't believe you can leave it to Congress.

Q Well, we have overruled decisions on statutory interpretation --

A That's right.

Q -- but we don't ordinarily do that.

A Ordinarily you do not.

Q Here you do have apparently -- a statute or a bill was introduced, I gather, with -- from the way you described it, if it didn't overrule Virginia-Volorado, it certainly would have cut out a good deal of it, wouldn't it, had it passed?

A If the bill had passed it would have provided

that at least for federal registration of these claims, and I frankly don't recall what the remainder of the bill was.

Q Was it passed with reference to this Court's decision -- I mean offered in connection with this Court's opinion in Virginia-Colorado?

A Certainly in the legislative history there is mention of that decision and what it had done, yes.

Q And was it an effort to undo what the decision had done?

A No, as I have explained, Congress didn't feel it could undo the decision. It felt it could make some corrections for the future but, because land is involved here, there is some constitutional inhibitions about Congress taking it away by statute. If this Court had made a mistake, I think the Court could correct it.

Q Suppose this case should be overruled, what effect would it have on the people who are in the same position as those who owned the land here?

A Well, I think there would be a number of effects. First, as to those lands which have already been patented, which have already been sold to private individuals, I should think there would be no effect.

Q Why?

A Because the transaction is done. There is a six-year statute of limitations on undoing the transactions.

The six years have passed. Second, as to the period before the decision, the period before 1935, I should think an overruling would permit the government to rely on a failure to do assessment work at that time. I should think an overruling would have no effect on what was done to the land between the date of this Court's decision in 1935 and the date of its decision overruling the opinion. Certainly the opinion was there and one can't deny its presence in that sense.

A more difficult question would arise as to certain claims. There are claims, for example, the compass claims and the oiler claims in this case, represent about a thousand acres of the land involved, a thousand out of eighteen-thousand acres of land involved in this case, which were rather diligently worked in comparison to most of the oil shale claims involved here. Most of the oil shale claims involved here simply weren't looked at between 1920 and the time in the 1950's when a speculator came around and bought up shares in them with very small amounts of money. But those that were rather diligently worked and those that show some continuity of title, I should think there might be some equitable considerations involved there which would govern the government's use of the failure to do the work, even before 1935. This Court has entertained that kind of relief in Simpson vs. Union Oil Company. There seems to me a very apt case at 377 U.S. 13, page 24 and 25 of the opinion, the

Court reserved the question, wherein all the facts were not known, there may be any equities that would warrant only prospective application in damage suits of the rule governing price-fixing that we announced today. The Court referred to that opinion again last year in the Donnelly case. Certainly there is some similar disposition that would be appropriate here. We don't deny that.

The Secretary, in fact, in the administrative opinion, the Secretary indicated that he would reopen claims when for particular claims there were equitable or legal grounds to do so, and that has not yet been a point of dispute in these cases, so far as I understand. No one has yet suggested that they have such special equitable grounds, and I think certainly they should be available to them.

Q Was Mr. Taylor's bill, which did not pass, the only one that was offered in Congress in connection with this problem brought about by the Virginia-Carolina case?

A As I recall, there were two or three during that period of time in which Secretary Ickes was seeking to have the effect of that decision limited.

A In which what?

Q Secretary Ickes was seeking to have the effect of that decision limited.

Q Mr. Strauss, looking at Virginia-Colorado again that opinion relies rather heavily on Kruschnic, doesn't it?

A It does.

Q Well, it wouldn't be enough for you, would it, just to overrule Virginia-Colorado. Wouldn't you also want Virginia-Colorado overruled? That is the flat one, at least as read in Virginia-Colorado, that plaintiff had lost no rights but the failure to do the annual assessment work. That failure gave the government no ground for forfeiture, set in Krushnic.

A I don't recall that Krushnic establishes the proposition of that flatly to --

Q Well, this whole thing is that this Court seems to have read it that way in Virginia-Colorado.

A If it did, we would have to ask for its overruling, but I do suggest to the Court that the facts of Krushnic were rather special, and the government really has no complaint and indeed concedes that it may be considerably fairer on the whole to have the Krushnic decision on the books.

What happened in that case was that individuals had been working their land, continued to work their land, applied for a patent and the Secretary decided on a very technical basis that in one year, the year after which they continued to work and which no one took any notice at the time, in one year there had been a lapse on one of the pieces of land and therefore you can't have a patent to that land. That is a pretty inequitable result. The Court and the Secretary

generally have avoided cancelling public land claims on that kind of basis, and the government doesn't want to be able to do so particularly.

I think on that sort of basis we would be very happy to have Krushnic continue in effect. Now, I do want to talk briefly about this issue of subject-matter jurisdiction, that is whether Virginia-Colorado requires the Court to treat these old claims as void. That was the only issue which was presented -- not presented but which was decided in the courts below.

The courts below never had to reach these questions of administrative practice because they concluded that Virginia-Colorado in itself was sufficient to show that the claims were void. We think the contrary conclusion follows very strongly from the fact that the 1920 act's saving clause authorized the Secretary to patent only certain claims, those claims which were valid before February 25, 1920 and which had been maintained since that date in accordance with the laws under which they were made.

When an application for patent was made, then the Secretary would have to determine two things; first, was the claim valid on February 25, 1920; second, has it been maintained since that time. And if he didn't make that second determination he might dispose of the public domain to a party not entitled to it. In West vs. Standard Oil, this Court said

whereby the terms of an act the Secretary is required upon application of the claimant to issue a patent, Congress by implication confers upon the Secretary the power to make all the determinations of law as well as the fact, which are essential to the duty to -- to the performance of the duties specifically imposed.

Here the duty was to patent the lands on which there were existing valid claims which had been thereafter maintained. And there obviously was much of a duty to inquire into the question what constituted maintenance and whether it had been done, as there was to ask what was required for validity in whether the existing claim was valid.

And this Court recognized that in the Krushnic decision. At page 318 of this Court's report, it specifically refers to the necessity that the officer, the Secretary in this case, read the law and therefore in a certain sense construe it in order to form a judgment, and the Court there specifically noted that there was a question left open as to the meaning of this law. It says that the question left open was whether the United States could proceed against these claims if there is a former challenge on behalf of the United States for the valid existence of the claim which is intervening, and that of course is the precise situation in these proceedings.

Now, the Secretary acted within the range left open

by the Court in Krushnic. He acted in order to determine whether these claims had been maintained. On this analysis, the only possible objection to subject-matter jurisdiction is the issue of timing, the challenge cancellations arose not out of patent applications but out of contest which the Secretary brought before patent applications were made. Patent applications need never be made under the law. The Secretary brought these proceedings to clear the land while evidence remained fresh, and that seems to me a perfectly appropriate thing for him to do.

Respondents seem to argue that even if the Secretary would have subject-matter jurisdiction to consider these issues when they were brought to him on a claim for patent, he had no power to be aggressive about them, but that question was settled by the Cameron case, as we show in our brief at pages 36 to 37, where the summary of argument in this Court shows precisely the same argument to have been made. That case did involve discovery, not maintenance, and we have already shown that at least at the stage of an application for patent the Secretary would have to consider both issues under the 1920 Act.

If I may, I will reserve the rest of my time for rebuttal.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Hamilton?

ARGUMENT OF FOWLER HAMILTON, ESQ.,

ON BEHALF OF RESPONDENTS

MR. HAMILTON: Mr. Chief Justice, may it please the Court, I shall address my argument to only three points. The first two are the two points that I understand, from Mr. Strauss' argument, are crucial to the government's case.

The first one of those points is a procedural point, and that is the point that goes to the merits. As I understood him to say on the procedural point, it is the view of the government that the only question now before this Court is the jurisdictional question, that is to say did the Secretary of Interior have jurisdiction to cancel claims for assessment work as he purported to do on two separate occasions in the late twenties and early thirties.

It is our view that that is incorrect, that that procedural point is incorrect. It is our view, to state it very summarily, before developing, that the questions before this Court are precisely the questions that we raised in the district court of which the district court, all but one of which, it did not have to consider.

In the district court, we objected or rather sought review of the Secretary's order. Speaking very broadly, it went to the merits, one upon the grounds that this Court had held that the Secretary had no jurisdiction to, very broadly, meddle in assessment work matters; secondly, that even if

that construction of this Court's decision in Krushnic and in Virginia-Colorado was not correct, those decisions clearly held that it was error for the Secretary to cancel claims for failure to do assessment work, even if that was not a jurisdictional matter; and, in the third place, we argue that the undisputed facts as to the course of administrative conduct from the period of 1935 until the proceedings that ultimately issued in this case here were such that administrative conduct had established the administrative rule which could not be changed retroactively.

Now the district court, having found that in its view the Secretary, under Virginia-Colorado, has no jurisdiction as to assessment work matters, quite naturally did not go to the other two points.

The court of appeals, in affirming the district court, took the same position, that is the procedural, so it is our view that there is now available for consideration by the Court our three alternate and independent positions that go to the merits.

Secondly, we take the opposite view, of course, to the government's position because the government's position, as we understand it, hinges upon its contention that the word "maintenance" in the saving clause of the 1920 Leasing Act confers rights upon the government with respect to claims in reference to assessment work that did not theretofore exist.

I believe in response to a question counsel almost said that they construed the word "maintenance" to mean assessment work.

Q Mr. Hamilton, this may be a small point, but isn't the words thereafter maintained?

A Thereafter maintained. Thank you, very much.

Q Compliance with the --

A Yes, thereafter maintained, as I understand it, is the gist of their case, that that means that assessment work must be done. We dispute that.

Thirdly, and in conclusion, I shall endeavor to establish that even if the question were now open, if you should, as we do not think you should, but if you should respond to the government's request to reconsider the Virginia-Colorado case, that that case correctly decided that the Secretary has no jurisdiction as to assessment work matters.

Now, before coming to develop those points in somewhat more detail, if I may, I should like to talk very briefly to two aspects of the background that are pertinent, we submit, to the consideration of those three questions.

One has to do with the development in respect of oil shale in the early days. Another has to do with certain broad historical circumstances that relate to development of the mining laws in general, to place the oil shale question in perspective, and the third has to do --

Q Is the shale oil the chief cause of contention in these cases?

A The sole cause of contention, Your Honor, yes. The public lands that contain shale oil, some of them, in a limited amount, is the sole cause of contention, yes, sir.

Now, turning briefly to that historical background, between 1915 and 1920 there developed a great interest in oil shale because of its widespread conviction that our country was running out of hydrocarbon energy, because of the great draft of the war and because of the great draft upon our requirements that was put by the development of the automobile and the use of petroleum instead of coal in a number of industrial uses.

An oil shale industry had existed in the world since the 17th Century. The Scots had quite an active one in the 19th and early 20th Centuries, and there was a great boon, as all sides concede, out on the coast, out on the western slope of the Continental Divide, Colorado primarily, some in Utah and some in Wyoming. People went out to stake and develop these claims.

This activity continued down through the 1920's. Prior to 1920 a number of claims were staked for oil shale. The development work continued down until the depression, of the early 1930's.

Now, coming against that background to the mining laws themselves, and while, Mr. Justice Black, this case only

considers or deals with oil shale, the law that is applicable in nowhere speaks expressly of oil shale. We are dealing broadly with the whole scope of the mining law. And as you will recall, the mining laws are the principal law taken in connection with the Homestead Act, under which approximately two-thirds of the total of two billion acres at various times our government has owned, has passed from public ownership into private ownership, because as the con try expanded westward the government found itself with increasingly large quantities of public land on its hands and it had a problem of disposing of it.

The principal law was the mining law. Indeed, when gold was struck in California in 1848 -- President Polk, as we refer to in our brief, made a great speech about it -- and that produced the gold rush of '49. There were no mining laws, no laws to deal with federal land of any kind. These miners went out there and they developed customs and they enforced these customs by vigilante measures. All the people who developed the gold in California were treaspassers. The early cases even held that their possessory rights, which were developed by customs and enforced by vigilante measures, that the federal courts had no jurisdiction over these rival claims because the land belonged to the federal government, the federal government didn't recognize the right -- people were mining the ground on a large scale, but the federal court had no

jurisdiction.

So the first mining law of consequence that was passed was passed in 1865, and the purpose of it was two-fold: The purpose was to get peace and to provide some kind of federal supervision. The only thing it provided as to mining claims was that the federal court should have jurisdiction of a claim, even though the federal government owned the land.

Secondly, it provided that the law of possession, that is to say the custom of the miners would determine who was entitled to what in connection with these possessory rights. There was no provision for a patent. There is no provision for the Secretary of the Interior or any other government agency doing anything, although the Federal Land Office, in the Department of Interior, of course, had been established back in 1810.

The next step was the passage of a series of three statutes between 1866 and 1872, and those in essence constitute the framework with which this Court will decide this case, as it looks.

In essence, what that statutory framework provided was that a claim would be granted -- this was the first time there was a reference to the granting of a claim -- anyone who discovered valuable minerals on the land could come in and stake a claim and he got a possessory right, which is what this Court said in Krushnic, without any action of any

government agency at all. He could mortage, he could sell, he could dispose of it, he could leave by inheritance. There was not then and there never has been any place in the federal government where you could even find out where these mineral claims are.

The policing of whether or not the claims were developed and how they are dealt with was left solely to another provision of this statutory framework, and that brings us to the assessment work provision.

So the framework provided that if an man did $100 worth of assessment work on each claim per year --

Q What do you mean precisely by assessment work?

A What the statute says is that if a man will do $100 worth of work on each claim in each year, that is called assessment work.

Q Each claim for how many acres?

A A claim could only be for 20 acres, but eight men could go together and claim a quarter of a section of land, claim 160 acres, and that became a claim. If one man located 20 acres, that was a claim. But if eight men went in and pooled their resources, and that was always done, they could get 160 acres, and that would be a claim.

So what the statute said was that if these people spent $100 per claim per year in assessment work, their claim can't be jumped. What that meant was this: If they didn't

spend the assessment work, somebody else could come in and locate on that claim, either for the same mineral or for another mineral. And the question as to who owned the claim, if there was a question between rival claimants, was expressly reserved for the state court.

Q Well, what was the evidence of actual assessment, that one prospected the claim, that one dug holes, that one built something? What was the actual evidence of assessment?

A Well, trenching, digging holes, putting up posts -- if you were mining, building a room-entry tippel, or running a head into it.

Q Is there a history of the word "assessment"?

A No, we have not been able to find anything. I have looked it up in all the dictionaries, and I just can't find anything. I assume, just as a matter of conjecture, that probably it means that it is something that would show the fellow has attached some value to his claim, sort of working like a county assessor, but I just don't know. These claims didn't have to be recorded even in the county court house.

Q How does this maintenance differ, if it does, from the kind of maintenance and sometimes occupancy that was required on patents --

A In the first place, Mr. Chief Justice --

Q -- like on farm lands?

A -- we dissent most strongly from the view that this is maintenance, that this is the only thing that maintenance can mean. If you do assessment work --

Q Is it conceptually the same basic idea though as the requirement that men went out and staked out the farms --

A That's right.

Q -- the government patents, had to live on it for so many months, work on it --

A Well, it was marked difference in this regard, and we think it is a significant difference.

Q That is what I want to get at.

A In the case of the Homestead Act, and a number of other acts, the Department of Interior has to decide who is qualified. They can determine the conditions on which the man lives. They can throw him off at any time, and he does not get a property right in the land until he has fulfilled their requirements and live there five years, and any time between that and the time he gets his patent he can be thrown off.

In other words, there the grant of the property runs from the Department of Interior to the homesteader. Here the grant of the property runs, under the congressional act, directly to the claimant and the Department of Interior not only has no authority in the area as to assessment work, but it doesn't even know about it.

Q I understand the difference in the mechanism.

I was wondering what was the difference in the conception.

A Yes, sir. The difference in conception is this: In the case of the Homestead Act, the Department of Interior polices to see whether or not the homesteader is in fact fulfilling his obligations by living on the land and developing it. The philosophy and principle of assessment work established by the Congress was that Interior would have nothing to say about it, but they would rely solely on competion between competing miners to see to it that claims were developed. And in order to make that competition effective, what they said to a claimant to whom the statute ha granted a claim, if you don't do $100 worth of assessment work per year -- not that your claim isn't forfeited, no one ever contended that before the contentions of this 1920 case -- but somebody else can come in and take this claim away from you and relocate it, either for the mineral you have got or for some other mineral. And they went further, in order to have this police by competition.

They said that if one of a locators wants to protect his claim from being located by somebody else and the other fellows won't put up their share of the money, he can give them notice by publishing in a newspaper near the mine, then he can pay, then he can forfeit the amount, their interest out and he can then go ahead and do the assessment work and keep the claim alive and keep other people from coming in.

Q Mr. Hamilton, I gather if one does the assessment work, then the claim is maintained within that?

A That's right. But the controversary is not necessarily true in our view.

Q Well, what I wanted to get is you suggest that in addition to doing the assessment work, a claim may be maintained by doing something else, is that right?

A Absolutely, even though assessment work is not being done --

Q Well, what is that something else?

A Well, I have heard extensive argument on that. The legislative history, would it be agreeable if I came to deal with that --

Q Please do.

A -- after I get through with this background?

Q Take your time.

Q Let me see if I have it clear here. It opens it to other claimants?

A Yes, sir.

Q It doesn't alter the relationship with the government?

A The only relationship the claim holder has with the government is that he owns the property and the claim at that point. He has no relationship with the Department of Interior at all. He owns the claim and if he doesn't do

assessment work and no one comes along and tries to relocate, he still owns it. That was the thrust of the language in this Court, as we construe it, in both the Krushnic case and Virginia-Colorado. The Court was saying, well, if it comes along at any time and revise it, the claim is maintained because no one can relocate it, eventhough he has not done it for ten years, if he thinks somebody is going to relocate, he then comes in and reestablishes assessment work and then the other people can't come in.

So all you have to do under the statute, the statutory scheme, was to stake the claim. Now, the Department of Interior did come in in certain areas. In other words, in the matter of abandoned claims, and there is no charge in this proceeding at all, despite some of the rhetoric, the slightest suggestion that any of these claims have ever been abandoned. That matter, if we prevail in this case, will still be open to the Department of Interior to raise when we go back, if they think these claims have been abandoned. If there had not been a discovery of a valuable mineral --

Q Discovery of what?

A Of a valuable mineral -- then there would never have been a valid claim and the Department of Interior could refuse a patent. Even if there had been the discovery of a gold mine, and assessment work had been done, and no patent had been applied for, and in twenty years the gold mine had

been worked out and the man wanted to come in and patent it because he wanted to set up a hotel or something, there would not be a valuable mineral on the land at that time and Interior could quite properly say no patent.

Q How did the exploiter get his title from the government?

A He didn't have anything, sir, from the government in the case of a claim. He staked the claim, he usually, as a matter of precaution, recorded it in the county recorder's office. That was all. It was recognized -- you see, we are still speaking of the western law in custom -- when he staked the claim, everybody recognized it.

Q And the stake was nothing more than the possessory interest?

A Exactly, it came directly to him under the statute, and was full property right, as has been conceded here this morning.

Q The lands were federal lands?

A Every acre of the two billion acres were federal lands.

Q He just got a possessory interest which was something he --

A Which he could take the patent out if he chose, and most of them never took it to patent, because most of them worked out the mine and went away. So that --

Q What constitutes abandonment?

A It is --

Q It is a question of fact in each case?

A It is a question of fact in each case, yes, sir. And if we prevail in this case and it is sent back to the Department of Interior, if they think they can show a better interest, they will have the opportunity to do so, the same way you take to show fraud.

Q That law was passed in 1870?

A The first law, which simply gave the federal courts jurisdiction to deal with these possessory rights, kind of implicit recognition of them, was passed in 1865, Mr. Justice Black. Then between 1966 and 1972 a series of acts were passed, the Placer Mining Act, and those acts are the ones that established the framework of the mining laws and which oil shale is simply a part until we come to the 1920 Act.

Q What I understand then is that if a man went out under the 1870 Act, in 1971 --

A Yes, sir?

Q -- and staked a place and said he found some gold, that was his as far as the government was concerned from then on?

A The Department of Interior people, if they came onto it, they would have been trespassers.

Q Nothing could be done by them?

A Not a thing.

Q But the --

A If they couldn't get a patent, sir --

Q Yes, they couldn't get a patent.

A -- they couldn't get a patent if they landed it or if they hadn't discovered a valuable mineral or if they discovered one and worked it out.

Q But as far as the government was concerned, the government's interest was gone?

A Yes, sir, if he met the conditions of the statute.

Q And it remained that way until some other man would come in, some competitor, in exploitation --

A Yes, sir.

Q -- and assert his claim and stake it off.

A That's right. And if there was a dispute between them, they went to the state court, they didn't go to the Department of Interior because the statute expressly said all those matters should be dealt with the state because obviously they wanted the local people to --

Q What was the object of the statement in the bill, the requirement in the bill that certain things be done in the way of assessment?

A So that the man could determine whether or not he could keep some locator off his claim or not. In other

words, the statute says --

Q Only to protect other people who wanted the land?

A Exactly, and provide a standard so you could determine which among these competing miners would be entitled to work the claim.

Q It seems to me that that is about what the old case held.

A That is exactly our view of what the old case held, sir, and I think it would be clear that no one would ever dispute by description of the law until we come to 1920.

Q It is kind of --

A And even today on minerals that are not in the Mineral Act, the Department of Interior doesn't argue that you have to --

Q Up to that point, if the assessment requirement or a failure to perform the assessment work had nothing whatever to do with your submission with his rights to --

A And even today the non-metal act leases.

Q -- as between him and the government?

A Yes, sir.

MR. CHIEF JUSTICE BURGER: Thank you; we will recess.

(Whereupon, at 12:00 o'clock meridian, the Court was in recess, to reconvene at 1:00 o'clock p.m., the same day.)

AFTERNOON SESSION

1:00 p.m.

MR. CHIEF JUSTICE BURGER: Mr. Hamilton, you may continue.

ARGUMENT OF FOWLER HAMILTON, ESQ.,

ON BEHALF OF RESPONDENTS - RESUMED

MR. FOWLER: Thank you.

I may conclude the observations that I presented on the history of the mining laws insofar as it relates to the assessment work question, if I may, by stating that it has never been seriously contended before this litigation that -- and save for the litigation that culminated in the Kruschnic case and in the Virginia-Colorado case -- that assessment work was a matter of any concern to the federal government.

I refer in this regard to a regulation of the Department of Interior which is quoted on the first page of our brief to this Court. This regulation is in virtually the same form as appeared since at least 1899, and what it says is this:

"The annual expenditure of $100 in labor or improvements on a mining claim, required by section 2324 of the Revised Statutes (30 U.S.C. 28), is, with the exception of certain phosphate placer locations, validated by certain acts and pursuant to certain regulations...solely a matter between

rival or adverse claimants to the same mineral land, and goes only to the right of possession, the determination of which is committed exclusively to the courts."

Q What is that from which you are reading?

A This is a regulation which is now in effect, sir --

Q When was it put in effect?

A It has been in effect since at least 1899 in this same form and substance. It is a regulation of the Department of Interior, is a statement of their position down through the years.

You will have noted, Mr. Justice Black, that it refers to an act relating to phosphates. Prior to the admission of Alaska into the Union, there was also an act that related to Alaska and the Phosphate Act and the Alaska Act provided in substance that if assessment work were not done, then the claims were forfeited to the federal government, from which we argue, of course, that when Congress intended to cause a forfeiture for assessment work, it said so, as it did in the Alaska Act which became obsolete when Alaska became a state, and it has in the Phosphate Act which is recognized by the department to be an exception to this general doctrine, that the federal government has no concern or responsibility or right with respect to assessment work.

And that leads to one final point, and that is the suggestion was made this morning that it would be some way unconstitutional for the Congress to make any change affecting the assessment work on claims that are already vested. We submit that is incorrect.

In 1954, the Congress passed a law called the Multiple Mineral Development Act, which is discussed in our brief, in which Congress did precisely that. The Congress provided there that as the minerals that are covered by the Mineral Leasing Act, that is the claims that are covered by the Mineral Leasing Act, any one could go in and locate on top of those claims if no assessment work had been done so long as they were locating before a non-Mineral Leasing Act mineral. For example, gold is not a Mineral Leasing Act mineral.

Tomorrow, if the claimants involved in this case had not, as they are doing, had not been doing their assessment work, they are doing it because of this very statute that I am discussing -- if they had not been doing their assessment work, tomorrow a prospector could go out and if he found gold there he could locate that claim for gold. Likewise with uranium.

It may very well be, the record is not clear, that much of the -- that some of the uranium that was discovered was discovered on these claims which are subject to the Mineral Leasing Act but as to which assessment work had not been done.

Q That is a rather strange law, I guess you would think, wouldn't you --

A Which one, sir?

Q -- that a man could stake off, put stakes on a mining claim in 1871, do nothing else, and then come in and claim title to that land in 1970?

A Not if he has abandoned it, sir, he couldn't.

Q What did you say?

A If he had abandoned it he could not.

Q Well, he wouldn't have abandoned it; he just hadn't developed it. If there is any duty on his part to develop it, then it seems to me like your argument loses part of its force.

A Yes, sir, but we do respect the use of the word "duty." It begs the question, if I may say so respectfully, because the duty was that Congress -- the way the Congress said the duty would be enforced, we submit, was by competition between rival claimants. I suppose the real problem was how to get rid of a large part of the two billion acres of land that the government found itself owning.

Q I gather that they wanted to get rid of it by people who would develop it?

A Yes, sir, but they did not make any requirement in the law that in order to keep it a man had to do the assessment work. They did make a requirement in the law that

he had to discover a valuable mineral.

Q What facts would constitute an abandonment in the hypothetical case that Justice Black gave you, 1870 to 1970?

A I suppose that if the land be taxable and the man hadn't paid taxes, that if it be demonstrated that he has never shown the slightest interest in doing anything about it, that he never referred to it, that he hadn't devised it in his will, that he had ranchland and he made provision for the disposition of his ranch among his family and he ignored this land, that one would build a case along those lines, depending upon the actual circumstances.

I should, of course, point out that abandonment is not an issue here. The department has not challenged it.

Q No, I was trying to put into focus the necessity for making --

A I suppose that if he had completely ignored it for a long period of time and taken positive acts to deal with analogous property and he had done nothing with this, that that would be a basis to argue to find as a fact that the man had intended to abandon it.

Q Did I understand from you from your argument -- I mean from the cases that have been decided, you would say the government has no right to challenge the fact that he has abandoned it?

A Oh, no, sir. I didn't make myself clear. The government in these very cases, should you -- and we urge you should hold that they can't challenge them for failure to do assessment work, we would then have to go back to the Department of Interior and apply for a patent and then when these very claims came up, the department could say these claims are invalid, we will not give you a patent because in fact you have abandoned them.

Q Then, in your judgment, the government does have a remedy?

A Absolutely, in these very cases, even if we --

Q Or in any cases of that kind?

A Absolutely, sir. Yes, sir, and --

Q And it can decline to give a patent?

A Absolutely.

Q And then they will not own it?

A That is correct, sir. They can decline to give a patent on the ground that it has been abandoned, upon the ground that there has been no discovery of a valuable mineral, upon the ground that it was fraudulently located or upon the ground that it has been worked out, so that it is no longer valuable for minerals. So the public interest would be protected in the case on the record.

Q Mr. Hamilton, may I ask, getting back, I think you said this morning that all that one who located one of

these claims back in the 1970's acquired was a possessory interest?

A Yes, sir, that --

Q Was that subject to condemnation?

A Yes, sir, it was. They had been --

Q And yet you say you thought the Congress could do as I think you told us they did -- was it in 1951 -- permit someone to locate on top of an existing possessory claim?

A If the assessment work had not been done.

Q Well, if you premise that the assessment work is unrelated to the possessory interest that is acquired, as I thought --

A No, sir, I haven't made myself clear. My position is that the assessment work is vital to maintain the possessory interest --

Q As against someone else?

A -- as against other locators.

Q I know, but I am -- well, as against the government, however, it isn't necessary, isn't that your argument?

A That is correct, sir, yes.

Q Well, then, how can the government locate something on top of a possessory interest which is valid as against the government?

A It cannot do it unless it condemns it and pays

for it, and --

Q I thought you told us there was a 1951 statute which permitted, if you locate on top of that --

A The Multiple Mineral Development Act of 1954 was passed to permit people to come on these oil shale claims and locate them, not the government --

Q No, I know.

A -- but other locators, to locate them for non-Mineral Leasing Act minerals.

Q And if one did he would oust --

A He would oust --

Q -- the original claimant?

A -- just as though the Mineral Leasing Act had never been passed.

Q And generally what metals are covered by the Mineral Leasing Act?

A Oil, gas, sodium, oil shale --

Q Well, looking at it on the other side, the exceptions, you said someone could locate gold --

A Well, gold, for example, is not covered. Uranium is not covered. Aluminum is not covered.

Q Well, could there be two locators on the same land if you had this other situation you mentioned? Suppose someone --

A No, because under the statute the new locator

would be locating, as a hypothecy, on a claim where there had been no -- where there had been a failure in assessment, so that claim then was subject to location so that the man who discovered gold could come in and get the claim, not just for gold but --

Q But for everything?

A -- for everything. Yes, sir. It was just the same situation that existed as to all these claims before 1920.

Q He would oust the prior locator?

A Yes, sir, that's right. He would, indeed. And then in turn if he did not do assessment work and somebody came along and wanted uranium, they could oust him.

Q In what forum are those claims resolved?

A State courts.

Q The state courts?

A Yes, sir, because they are between private claimants, presumably because of the policy of keeping the cases originally in the state courts where the facts were known.

Q Well, you are going to get to your maintenance question?

A Yes, sir, I am. I have one other point to touch on, and that is between 1935 and 1961, that is to say after the decision of this Court in Virginia-Carolina, the Department of Interior -- and we submit that the evidence is uncontradicted and uncontradictable -- administered these lands, as

is stated time and time again, upon the principle that the old assessment work decisions were invalid, void and of no effect.

We have quoted in our brief the government's response to our interrogatories in which they said they had no evidence that any government official had ever taken any act or done anything on the assumption that these claims were in any way tinged with invalidity because of the old assessment work decisions.

Furthermore, we describe in detail in our brief the circumstances that show that the existence of these claims did not in any way impair the use of land for public parks, the use of it for reservoirs, or for any other purpose, because these claims, just like any other claims, are always generally accepted. Whenever there is a reservation of government land, the government says this reservation shall apply only to the public land that is not encumbered by claims.

Now, as I mentioned earlier, there is no way for the government to know what land has claims or not unless it goes out and searches the local county offices. So that the practice has always been, whenever a grant is made of public lands for any of the purposes that are discussed in the government's brief to contain a reservation.

For example, in 1916 oil shale lands were first held to be valuable minerals. The Geological Survey said we do not want them reserved because we don't want to keep them

open for location and grant because we want to have the processes developed to get this shale out. The Navy wanted a reservation of oil shale lands. In recognition of the fact that the reservation would not cover claims, they asked and got a reservation of twice as much land as they thought they needed because they anticipated that about half of the land would be covered with claims.

That is our response, as spelled out in our brief, to the government's contention that the existence of these claims in any way has interfered with the operation of these public lands. These claims haven't done it any more than any other claims, such as claims for uranium, et cetera, that are not covered by the Mineral Leasing Act.

Q May I ask one other question --

A Yes, sir.

Q -- about my hypothetical claimant of 1871.

A Yes, sir.

Q Suppose he were to get into a controversy with the government or the government claims they had a controversy in 1969 --

A Yes.

Q Could the government sue him and say he had abandoned it?

A Yes, sir.

Q They could say him and say he had abandoned it?

A Yes, sir.

Q So there is that much interest in the government?

A The government -- if the government goes out and finds a man on government property and they say he has no right to it, they can -- he is a trespasser and they can evict him. Then if he wants to litigate presumably he has a right to a hearing some place because he is claiming they are taking his property.

Q And then --

A And then they can litigate out the question of whether or not he in fact abandoned it.

Q Isn't some of the language then in the Colorado-Virginia case a little too broad?

A No, sir, because they cannot evict him for failure to do assessment work.

Q I know, assessment work, but --

A But they can evict him --

Q -- he hasn't developed it, he has abandoned it.

A He has abandoned it.

Q Well, that is the other side of the coin.

A But the language -- that is correct, sir, but Mr. Justice Black, I submit that the language in the Virginia-Colorado case speaks only of the question of assessment work. It doesn't talk about other ways of maintaining the claim, you

see. But there still remains a duty on his part not to abandon it, which the government can enforce --

A Absolutely.

Q -- and a right of its own.

A Yes, sir, and he gets no right unless he has discovered a valuable mineral. In a series of companion cases we are litigating that with the government now.

Q So you limit Virginia-Colorado wholly to the question of assessment?

A Absolutely, sir, yes, sir.

Q When is the right to patent a right?

A Once you have a valid claim, then you have to do $500 worth of work. You can do it in one year or forty, and then you file an application for a patent --

Q Whether or not you discover something?

A No, sir, you have to have discovery. You file an application for a patent and you have alleged that you have a valid claim in that you have discovered a valuable mineral. Then the Department of Interior people send people out, as they did on this Penelope Brown case three times and found she had a valid claim, they look at it, if the inspector thinks it has been abandoned, he writes a report and they don't grant the patent.

He inquires in the community and says who owns this thing and what have they done about it. If the mineral showing

is not sufficient to constitute a discovery of a valuable mineral, he writes a report and recommends against it, and then the patent claim is rejected.

Q The government can contest that far --

A Yes, sir.

Q -- as to say that you didn't comply with the act and pay the $500 or make the discovery --

A Right.

Q -- therefore you do not own the land and never have?

A Yes, sir, and since about 1927 it can go forward and do it on its own motion. In other words, if it wants to build a dam and thinks there are a lot of valueless claims on it there, it can find the claimants, make publication and clear this land of claims. And if they don't come in and defend it, which I suppose as a practical matter is one of the ways on abandoned --

Q I gather that the patent gives it fee simple?

A Yes, sir.

Q To what?

A To the land.

Q Well, I mean 20 -- you told us earlier this thing all started with --

A However, 20 acres are covered by this claim, sir. In this case here, for example, what happened was that

there were 18 claims pending in the Department of Interior, 18 applications for patents, covering about 250 claims of 160 acres each, so that is about 35,000 acres. And what happened was that the Solicitor of Interior issued instructions to the field office to reject these applications upon the ground that these old assessment work decisions were res adjudica. He did so. Then the Solicitor took -- there was no notice to anybody about this, no opportunity to be heard, nothing -- then the Solicitor took the cases up, reviewed them on appeal and confirmed his original instruction in a decision called the Union Oil case, which is the one that is involved here, in which he conceded that there was a right of appeal in 1935 to the courts, but he held that there had been laches.

The trial in the court below was solely on the question of laches, because we introduce voluminous evidence, all from the government files, to show this unbroken conduct where they had recognized the validity of these claims. In our brief, we set forth the number of acres that were patented, on page 40, on a map.

By far, the greater part of the land has been patented in Colorado and it is the biggest part of the land that has been patented for oil shale, was covered by these decisions. So I don't think it is really disputable that there is no laches. The district court found there was no

laches. They said there has been a dearth of of any evidence, and the Tenth Circuit confirmed that.

Q Mr. Hamilton, taking it up to the point that Justice Black just described it in his hypothesis, the government, Interior man reports that there is no valuable mineral and the claimant says there is a valuable mineral, where does he contest --

A They have a hearing in the department of Interior.

Q Where do they go from there?

A Then he can appeal either to the land office or what is usually the practice in large cases, is for the Secretary of Interior to hear the appeal himself or have it heard by someone to whom he delegates it. And within the last year there has been set up in the department an appeals board for the purpose of hearing appeals from mineral examiners. At the hearing there is a record made before the examiner. Then you can go intermediately to the head of the land office or, as is usually done in large cases, directly to the Secretary who up until a year ago had the matter decided by the Solicitor. That is what happened in this case. The same gentleman who gave these instructions then wrote the opinion in the Union Oil case.

Now the Secretary has set up an appeals board. Then you go to the appeals board, then it is reviewed by the courts.

Q Not the state court this time, is it?

A No, the federal courts. That is right, sir. Then it goes to the federal courts.

Now, --

Q This would be the controversy arising out of an application for a patent?

A That is right, sir.

Q Yes.

A Or, since recent years where this Court has sustained the right of Interior to attack patents at its own initiative --

Q Yes.

A -- originally that was not clear, now they can go out and challenge claims and force the claimant to come in and defend his claim.

Q Not waiting for him to assert --

A Not waiting for him to assert, yes, sir.

Q Well, then, I suppose they could also go into a court in an action for rejection or title or --

A Right, yes, sir, they dealt with those.

Now, I come, sir, to a question on maintenance, to maintain. We think the background of that is not uncomplicated but we believe it is clear.

Q This came in in the 1920 Act, did it?

A That is correct, sir.

Q Yes.

A The background of it is this, briefly: You recall that the mining laws that I have described in which there was a direct grant of a claim went back primarily to what is called the so-called hard rock minerals. They came out of the gold rush to California and hard rock minerals, unlike petroleum and natural gas, are found, characteristics, either in lodes, in which you have a vein, which under our law, as you know, you can follow wherever the gold goes, or they are placer claims like those out in the open where you might find gold in a riverbed.

In the 90th Congress, the last session, the question came up as to which one of these categories oil and gas fitted in. The Interior said first it is patented as a placer. Then the Interior Secretary said he didn't think it was. Then he finally said he thought oil and gas was and finally Congress affirmed that by saying that oil and gas was patentable as a placer.

Then a question arose, because in 1909 oil and gas was going to be withdrawn from further location, and Interior, in connection with various withdrawals that it had made, had decided that if a man was looking for oil or gas and was drilling and hadn't hit it but was still looking, it was unfair to cut him off even though he hadn't made a discovery. So they established the administrative rule that when, in

connection with oil and gas, there was a withdrawal and a prospector was still looking, so long as he went right ahead and kept looking, if he found it and made a discovery he got the claim, even though as a technical matter under the mining laws no claim vested until the discovery. So this was kind of a special, a quasi- or in-court claim.

Now, when the Mineral Leasing Act was passed, this question arose in the Congress, because they said -- the Interior said what are we going to do about these different kind of claims that aren't real claims because no discoveries happened.

So they put in this provision that so long as the oil or gas man, it was directed at him, maintained the claim by going forward to seek discovery, he would be entitled to a claim, even though at the time the act vested he had not a claim in the proper sense of the word. And the papers that are set forth in the government's amended reply brief, we submit, make perfectly clear that what Mr. Vogelsang was saying to people on the Hill was, if this law goes through without some kind of a saving clause, what are we going to do about these oil and gas leases.

The last sentence in the last one of those letters, the last letter we think makes that clear. Mr. Sinnott, who is a Congressman, in replying to Mr. Vogelsang, said: "I do not know that I just understand your reference in the first

paragraph on page 2 to the $100 worth of labor or assessment work. Do you have in mind assessment work under the state laws or under the federal statutes? As I understand it, under the federal state assessment work is required only after discovery."

The point being that you didn't have any claim in an oil shale situation until you had discovery, so when we come against that background to the decision of this Court in Krushnic and in Virginia-Colorado, we submit that it is clear that what the Court was saying there was that this is a jurisdictional matter in the second case.

The Interior Department only has jurisdiction to do these various things with respect to abandonment of discovery because they have a duty to issue the patent. Justice Brandeis, in the very clear and well-reasoned decision, as quoted in our brief, makes it perfectly clear that the department originally had no jurisdiction at all. There is no statute that gives the Department of Interior jurisdiction to hold contest proceedings to do any of these things.

As he points out there, the department has jurisdiction only there -- and I think I should perhaps refer to his specific language -- what he said was, "Jurisdiction is conferred upon the Secretary, giving him the power to make all determinations of law as well as fact which are essential to the performance of the duties specifically imposed," and we

submit that Chief Justice Hughes was saying, in Virginia-Colorado, there is no duty specifically imposed with respect to assessment work. It is only imposed with respect to granting of the patent. You don't have to do assessment work to get a patent.

Q What case are you reading from?

A I am reading, sir, from Mr. Justice Brandeis' decision in West, 278 U.S. 20. And we submit therefore that on the basis of that analysis that the -- two things, that the Virginia-Colordo case was a case of jurisdiction, and also that it was a case that was rightly decided as a case of jurisdiction so that if it were up new, it should be decided the same way.

Thank you.

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

Mr. Strauss, you have eight minutes, I think, left.

ARGUMENT OF PETER L. STRAUSS, ESQ.,

ON BEHALF OF THE PETITIONER -- REBUTTAL

MR. STRAUSS: Thank you. I take it from counsel's last remarks that they no longer claim that this Court can pass on these claims as on direct review, and so I will leave that part of our argument to our brief.

Counsel was just addressing himself to the West case, Justice Brandeis' reference to the duty of the Secretary. Of course we rely on precisely that same language. Under

section 37, the Secretary had a duty to ascertain whether claims were being maintained. If they weren't being maintained it was in error for him to give patents on the land.

When Secretary Fall, the West Case, which involved Secretary Fall, when Secretary Fall had tried to give away government lands without the right to do so, he wound up in jail. The Secretary in all of these cases was following his plain duty under the statute to see whether these claims had been maintained.

Now, Justice Brennan, you asked Mr. Hamilton what does that word mean, what might it mean, and he kept saying he would answer it. He has finally come back with an answer which appears to me to be well, that word only applies to oil claims. It doesn't have anything to do with oil shale at all.

That may be true in this sense: As we point out in our brief, the only legislative history which specifically addresses itself to the question what shall happen to the pending oil shale claim, says that anyone who has an oil shale claim may trade it in for a lease. That is the sole direct legislative history on the oil shale claims and their savings. You may get a lease, the lease was to run for a relatively indefinite time, but one advantage of the lease was that the Secretary could suspend the payment of any rent or royalty for five years, and it was quite clear why that was provided.

That was provided in order to encourage people to

get the lease in recognition that people weren't going to be working on these lands for a while because nobody knew how to make oil from shale. Mr. Hamilton's clients are working very hard at that, but they still haven't forty years later, fifty years later, there is still no commercial process in this country making oil from shale.

Q Is there a public policy aspect involved in the background at least here to encourage the development of this by the private sector rather than have it either not developed on the one hand or developed by government?

A Public policy is precisely the contrary. The public policy of the Mineral Leasing Act was to have this and to encourage the development through lease, and there are all kinds of reasons today, environmental considerations not the least of them, why that should be done.

Now, there was this limited exception left for people who had valid claims and maintained them, and I think if one reads the legislative history one can come away with no conclusion other than that that meant diligence. Mr. Hamilton admitted as much when he said this language came in there because of people who were prospecting for oil. Now, the rules that applied to them -- it wasn't just $100 worth of work. You had to be on that land working every minute trying to get the oil. If you take your drills away for thirty days, you have lost your right to the land. Surely the Congress, which

imposed that kind of drastic rule, would never have considered what happened in this case, that --

Q Isn't there a difference between that case and the oil shale case situation?

A None in practice, Mr. Chief Justice.

Q Well, I understood you to say just now that we haven't been able to develop the processes of extracting oil from shale and they have been working at it for fifty years, more or less.

A Well, that is right.

Q That is all done at private expense, I take it, isn't it?

A The development is done at private expense. I may say with the exception of one of Mr. Hamilton's clients, perhaps two of them, the one in particular that has given its name to this case that began in 1955, there has been very little serious work. The people from whom these claims came, 13,000 acres of the 18,000 acres in this case were located over a space of a month, less than a month, by people who never returned to the land, never replied to the Secretary, work was never done on that land, they were maintained in any sense of the word.

In 1954 there was some speculator who went around sort of quietly gathering up the claims and turning them into what the Oil Shale Company --

Q Are you suggesting -- there is no valid claim if before 1920 the assessment work had not been done?

A No, I am not suggesting that.

Q You are not?

A And I think that, if I may, takes me back to a statement that Mr. Hamilton made. He said that before 1920 nobody ever thought that the government could have any interest in assessment work. That is true only as a general rule. There were cases, and we cite them in our brief, where the government needed land for a dam or for a fort or for some other specific purpose, and in that case it went out and it got interested in whether the land was being maintained again.

Q Maintained in what sense?

A In the assessment work sense, among others. The case of E. C. Kinney, which is --

Q I must confess, I am a little lost. I thought the basic premise of your case was that a condition to retaining a possessory interest was that you continued to do the assessment work required by the statute. Am I wrong?

A No. Our case is that a condition of maintaining any claim is that you continue to do the assessment work up to a point where the government may come in and relocate, in effect, that in this kind of case, where the government wishes land for specific use, whether it be a dam or a national park or a national forest, or in order to lease it. If it

comes along and it finds that here is a piece of land and the people who have claims on this land aren't using it, aren't maintaining it, aren't doing assessment work at this point, it can post the land and take it back, and that is precisely what was done in these cases.

Indeed, this is a case very much -- if these were private individuals involved, I have every confidence that the Colorado courts would say the government has taken over these lands by adverse possession. It staked them in 1932. No one else breathed on them until 1954.

It seems to me incredible that one could have a state of law that said that these claims must be honored today. There was some discussion of abandonment as a remedy for the government. The difficulty with that remedy, the practical difficulty with that remedy again is this sentence in Virginia-Colorado, and before I get to it I would like to read some sentences from some other Supreme Court opinions.

In Union Oil Company vs. Smith, Volume 249 of this Court's report, the Court said the possessory right is lost only by abandonment as by non-performance of the annual assessment work.

In Donnelly vs. United States, in 228 U.S., the Court said, of course, under the mining law a claim may be abandoned by failure to do the required development work. So up to this point the government, if it could show that

assessment work was not being done, might have some kind of remedy if it called it abandonment. In Virginia-Colorado we find a very different sentence. That sentence says the government gained no right by the failure to do assessment work. The failure to do assessment work is no evidence of abandonment, and that is a very pernicious sentence.

Q It is just that sentence, isn't it?

A It is principally that sentence in terms of the effect on the government's continuing right. I may say it is also, if I may, in conclusion -- there is also this other matter, that we do not believe that the Secretary back in 1935 exceeded his jurisdiction when he passed on these claims, even if they were erroneous. We are confident, Mr. Justice Black, from your opinions in United States vs. San Francisco and United States vs. California, that any error the Secretary may have made in interpreting this Court's holding does not mean that on the basis of that error the government must give up its claim to these three million acres of land.

Q I think it is close to that argument, but when I look at Ickes vs. Development Corporation --

A Right.

Q -- Chief Justice Hughes said there was authority in the Secretary of Interior by appropriate proceedings to determine that a claim was invalid for lack of discovery for fraud or other defects or that it was subject to cancellation

by reason of abandonment. So that I would suppose that maybe your only objection to this case -- I may be wrong -- would be that the government has all the remedies it would have, the title has not passed from it, so that if a person owns it to the eternal exclusion of the government, but that the government can proceed and that I would suppose that failure to assess would even now, I think, it could be held and should be held that failure to assess was evidence pointing in the direction of abandonment.

A Well, if you will turn to page 646 of that court's opinion, Mr. Justice Black --

Q Yes?

A -- you will see the following sentence: plaintiff had lost no rights by failure to do the annual assessment work. That failure gave the government no ground of forfeiture.

Q Well, one might agree with them that it gave them no ground of forfeiture, but still not say that it didn't -- there wasn't some evidence that they had abandoned their claim.

A Well, I think you can be quite sure that in the ensuing proceeding -- and I must say it is a reasonable reading of the language -- people will take that language to mean that it was no evidence.

Q Yes, but that language might be explained.

A Yes, it might.

Q Except that two sentences before that, the introduction of that discussion is a sentence, there is no ground for a charge of abandonment.

A Well, I think that was proved, as I explained before in the circumstances of that case.

Q Isn't that connected with the later sentence, plaintiff had lost no rights for failure to do the annual assessment work?

A If I may review for a moment the circumstances of that case, the court had decided in Wilbur vs. Krushnic in 1930, the Virginia-Colorado Company had been doing assessment work up to that very year. When Wilbur vs. Krushnic was decided, there may have come to be a belief, well, it is no longer necessary to do this work. So for fifteen months, and it was only fifteen months and not fifty years, the work stopped.

At the end of the fifteen months, the Secretary came in. The claimant in that case, unlike most of the claimants here, responded and they said no, we are all set to go back on the land and we are ready to resume the assessment work. We are going to do it. And that was stipulated and agreed to as being the actual state of affairs in that circumstances we would agree that there was no ground for forfeiture.

Thank you very much.

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

Mr. Hamilton -- you went about three minutes over, Mr. Strauss -- if you need to make a comment --

MR. HAMILTON: May I just make one comment, please.

MR. CHIEF JUSTICE BURGER: -- you may make a comment.

ARGUMENT OF FOWLER HAMILTON, ESQ.,

ON BEHALF OF RESPONDENTS--REBUTTAL

MR. HAMILTON: In connection with maintenance, I have given you our view of the genesis of the phrase "to maintain." We think that when Chief Justice Hughes was discussing in the latter paragraph, in which he said a claim could be maintained by doing assessment work, he was answering, in effect, a rhetorical question that had been put to him in the course of the argument in the brief, so that we say as a matter of definition a claim can be maintained and is against other people, and the locators by doing assessment work. It can be maintained against the government by not abandoning it. It can be maintained against the government, in other words, by doing all of those things that are necessary to qualify you for a patent.

Thank you, sir.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Hamilton. Thank you, Mr. Strauss. The case is submitted.

(Whereupon, at 1:40 o'clock p.m., argument in the above-entitled matter was concluded.)

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