In the

# Supreme Court of the United States



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CECIL D. ANDRUS, SECRETARY OF THE INTERIOR,

Petitioner,

v.

CHARLESTONE STONE PRODUCTS, CO., INC.,

Respondent.

No. 77-380

Washington, D.C.
April 18, 1978

Pages 1 thru 39



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IN THE SUPREME COURT OF THE UNITED STATES

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| v. | : | No. 77-380 |
| CHARLESTONE STONE PRODUCTS, CO., INC., Respondent. | : | |

Washington, D. C.

Tuesday, April 18, 1978

The above-entitled matter came on for argument at 11:24 o'clock, a.m.

BEFORE:

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

APPEARANCES:

SARA S. BEALE, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D. C. 20530, for the Petitioner.

GERRY LEVENBERG, ESQ., 1700 Pennsylvania Ave., N.W., Washington, D. C. 20006, for the Respondent.

# C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 77-380, Cecil Andrus, Secretary of the Interior against Charleston Stone.

Mrs. Beale.

ORAL ARGUMENT OF SARA S. BEALE, ESQ.,

ON BEHALF OF THE PETITIONER

MRS. BEALE: Mr. Chief Justice, and may it please the Court:

This case comes before the Court on the Government's petition for review of a decision of the Court of Appeals for the Ninth Circuit, holding that water is a mineral subject to location under the federal mining laws. To put it another way, the Court of Appeals held that rights to water on the public domain are mineral rights which should be acquired pursuant to the federal mining laws.

Since 1866, the federal mining laws have enabled citizens to discover and extract valuable mineral deposits in the public domain and to secure free title to lands containing such discoveries. A claimant must establish that he has discovered a valuable mineral deposit within the limits of each claim. To show the value of such discovery, the claimant must establish that a person of ordinary prudence would be justified in the expenditure of both time and money with the reasonable expectation that minerals from such a claim could be marketed

at a profit.

At the outset, none of the parties in this case viewed it as a water law case. The disputed issue was, rather, whether the Respondent could show a valuable and marketable discovery of sand and gravel.

In 1942, Respondent's predecessor in interest had located more than twenty placer mining claims in a narrow wash on public lands about fifteen miles northwest of Las Vegas, Nevada. In the aggregate, these claims and several others located a few years later, cover about 500 acres of land and they encompass a massive deposit of an estimated 20 million cubic yards of sand and gravel.

Until 1955, sand and gravel were subject to the federal mining laws. But in that year Congress withdrew common variety minerals, including sand and gravel, from location under the mining laws. The Secretary of the Interior initiated administrative proceedings in 1965 contending that each of Respondent's 25 sand and gravel claims were invalid for want of discovery of a valuable mineral prior to this 1955 withdrawal date.

A hearing was conducted at which the Secretary presented the testimony of a mining engineer who stated that the excessive distance from these claims to the market in Las Vegas and the lack of water to wash the material prevented profitable marketing of this sand and gravel prior to the withdrawal date

in 1955. It is undisputed that water was first discovered on these claims in 1962, when Respondent drilled a successful well on Claim 22. The presence or absence of water was important here because washing sand and gravel greatly increases its marketability.

The Interior Board of Land Appeals credited the testimony of a Government expert witness and concluded that Respondent had established a valuable discovery of sand and gravel on only one of the twenty-five claimed, the one from which sizeable deposits had actually been removed prior to 1955.

QUESTION: Mrs. Beale, would you help me out of my ignorance? A placer mine is a mine which involves the use of water, isn't it?

MRS. BEALE: In most cases, I believe it does. The difference between a load and a placer claim, as I understand it, a load claim is one where there is a vein of the mineral running through, so that often one can come in with a pick, or whatever, and get at that mineral, whereas the placer claims usually involve a mineral more broadly disbursed throughout the geographic limits of the claim. So very often in the case of, say, a gold placer claim, one would use water to wash out the other materials and get at the valuable mineral.

QUESTION: A placer mine doesn't inevitably involve the use of water?

MRS. BEALE: I don't believe so. In the case of a sand and gravel placer claim, it is useful only to wash the water, but in this case --

QUESTION: It was not actually necessary.

MRS. BEALE: Right.

Respondent sought review of this decision in the District Court which satisfied the administrative decision as arbitrary, capricious and not supported by the evidence. The court held that the Interior Board had erred in crediting the testimony of the Government's expert witness, found credible the Respondent's evidence on the issue of marketability and it concluded that at least the Claims Numbered 1 through 16 had been found valid. Moreover, it concluded that the Respondent should be permitted access to Claim 22 in order to make use of the water produced by the well.

The District Court did not offer any legal basis for offering access to the water on Claim 22. The Court of Appeals affirmed the decision of the District Court with one significant addition. It held that Claim 22, itself, was also valid because the water that Respondent had discovered on that claim was itself a locatable mineral under the mining laws.

The parties had neither briefed nor argued this issue. The court, however, looked to the mining laws and found that there was no provision that expressly defined water as a non-mineral. The court stressed the fact that the recovery

procedures used in the case of many hard minerals required the use of water. Therefore, it found that it should not assume that Congress had been unaware of what the court called "the necessary glove of water for the hand of mining." And it had made no provision for the necessary acquisition of water rights for the operation of such claim. Accordingly, it concluded that Congress must have intended that water itself should be locatable as a mineral.

In the case of Claim 22, the court held that the evidence established the discovery of a valuable mineral, first, because water has an intrinsic value in a desert area and, moreover, because Respondent's use of the water to wash his sand and gravel, thereby increasing the value of the sand and gravel, show that there was a profitable market for the water, and that it was a valuable mineral deposit.

The Government submits that the Court of Appeals' conclusion that water is a locatable mineral disregards the intent of Congress.

QUESTION: That's the only question you've brought here, isn't it?

MRS. BEALE: That's correct. In our petition, we note that there are other respects in which we believe the Court of Appeals had erred, but we did not raise those in this case.

We believe that the decision disregards the intent of

Congress as expressed in the mining laws themselves, that the acquisition of private water rights on the public domain should be governed by state and local laws, therefore not by the federal mining laws.

The court's decision, in our view, also disregards the precedence of both this Court and of the longstanding administrative interpretation of the Department of Interior. The promise of the Court of Appeals opinion is that Congress did not expressly define water as a non-mineral, and that it made no express provision for the acquisition of water rights necessary to work mineral claims.

QUESTION: Do you think the 1955 legislation has anything to do with the issue in this case?

MRS. BEALE: Well, the 1955 legislation to which I believe you are referring is the one which withdrew the common variety minerals and it specifies the minerals, sand, gravel, pumice, I believe, fossilized bone --

QUESTION: It specifies all -- I couldn't find the language of the legislation in the paper here, but it specifies every --

MRS. BEALE: It specifies the minerals. And, indeed, we note in, I believe, both in our petition and in our brief that there is a provision in the 1955 legislation indicating that there was no intent to interfere with state water laws. And we think that buttresses not only our conclusion that the

mining laws do not affect water laws, but should water be held to be a locatable mineral it would make it impossible to somehow construe, in my view, the provision of removal of common variety as applicable to water.

The premise of the Court of Appeals opinion was that since there was no express provision for any acquisition of water rights that are necessary to work mineral claims, and the court thought that Congress must have intended to provide some mechanism so that miners could acquire these rights. And, therefore, it must have intended the only provision which the court saw at hand, the mineral laws themselves, to apply to the acquisition of water rights.

The premise for this reasoning is false. The general mining laws, since their inception in 1866, have provided separately for the right to mine valuable minerals on the one hand and for the acquisition of water rights on the other hand. Congress did recognize from the outset the critical role that water played in mining operations. But instead of establishing a federal statutory system to govern the acquisition of private water rights on public lands, as it set out the system for the right to acquire minerals, instead Congress chose to ratify the rights that were recognized under state and the local laws that were developing in the arrid regions to allocate water among the competing uses, including mining. Both the general mining laws enacted in 1866 and in 1870 contained separate provisions

regarding water rights. These provisions were left unchanged when Congress enacted the 1872 mining law and they are now codified at Section 51 and 52 of Title 30. They are reprinted at page 2 of the Government's brief.

Section 51, which was part of the mining law of 1866, provides that rights acquired by priority of possession to the use of water on public lands, rights that are recognized and acknowledged by local customs, laws and decisions of the court should be maintained and protected. Then, in 1870, Congress enacted what is now Section 52 which provides additionally that any patents granted or homesteads allowed are subject to vested and accrued water rights acquired or recognized under Section 51.

Congress, thus, expressly provided in the mining laws, themselves, that the acquisition of private water rights on the public domain is governed by state and local law, not by the federal mining laws. Other public land laws, particularly the Desert Land Act of 1877, advents the same intent to sanction water rights acquired in accord with state law, rather than to establish a new and separate system of federal law.

QUESTION: That was our holding in Beaver Portland Cement, wasn't it?

MRS. BEALL: That's precisely the very next thing I was going to say. This Court has recognized that intent and in particular in California Oregon Power Co. v. Beaver Portland

Cement, the Court said as follows about these two provisions. The Court said that provisions of the 1866 and 1870 mining laws -- and this is a quote -- "approve and confirm the policy of appropriation for a beneficial use, as recognized by local rules and customs and the legislation and the judicial decisions of the arrid land states as the tax and the measure of public rights into the non-navigable waters on the public domain."

The inclusion in the mining laws of these specific provisions for the acquisition of water rights precludes any inference that Congress intended the federal law of mining claims to guide any acquisition of water rights. The Court of Appeals, however, was apparently unaware of this provision and of the decisions of this Court concerning them. Contrary then, to the Court of Appeals belief that it would be advancing the purposes of the mining laws, instead, it's interpretation of the mining laws would defeat what this Court recognized as Congress' clear intent that the acquisition of such rights should be governed by the state and local laws.

Congress was well aware that the Western States were gradually developing a system of water laws that was especially suited for the needs of that arrid region. And Congress, obviously, intended that water rights on the public domain would be acquired in accordance with this especially suitable system.

We believe, therefore, that a reading of the mining laws, as a whole, leaves no doubt as to Congress' intent to

treat water rights as separate and distinct from the right to mine valuable minerals. But even if these provisions were unclear, any possible doubt on this score has long since been removed by the administrative decisions of Department of the Interior which is charged with regulating the acquisition of rights in the public lands.

QUESTION: Mrs. Beale, do you think your position here is fully consistent with the position the United States has taken before, say, in the original Number 8 where is involved a Reclamation Service dam in California, and the question is whether or not -- one of the questions was whether the United States to get its water rights must comply with state law?

MRS. BEALE: I think the position here is completely consistent. The question of whether federal water rights --

QUESTION: You mean the Congressional acts up to date shouldn't be understood to bind the United States?

MRS. BEALE: No, I don't think that --

QUESTION: Or the Reclamation Service.

MRS. BEALE: I don't mean to draw that distinction. What I am saying is -- or what I mean to say -- is that in the mining laws and in the Desert Land Act Congress is speaking to the acquisition of private rights, the rights of homesteaders, the rights of individual --

QUESTION: Why wasn't it speaking to how the United States should get its rights?

MRS. BEALE: Well, as this Court recognized in the California Oregon Power Co. case, the United States, initially, had, in the public land states, rights -- ownership rights of not only the land but the water. And in the California Oregon Power Co. case, this Court said that it viewed the intent of Congress as intending to give out land patents, on the one hand, under one system, under the mining laws, under the agricultural entry laws, under the Desert Land Act, and also to provide a way whereby private rights to waters on the public domain could be acquired.

That seems to me to be a different question from what happens when the Federal Government needs to use certain water rights. If they have not been given out to private individuals, then the questions are entirely different, I would think.

QUESTION: In any event, if I understand your argument, it is that however this case is decided it has no relevant impact upon that other litigation.

MRS. BEALE: I believe that is correct, yes.

QUESTION: Certainly a private claimant, for example, would have no claim for water under the implied reservation doctrine, although that was not relied upon by the Government in the original Number 8. But that's certainly an example of a way a governmental right might be different from a private right.

MRS. BEALE: It certainly is. And I think the

reservation doctrine is based upon the notion that Congress had those water rights at the time that it set aside and reinforced certain purpose. Congress had those water rights. No private party is in the same position. And it is a question of interpreting the intent of Congress in the mining laws as to how private rights would be acquired, which is really quite separate from the reservation.

QUESTION: Why isn't it arguable, though, that by granting mining claims the United States impliedly grants water rights, or reserves them for that purpose?

MRS. BEALE: If Congress had not expressly provided in the mining laws that right acquired under state and local law -- water rights, excuse me -- acquire under state and local law -- should be acquired under state and local law and would be recognized by the Federal Government, and if Congress had not in other statutes, such as the Desert Land Act, indicated that there was this division, that might have been a possible interpretation.

If the Court were to view the provisions as ambiguous, however, the decisions of the Department of Interior, beginning in the 1880s, shortly after the adoption of the Mining Law of 1872, resolved any doubt, the Department held, unambiguously, that water claims could not be patented under the mining law, but must be acquired, instead, under state law.

So that, to the extent that the Court might find the

statutes ambiguous, that doubt, I would say, has long since been resolved by the consistent interpretation of the Department charged with administering the public land laws. And that view of the statutes was reaffirmed as recently as 1976, in a comprehensive decision which we have reprinted in our petition for certiorari. We believe that given the fact that this long-standing interpretation has prevailed for a century and has been the basis for a settled system of property rights, it should be virtually conclusive at this point.

The recent decision of the Interior Board of Land Appeals on this point, to which I referred, convincingly demonstrates the soundness of that Department's view. They relied not only upon the theory of this Court in the California Oregon Power Co. case, which looked to the structure of the mining laws themselves and the fact that Congress had provided, on the one hand, for the acquisition of water rights, and on the other hand, for the acquisition of the right to mine valuable minerals. But the Board also took a very common-sense view of Congress' intent in using the term "minerals." It recognized that if Congress had intended the statute, the mining laws and the use of the term "minerals" to be given the broadest possible definition of the term, such as when one speaks of the division of all matter into animal, vegetable and mineral, and intended that all matter that could be classified as mineral in that sense, to be locatable under the mining laws, then all the

public lands would be mineral lands. If this were so, there would have been no need for separate provisions in the many public land laws dealing with non-mineral lands, permitting agricultural entry, and so forth.

Congress clearly, as the Interior Board recognized, could not have intended the term "mineral" to be given such a broad definition, which would make nonsense of the mining laws and of so many of the other public land laws.

The Board also noted -- and this is an important consideration -- that the location of water, as a mineral, would invite the widespread use of the mining laws by persons who were seeking public lands for other purposes, who would attempt to take advantage of the widespread occurrence of water and the relative ease with which mining claims may be patened.

QUESTION: Isn't that one reason that Congress acted the way it did in 1955 to eliminate sand and gravel patents, is that people were really getting the patents not for the valuable sand and gravel but because they wanted the acreage?

MRS. BEALE: That's precisely correct. The legislative history of that provision indicates clearly that the location of sand and gravel claims were being misused and that they were being used to acquire land for residential purposes, and all sorts of purposes not comprehended in the mining laws. And the Interior Board of Land Appeals concluded that the very same abuses would be invited if water, itself, which is of such

common occurrence, could be located under the mining laws. It was relatively easy to acquire a mining claim and it would invite abuse for that reason.

Now, we have no figures available that would tell precisely how many acres of public land might contain water which could be discovered, but it seems relatively clear that millions of acres of public land would be affected.

We believe that setting aside the long-established administrative and judicial construction of the mining laws would throw established rights into question and would, therefore, completely unsettle the law of water rights throughout the western states.

The Court of Appeals decision, because it does not acknowledge the existence of the water rights provisions adopted as part of the mining laws, does not give any hint whether that court's opinion should be viewed as holding that the location of mineral claims to water rights is the exclusive method by which private water rights on the public domain could be obtained.

Perhaps, it might have intended that there was to be an alternative method to state laws, but if that decision were interpreted as holding that the only way that one could acquire water rights, on the public domain, is under the mineral mining laws, then private rights long since considered throughout the West would presumably be invalidated.

Respondent seeks to avoid this obviously undesirable result and to interpret the Court of Appeals' decision somewhat more narrowly, arguing that the mining laws should be viewed as merely an alternative to state procedures. However, Respondent offers no evidence that Congress actually intended to create such an unmanageable, dual system. Harmonizing the rights acquired under the two systems would be a difficult task and one that would surely generate extensive litigation. Moreover, the mining laws were never designed to allocate water rights and we believe they are ill suited to this task.

Respondent has failed to suggest any reason why this Court should reverse all prior judicial and administrative interpretations of the mining laws to reach such a result.

We believe that the administrative interpretation of the mining claims, the decisions of this Court and examination of the structure of the mining laws themselves, each compels the conclusion that Congress did not, in fact, intend water rights on the public domain to be located under the federal mining laws. But rather that it intended that such rights would be acquired pursuant to state and local laws.

We, therefore, respectfully submit that the decision of the Court of Appeals should be reversed, insofar as it holds that the water on Claim 22 was subject to location under the mining laws.

MR. CHIEF JUSTICE BURGER: Mr. Levenberg.

ORAL ARGUMENT OF GERRY LEVENBERG, ESQ.

ON BEHALF OF THE RESPONDENT

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

In our view, the Government makes too much of Sections 9 and 17 of the 1866 and 1870 provisions of the mining laws.

QUESTION: Well, didn't this Court make quite a bit of them in Beaver Portland Cement case, written by Justice Sutherland who is, himself, regarded on an expert on western water law?

MR. LEVENBERG: Your Honor, he certainly was so regarded. He discussed those provisions at some length in the opinion, as we acknowledge in our brief. But I think that a fair reading of that decision suggests that the Court did not, in fact, hold that the sole means by which water rights could be obtained under the mining laws was by appropriation under the state laws.

QUESTION: Well, do you think it is unfair to say that most western lawyers involved in water law have read that decision to mean that those two acts severed the water from the land and left the water to acquisition by state law?

MR. LEVENBERG: I don't think that is unfair to say either, Your Honor.

QUESTION: But you now say that perhaps those lawyers were wrong in reading the decision that way?

MR. LEVENBERG: What we try to say is that, as we set forth in the brief, especially at pages 16 through 18, that what was involved in Beaver Portland were not claims under the mining laws of 1866, 1870 or 1872. There were two separate claims to water by two private parties, one under the Homestead Act of 1862, the other under the Oregon State Water Code. And the Court concluded and held in that case what the provisions of the Desert Land Act meant. It did not hold, we submit, that the only means by which water could be obtained under the mining laws was by state appropriation.

QUESTION: But if the Desert Land Act severed the water from the land, didn't that mean that no further water could be acquired in the same way that you could acquire other mineral patents?

MR. LEVENBERG: Insofar as Desert Land Act entries, Homestead Act entries, Preemption Act entries were concerned, that is precisely what Justice Sutherland said. He was a man who, as you pointed out, wrote quite carefully. There is no indication anywhere in Justice Sutherland's opinion,and the Government points to none, which states specifically that with respect to claims under the mining laws -- and that's what's involved here -- with respect to those claims, the sole means by which water may be obtained is under state appropriation. There was no edict from this Court, if you please, which said henceforth Mining Act patents shall sever land from water.

QUESTION: Were you troubled at all by the Ninth Circuit's failure to refer at all to the Beaver Portland Cement case and its opinion in this case?

MR. LEVENBERG: Obviously, Your Honor, we would have preferred for the Ninth Circuit to spell out in greater detail the basis for its holding. We do wish to make it very clear that we are not contending, as the Government appears to attribute to us, that with respect to vested water rights, pursuant to Section 9 of the 1866 Act and Section 17 of the 1870 Act, that rights which have already vested and rights which vest tomorrow should not be protected. That is not our position. Our position, very simply, is that the plain language of the Act of 1872, which states that "all valuable minerals" -- all -- "may be discovered" is what Congress meant to say and, in the absence of a withdrawal by Congress, as you pointed out, and as the Government points out, it did in 1955 when it removed certain common variety minerals -- In the absence of a withdrawal from the broad provisions of the 1872 Act of specified minerals, that that general grant of authority prevails.

Our position is that with respect to rights that have already vested -- and that's the language of Section 9, and that's the language of Section 17 -- rights which have vested and accrued, those rights remain vested and accrued. And nothing that this Court could decide in this case, affirming the lower court's opinion, would derogate from those vested

rights.

The Government argues that it would leave an unmanageable system. The Government does not explain why the system is any more manageable today, in circumstances where a state appropriation, with respect to a given portion of water that runs during particular times of the year or particular specified flows and leaves to be claimed what is left of that residuum of rights under state law, is any more manageable --

QUESTION: But, of course, the two tests are quite different, though, aren't they? If you are talking about how you acquire a mineral claim, it's a prudent man thinking that there is valuable mineral and place on the claim.

MR. LEVENBERG: Correct.

QUESTION: And on your water claim, under most western state appropriative systems, it doesn't depend upon value, it depends upon prior and beneficial use.

MR. LEVENBERG: Yes, Your Honor, that's absolutely correct.

Our point is, again in response to the parade of horribles that the Federal Government sets forth in this case that would prevail if we prevail, the answer to that is, in our view, that the very requirement that a demonstration be made that the mineral is valuable, the very requirement of the prudent man test, the very requirement of the marketability test is sufficient to insulate claims that would lead to abuse.

We have no quarrel with the proposition that, of course, the tests are different under a state appropriation and under the mining laws of 1872. But that does not, in our view, lead inexorably to the conclusion, as the Government would have it, that when Congress said in 1866 and in 1870 that we will respect those water rights that have vested and accrued under state law, that it was saying that was the only manner in which water rights could be obtained. We don't believe there is support for that. And we don't think that Mr. Justice Sutherland and this Court decided that issue in the Beaver Portland case.

The argument that the Government makes about the long-standing interpretation of the Interior Department does not take into account that, as this Court has made clear, while construction of legislation by departments charged with administering the legislation is, indeed, entitled to deference. This Court is not, thereby, permitted to abdicate its function of reviewing the wisdom and correctness of that interpretation. And, in particular, I cite to the Court its decision in an opinion by Justice Harlan in Zuber v. Allen, 396 U.S. 109 at 328.

The abuse argument that is relied upon so heavily by the Government, it seems to me, was, indeed, answered, Mr. Justice Rehnquist, by what Congress did in the 1955 Act. When it was confronted with circumstances which demonstrated that abuses of the mining law had been taking place, the

Congress responded. And it did so on the basis of evidence before it, not on the basis of allegations about the horrible things that will happen, that might happen, that could happen, if this Court interprets the law as it appears to us to be written.

QUESTION: Do you think there have been many mining patents obtained on the basis of discovery of water?

MR. LEVENBERG: No, sir.

QUESTION: Well, then, really, that's all the Government has to go on in a case like this. In the case of the sand and gravel amendments in '55, they had -- you know, sand and gravel were recognized mineral -- patentable minerals -- and they had record of abuses. Here, apparently, your client is the first one to have successfully tried this one.

MR. LEVENBERG: That appears to be the case. I am suggesting to you, sir, that the argument that a statute should be interpreted in a given way, in order to avoid the prospect of abuse, should not prevail here. And that that is an argument that ought to be presented to the Congress of the United States when, as and if facts are developed to demonstrate to the satisfaction of that political body that its law ought to be amended.

QUESTION: Well, did the Ninth Circuit arrive at this conclusion -- Did it take the position you presented to it?

MR. LEVENBERG: Your Honor, as the Government points out, neither party briefed or argued.

QUESTION: So your client came upon this by accident -- at least inadvertently.

MR. CHIEF JUSTICE BURGER: We will resume there at 1:00 o'clock, counsel.

(Whereupon, at 12:00 o'clock, noon, the Court recessed to reconvene at 1:00 o'clock, p.m., the same day.)

AFTERNOON SESSION

(1:01 p.m.)

MR. CHIEF JUSTICE BURGER: Counsel, you may continue.

ORAL ARGUMENT OF GERRY LEVENBERG, ESQ., (Resumed)

ON BEHALF OF THE RESPONDENT

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

At the buzzer, Mr. Justice White, you were asking whether we came to this claim by inadvertence or accident.

As indicated, the issue that is briefed here was not briefed below, but I do invite to your attention page 15A of the Appendix to the Government's petition for certiorari, a description by the court below of the nature of our location notices. And I quote: "Each of the location notices, covering Claims 1 through 22, described a 'piece of mineral-bearing ground as a placer claim' as distinguished from a claim location of any particular mineral, either surface or underground, within that tract of ground."

But it is true that the matters that are being briefed and argued here were not briefed or argued below.

I would like, if I may, to address a more fundamental question that you posed this morning to counsel for the Government, and that is whether the Government's position here is inconsistent with the Government's position in California v. United States. The Government, not surprisingly, says, of

course, it isn't. We think it clearly is.

Government argues in California v. United States that Section 8 of the Reclamation Act, which it describes in its brief in this case as similar in nature to Sections 9 and 17 of the mining laws -- the Government takes the position in California v. United States, as it has in virtually every case involving Section 8, that in spite of the language written by Congress in the Reclamation Act, protecting the state's concerns and interests with respect to water --

QUESTION: And despite the Desert Land Act.

MR. LEVENBERG: And despite the Desert Land Act -- that a narrow reading of Section 8 is required; whereas, in this case, the broadest conceivable reading of Section 9 and Section 17 is required.

QUESTION: But your case doesn't turn, anyway, on Section 8 of the Reclamation Act.

MR. LEVENBERG: No, sir, it does not. It turns on the laguage in Section 1 of the Mining Law of 1872, which says all valuable minerals, except as otherwise --

QUESTION: It doesn't turn at all on the Reclamation Act of 1902?

MR. LEVENBERG: No. We are not basing our claim on the Reclamation Act. We do address in our brief what we regard to be the Government's inconsistent position with respect to what it now calls an unmanageable dual system that would be

brought about by the decision of the Court of Appeals below. And we suggest to you, most respectfully, that the unmanageable duel system that the Government so fears, as a result of this case, it fosters and presses in particular in the reservation doctrine cases and in particular in the case that is pending before this Court and will be argued next week, New Mexico v. United States.

QUESTION: Now, the reservation doctrine is not involved in California v. United States.

MR. LEVENBERG: No, it is not; to the best of my knowledge it is not.

I was moving on from what we regard to be the inconsistency of the Government's position with respect to its attitude that Section 8 of the Reclamation Act, although it purports to protect state interests, must be read very narrowly; whereas, the language of Section 9 and Section 17 of the Mining Law, the Government argues should be read in its broadest terms, and going beyond, as we see it, the protection of vested rights.

The Government, in its brief in this case, at page 20, in a footnote, refers to the Federal Power Act as another example of the kind of act that was based upon the sort of concerns the Government perceives in Sections 9 and 17 of the Mining Law. The fact is that this Court in First Iowa made it very clear -- and this Court in Arizona v. California confirmed that Section 27 of the Federal Power Act, upon which the Government -- to

which the Government adverts in its brief, was no more than a savings clause -- saving, and I now quote from Footnote 92 of this Court's decision in Arizona v. California: "See First Iowa where this Court limited the effect of Section 27 of the Federal Power Act which expressly saved certain state laws to vested property rights."

That's precisely the position that we take here. That's what is at issue here, in our judgment, the extent to which state water rights are to be protected under the Mining Laws of 1872, as Congress has so clearly said are vested state rights. And we do not argue, as the Government would like to attribute to us, that those rights must have vested prior to 1866 or prior to 1870. We say that they could vest tomorrow, so long as they vested prior to the discovery of water as a locatable mineral, under the law of 1872.

Now, with respect to the Government's position, insofar as the reservation doctrine is concerned, we think that it is worth inviting to the Court's attention, contrary to the argument that was made earlier by the Government of no inconsistency, what the holder of mining claims in the Gila Forest that is involved in the New Mexico case to be argued next week, views the Government position in that case as contrasted to the Government's position articulated in its brief in this case.

Specifically, on page 23 of the amicus brief, on behalf of Molly Corp. (?) in 77-510 to be argued next week, it is

stated: "In Charlestone the Government argues that the decision of the Court of Appeals in that case 'would cast doubts on right long thought to be established under state and local law and would unsettle the law of water rights in the western states.'"

That's a quote from their brief in this case, the Government's brief.

We agree, but find the Government's position there to be irreconcilable with its position in this case. Here, the Government argues, that is, in New Mexico, that private water rights which have evolved over the last 100 years to be subjected to an undefined reserved water right of the United States, citing the U.S. brief in the New Mexico case at page 30. Although the Government does not address the consequences of its assertion, it follows from the Government claim for reserved water for the present and future needs -- citation of the Government's brief -- of the federal course for "aesthetics, recreation, etcetera, that the very same rights which the Government seeks to preserve in Charlestone will be seriously undermined if its position here is accepted."

We think that it is quite clear that the dual system, the dual management system, which the Government contends would be brought about by affirmance of the Court of Appeals' decision below is here. It's already here. The Government makes a reservation claim of an unquantified, undetermined amount. There are

interests that it seeks to protect in that case that are private interests. The Government's brief there points out that it has issued 1600 permits to cattle raisers to roam 29,000 cattle through the forest. Those are private rights.

The Court of Appeals below did not invent or create the dual management system. Congress did, with respect to mining rights, in the 1872 law. Congress said all valuable minerals may be subject to location and the lands they are on subject to purchase.

QUESTION: You could be quite right in your argument, I suppose, about the relationship between the mining laws and the Desert Land Act and still lose just because water isn't a mineral.

MR. LEVENBERG: That's conceivable. That is conceivable.

QUESTION: How about that question?

MR. LEVENBERG: Well, we think that --

QUESTION: The Department of Interior's position has been consistently that water isn't a mineral. It isn't because water rights are subject to local law, or anything. It's because water isn't a mineral.

MR. LEVENBERG: Well, I'm not sure that that's the case, Mr. Justice White. It strikes --

QUESTION: Has the Department of the Interior ever taken the position that water is a mineral, but it just so happens

that it is not disposable of under the mining laws?

MR. LEVENBERG: No.

QUESTION: They have never said water is a mineral?

MR. LEVENBERG: Not to the best of my knowledge. But they have made the decision, so far as I am aware, in the context of reference to Section 9 and Section 17, that water rights are something to be taken care of --

QUESTION: That may be so, but there is still the question of whether water is a mineral.

MR. LEVENBERG: That's true.

QUESTION: What about that question?

MR. LEVENBERG: We think that while -- as we point out in our brief -- the judicial authority on that is really quite sparse. There is not very much on it.

QUESTION: So why do we have to get to the argument about water rights and mining laws? What about the threshold question about whether water is a mineral?

MR. LEVENBERG: We argue -- and I believe that there is sound authority for our position -- that water is a mineral, that it was regarded by the Congress as a mineral and that the question whether water is a locatable mineral really depends upon whether those who claim it can demonstrate that it is valuable -- which is a key word, as we see it, in the 1872 law -- and that demonstration and that issue have very well articulated standards that have been set forth by this Court and

followed by the --

QUESTION: Were gas and oil locatable minerals?

MR. LEVENBERG: Gas and oil are dealt with separately under separate statutes.

QUESTION: I know, but is it a mineral -- are they minerals, within the meaning of that law?

MR. LEVENBERG: Of the Mining Law of 1872?

No, because the Mining Law of 1872 begins with the language, "except as otherwise provided." And then there are specific, identifiable statutes that deal with the discovery of gas and oil, as there are with respect to the discovery of coal, potassium, phosphate and a number of other minerals.

QUESTION: Well, your answer is not no, but yes. Gas and oil probably are minerals, but not dealt with under this statute.

MR. LEVENBERG: I am sorry. But not locatable minerals under the Mining Law of 1872, that's correct.

QUESTION: Would you say that earth qua earth is a mineral?

MR. LEVENBERG: Well, the Government argues that that is the inexorable consequence of this Court affirming the Court of Appeals decision below. No, I would not say that earth qua earth is a locatable --

QUESTION: Why isn't it? Because it isn't a mineral?

MR. LEVENBERG: Well, we are not at all -- The standard

still is whether it is a valuable mineral, and whether in the context of the claim that has been made --

QUESTION: I just bought some soil the other day and it is pretty expensive.

MR. LEVENBERG: I am sure that it was, but we do not claim, nor do you have to decide in this case that earth is a locatable mineral.

QUESTION: But you've got to show us some way to tell why water is and earth isn't, other than just saying that it has to be valuable, because certainly by the standard of value you can say that a 20-acre placer claim,consisting solely of earth, is valuable by the prudent man standard.

QUESTION: I asked the question what Congress intended by the word "mineral." At least that's one question. It might not have intended to include water, even if water is a mineral.

MR. LEVENBERG: That is certainly conceivable, Your Honor. The fact is that there is very, very little in the legislative history of the 1872 mining law.

QUESTION: Wouldn't it be reasonable, as the Court has often said, that we read legislation in terms of what -- of the ordinary meaning given by ordinary people to the words used at the time they were used? In 1872, did they regard water as a mineral?

MR. LEVENBERG: There is no evidence that water was not regarded as a mineral, Mr. Chief Justice.

QUESTION: Well, is there any evidence that it was regarded as a mineral?

MR. LEVENBERG: Well, I think that it is reasonable to argue that the attention that the Congress devoted to water by excluding those vested water rights, within the mining law, is evidence that Congress, indeed, regarded water to be --

QUESTION: How do most dictionaries define "minerals"? Do they include water?

MR. LEVENBERG: I am afraid I can't answer that.

QUESTION: I can give you a little help. I looked at five of them and none of them included water and all of them had a common denominator of solids as --

MR. LEVENBERG: Well, the Ninth Circuit, again, in another case in which cert was denied in this Court in the Geothermal Steam case, in fact, concluded that water is a mineral. That is a case in which the Ninth Circuit opinion is being challenged here. It was relied upon. That's the Union Oil case.

I don't know what the dictionary says.

QUESTION: Sometimes there are minerals in suspension in water or minerals in suspension in other fluids, but does that make water, per se, a mineral?

MR. LEVENBERG: No, I would not think that it does.

I think that the best evidence that there is that the Congress regarded water as a mineral in the mining laws is the

fact that it was concerned to be sure that those local customs of the states and territories, insofar as the acquisition of water rights to that time were protected, in the 1866 and the 1870 Act.

I would leave it there.

MR. CHIEF JUSTICE BURGER: Very well.

Mrs. Beale, do you have anything further?

REBUTTAL ORAL ARGUMENT OF SARA S. BEALE, ESQ.,

ON BEHALF OF THE PETITIONER

MRS. BEALE: Just one or two very brief points.

First of the Court's question as to generally what is a mineral. The Government would contend that there is no one single definition of the term "mineral" for all purposes. I would point out to the Court that originally the mining laws -- or at least at some point in their history -- were construed to apply to oil and gas which were later then dealt with more specifically in the mineral leasing laws.

QUESTION: Oil was a mineral, for those purposes?

MRS. BEALE: It is my understanding that oil was considered a mineral.

QUESTION: If one proceeds on the childhood game that everything is animal, mineral or vegetable, certainly water is a mineral, isn't it?

MRS. BEALE: That's correct. And we think that kind of a very broad definition, as the Interior Board of Land Appeals

said, just makes no sense in this context.

I would think that we would have to agree that within the broadest definition of the term "mineral", as in animal, vegetable and mineral, water is included, dirt is included, and we don't think that there is any suggestion or any evidence that that's what Congress was thinking of when it allowed the exploration and discovery of valuable minerals.

QUESTION: So, you think you must go to some other statutory plan to get water out from under the word "mineral"?

MRS. BEALE: I don't think that is quite the way I would phrase it. I think when we look at the mineral statutes, the mining statutes, themselves, we see water treated separately.

QUESTION: What if there were no Desert Land Act?

MRS. BEALE: And no provision in the 1866 and 1970 mining laws, themselves? Then I would think that we would rely upon the Interior Board of Land Appeals' construction. I would think that would be very weighty as to how --

QUESTION: And they just say water wasn't intended to be a mineral?

MRS. BEALE: That's exactly correct, from the 1880s on in a whole series of decisions, which we find very persuasive.

QUESTION: What do they say about mineral water?

MRS. BEALE: The Desert Springs case says that that is not a mineral.

The only other point that I would like to draw to

the Court's attention is that Respondent has tried to emphasize the narrowness of this decision and the fact that if the mineral laws were construed as an alternative way of acquiring water rights that really wouldn't unsettle the law, the Western Water Law, it wouldn't throw established rights into question, and so forth. But the very point upon which the Court of Appeals and Respondent rely is the fact that a mining claim need not specify what mineral it is locating for. As the claims here didn't indicate sand and gravel or water allow someone later -- these claims were located in 1942 and now, at this late date, it is possible for Respondents to claim that they were locating for water. There are many claims outstanding that were located in 1940-1950, whenever, and it would be possible now to attempt to validate those on the theory that water was present.

And one can imagine, of course, the difficulties that trying to harmonize those rights with the rights acquired under state law would cause.

The final point is that the Court of Appeals' theory, at least, was that the value of the mineral deposits here was shown by the fact that water has an intrinsic value in the desert region. And it seems to me if that construction were adopted it would substantially lessen the impact of the prudent man and marketability tests, and so forth. If you could find water, you could argue under this decision that your claim, simply by showing that water was present in an arrid area, would

show a valuable discovery.

QUESTION: Mrs. Beale, in order to decide this case, we don't have to say, in front of God and everybody else, that water is a mineral, do we?

MRS. BEALE: That water --

QUESTION: Is a mineral. Do we?

MRS. BEALE: No. Our contention is that water is not a locatable mineral under these laws, under the mining laws.

If there are no other questions --

MR. CHIEF JUSTICE BURGER: Thank you, counsel.

The case is submitted.

(Whereupon, at 1:18 o'clock, p.m., the case in the above-entitled matter was submitted.)