

ORIGINAL

# OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 81-1686

TITLE JAMES G. WATT, SECRETARY OF THE INTERIOR, ET AL.,  
Petitioners v. WESTERN NUCLEAR, INC.

PLACE Washington, D. C.

DATE January 17, 1983

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1                   IN THE SUPREME COURT OF THE UNITED STATES  
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3   JAMES G. WATT, SECRETARY OF THE   :  
4   INTERIOR, ET AL.,                   :  
5                                   Petitioners   :  
6                   v.                   :       No. 81-1686  
7   WESTERN NUCLEAR, INC.               :  
8   - - - - -x  
9                                   Washington, D.C.  
10                                  Monday, January 17, 1983  
11       The above-entitled matter came on for oral argument  
12   before the Supreme Court of the United States at 10:01  
13   a.m.  
14   APPEARANCES:  
15   JOHN H. GARVEY, ESQ., Washington, D.C.; Office of the  
16   Solicitor General, Department of Justice;  
17   on behalf of the Petitioners.  
18   HARLEY W. SHAVER III, ESQ., Denver, Colorado;  
19   on behalf of the Respondents.  
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P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments first this morning in Watt against Western Nuclear, Incorporated. Mr. Garvey, you may proceed whenever you are ready.

ORAL ARGUMENT OF JOHN H. GARVEY, ESQ.,  
ON BEHALF OF PETITIONERS,  
JAMES G. WATT, SECRETARY OF THE INTERIOR, ET AL.

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

The issue in this case is whether gravel deposits which are susceptible to commercial exploitation are reserved to the United States under the Mineral Reservation and the Stock-Raising Homestead Act. Respondent, Western Nuclear, owns a uranium mine about 12 miles south of Jeffrey City, Wyoming, a company town where its workers live. It also mills the uranium a mile or two northeast of the town.

From the time in the early 1950s when Western Nuclear first located in this area, it acquired gravel for its various needs in Lander, Wyoming, about 65 miles away, and in Casper, Wyoming, about 85 miles away.

In 1975, finding that method of acquisition a little expensive, it acquired part of some land about a mile north of Jeffrey City where there was a deposit of



1 gravel. Respondent thereafter mined about 43,000 cubic  
2 yards of gravel from that deposit, or about 60,000 tons,  
3 which it used for making cement to line the sides of its  
4 mineshafts, for concrete aggregate for lining the  
5 streets and the sidewalks in Jeffrey City and for  
6 building roads on which to haul its ore.

7           The land on which the gravel deposit was  
8 located had been patented in 1926, under the  
9 Stock-Raising Homestead Act.

10           QUESTION: At that time had the modified  
11 definition been reached by the Interior Department?

12           MR. GARVEY: It was in 1929 that the --

13           QUESTION: '29.

14           MR. GARVEY: -- Department of the Interior  
15 decided Layman against Ellis. The Homestead claim which  
16 was at stake in Layman against Ellis had been first  
17 located in 1925.

18           When the Bureau of Land Management learned of  
19 the appropriation of the gravel deposit, it informed  
20 respondent that its appropriation of the gravel was a  
21 trespass against the mineral interests of the United  
22 States reserved under the Stock-Raising Homestead Act  
23 and, after undertaking an appraisal of the property,  
24 concluded that respondent was liable in the amount of  
25 \$13,000 for royalties for the gravel taken.

1           QUESTION: Mr. Garvey, was this the first time  
2 that the government had brought such an action against  
3 claimant or user of gravel under the Farmers and  
4 Stockmen's Act -- Stockmen's Homestead Act?

5           MR. GARVEY: To my knowledge, it was the first  
6 such action, although I should say that the history of  
7 the government's enforcement of this -- of these rights  
8 is a little like what Mark Twain said about Wagner's  
9 music, it's actually better than it sounds.

10          MR. GARVEY: Until 1955 these kinds of gravel  
11 deposits were not sold but were locatable under the  
12 Mining Act of 1872 and they --

13          QUESTION: Until when?

14          MR. GARVEY: 1955. And so anybody who wanted  
15 to acquire these deposits could just go on the land and  
16 take them with -- after making accommodations with the  
17 homesteader.

18          After 1955, in fact, in 1957, promptly after  
19 the Common Varieties Act, which permitted sale of these  
20 deposits was passed, the Solicitor of Interior in a  
21 Solicitor's opinion addressed to the Director in Denver  
22 said that passage of this act shouldn't be understood to  
23 have relinquished the government's interest in gravel  
24 deposits on Stock-Raising Homestead Act lands. All that  
25 the Common Varieties Act did was to change the method of

1 disposal from location to sale.

2           And although it's difficult to say to what  
3 extent the people seeking gravel deposits on  
4 Stock-Raising Homestead Act lands actually get  
5 permission of the Department because of the way the  
6 records are kept in the resource area -- there isn't any  
7 -- there isn't any separate line on the form that they  
8 fill out to say what kind of lands gravel deposits are  
9 taken from -- I notice that in the Trujillo case, on  
10 which respondent in the Court of Appeals relied, that  
11 the State of New Mexico in 1971 had acquired a permit  
12 from the Bureau of Land Management to acquire gravel  
13 deposits on Stock-Raising Homestead Act lands.

14           QUESTION: Well, I suppose a lot of holders of  
15 land patented under the Stock Raisers Act simply go  
16 ahead and use the gravel, or have in the past, on the  
17 assumption that it's not a mineral.

18           MR. GARVEY: That's entirely possible. And  
19 it's also the case that the enforcement resources of the  
20 Bureau of Land Management are not such that they are  
21 able to police the use that's made of these deposits.

22           QUESTION: So, so far as you know, from the  
23 time of 1916, when the Stock Raisers Act was passed,  
24 until the bringing of this action was the first time the  
25 government had ever brought an action in court asserting

1 that it retained title to gravel because it was a  
2 reserved mineral under the Stock Raisers Act?

3 MR. GARVEY: So far as I know, that's correct.

4 QUESTION: But is the government's position  
5 narrow, that that -- that on these, where the government  
6 reserves minerals on this kind of land, that it's a  
7 trespass for the rancher or owner to use any gravel?

8 I thought you were now limiting --

9 MR. GARVEY: In the District Court --

10 QUESTION: -- your claim to commercial  
11 deposits.

12 MR. GARVEY: In the District Court -- it's not  
13 that we are now limiting our claim. In fact, that has  
14 been the issue right along. In the District --

15 QUESTION: So -- so anyway, you -- whenever  
16 you made your position clear, it is now your position at  
17 least that the -- it's only commercial deposits that is  
18 at issue?

19 MR. GARVEY: That's correct.

20 QUESTION: So you mean commercial use.  
21 Suppose it's a commercial deposit.

22 MR. GARVEY: But the stock-raising homesteader  
23 makes use of it?

24 QUESTION: Yes. But not commercially.

25 MR. GARVEY: That was -- that issue was left



1 open in the District Court, and I am not in a position  
2 to concede on behalf of the Department that those  
3 deposits don't --

4 QUESTION: Well, not --

5 MR. GARVEY: -- belong, although if -- it may  
6 be that the government could permit free use to the  
7 Stock-Raising Homestead Act --

8 QUESTION: Well, there are a lot of  
9 noncommercial deposits of gravel around, and the --  
10 certainly, you concede that the rancher's or  
11 homesteader's use of that gravel is permissible?

12 MR. GARVEY: Indeed. If the deposit --

13 QUESTION: As a matter of fact, it doesn't  
14 even belong to the government.

15 MR. GARVEY: That's right.

16 QUESTION: Well, has the federal mining law  
17 ever treated something that was arguably a mineral as a  
18 mineral when it's found commercially but not a mineral  
19 when it's not found or used commercially?

20 QUESTION: Well, you can't even get a -- you  
21 can't patent your mining claim unless it's a commercial  
22 deposit.

23 MR. GARVEY: Unless it's -- unless it is a  
24 valuable mineral. Under the mining law --

25 QUESTION: Yes, but that -- that depends on

1 whether you can properly locate. That doesn't -- the  
2 definition of mineral has never turned on whether  
3 something --

4 QUESTION: No, no.

5 QUESTION: -- was commercially used.

6 MR. GARVEY: That is correct, although you  
7 have to bear in mind that under the mining law -- what  
8 the Mining Act of 1872, for example, is talking about  
9 deposits on -- on lands which the government owns in  
10 fee, so that it's possible to speak of minerals without  
11 taking any account of how much of the mineral is on the  
12 land.

13 On the other hand, where the government has  
14 severed the surface estate from the mineral estate, it's  
15 difficult to speak of -- to say that the government has  
16 retained an interest in all minerals in the land simply  
17 because it would be virtually impossible for anybody on  
18 the surface to make any use of the surface without  
19 somehow interfering with some of the minerals that --

20 QUESTION: Well, but under the 1906 Act, or  
21 '16 Act, there certainly have been numerous instances,  
22 have there not, of entries by private individuals on  
23 land that was open -- but where the subsurface was open  
24 to entry who proposed to become mineral claimants?

25 MR. GARVEY: Certainly.

1           QUESTION: And there as in other branches of  
2 the mineral, I have never known of a court case that  
3 said the definition of a mineral turns on the degree to  
4 which it's commercially used.

5           MR. GARVEY: We don't maintain that the  
6 definition of a mineral turns on whether it's  
7 commercially usable. We rather say that the minerals in  
8 which the government is interested under the  
9 Stock-Raising Homestead Acts are minerals which it is  
10 able to dispose of separately and which have some use  
11 apart from the land on which they're found.

12          QUESTION: Well, it is your contention that  
13 the reservation of minerals under the 1916 Act included  
14 all gravel?

15          MR. GARVEY: I don't know whether the Court  
16 has to reach --

17          QUESTION: Well, I am interested in reaching  
18 it right now by a yes-or-no answer from you, if I could.

19          MR. GARVEY: Okay.

20          QUESTION: You have already answered it once,  
21 and you --

22          MR. GARVEY: It's -- it's a little bit more  
23 complex. As the passage of the Materials Act in 1947  
24 made clear, there were some kinds of gravel that were  
25 locatable under the Mining Act and some kinds of gravel

1 that were not. Essentially, the distinction between the  
2 two types was that the kinds of gravel which were useful  
3 for making concrete for paving, for making cinder block,  
4 were reserved. The kinds of gravel which were useful  
5 for purposes of fill or riprap -- that is to say, large  
6 chunks six or eight inches in diameter -- were not  
7 disposable under the Mining Act. Those kinds were not  
8 considered minerals.

9           The reason I said the Court needn't reach that  
10 question in this case is that the kinds of gravel which  
11 respondent was using are the kinds of gravel that were  
12 disposable under the Mining Act. Those other kinds  
13 which are useful for purposes of fill or for riprap are  
14 a question which the Court needn't reach in this case.

15           QUESTION: Well, why do you say one is  
16 "disposable" under the Mineral Act and the other not?

17           MR. GARVEY: One was locatable as a mineral  
18 under the Mining Act of 1872. The presence of that kind  
19 of gravel on the land in deposits sufficiently valuable  
20 to justify a location would permit somebody to go on the  
21 land with respect to location.

22           QUESTION: Mr. Garvey, with respect to that  
23 kind of gravel, what is your answer to Justice  
24 Rehnquist's question?

25           MR. GARVEY: I would say that the



1 Stock-Raising Homestead Act leaves open the possibility  
2 that that sort of gravel can be considered --

3 QUESTION: Can you answer it yes or no?

4 MR. GARVEY: Yes.

5 QUESTION: Yes?

6 MR. GARVEY: The acts --

7 QUESTION: You think they do reserve it all?

8 MR. GARVEY: The act says in the second  
9 sentence that the disposal of the mineral deposits on  
10 the land shall be subject to disposal in accordance with  
11 the provisions of the mineral land laws in force at the  
12 time of such disposal, which means that even though it  
13 may not have been disposable in 1916 it could well have  
14 become disposable and hence included within the mineral  
15 reservation with the passage of the Materials Act.

16 QUESTION: Well, how will a rancher know  
17 whether a particular gravel is commercially -- of  
18 commercial quality or not? Does he have to go to the  
19 Department of the Interior and get a ruling before he  
20 makes any use of it himself?

21 MR. GARVEY: If he were in doubt, he could  
22 certainly ask the Bureau of Land Management.

23 QUESTION: And perhaps commercial use that is  
24 unknown today may exist a few years from now?

25 MR. GARVEY: It's entirely possible, although

1 I should point out that in that respect gravel is not  
2 different from other kinds of minerals under the Mining  
3 Act or under the -- under the mining laws in general.  
4 In 1915, a year before this act was passed, the  
5 Department of the Interior held that bauxite was not a  
6 locatable mineral even though it was known that bauxite  
7 contained uranium, simply because at that time there  
8 wasn't the technological process for extracting uranium  
9 from bauxite. I doubt whether that would be followed  
10 today.

11 Or, to take another example, in 1949 Congress  
12 said that people were going on Stock-Raising Homestead  
13 Act lands in order to mine bentonite, which is used for  
14 drilling mud or for a process for collecting iron ore  
15 called taconite pellitizing. And although bentonite  
16 wasn't used for those purposes in 1916, Congress  
17 recognized in 1949 that those had become minerals which  
18 would justify entry on stock Raising Homestead Acts from  
19 -- Act lands for mining purposes. Or uranium, for that  
20 matter.

21 QUESTION: In other words, before 1916 or  
22 whenever this first decision was made, or before the  
23 '29, whatever is the ore from which nuclear material is  
24 extracted would not have been regarded as a valuable  
25 mineral in that time, would it?

1           MR. GARVEY: I am -- I was unable to find  
2 cases holding to that effect, undoubtedly because nobody  
3 had any use for the material. It may well have been  
4 considered a mineral. I doubt that it would have been  
5 considered a valuable mineral at that time.

6           QUESTION: Didn't we have a case within recent  
7 years where it turned to some extent on the adjective  
8 "valuable" mineral, which --

9           MR. GARVEY: Correct.

10          QUESTION: -- considers that --

11          MR. GARVEY: In Andrus against Shell Oil this  
12 Court decided that the interpretation of the mineral  
13 leasing Act of 1920 since the time of its passage by the  
14 Secretary of the Interior and by Congress suggested that  
15 oil shale was a valuable mineral before 1920 and so  
16 locatable under the Mining Act. What we are maintaining  
17 in this case is much the same, that the consistent  
18 interpretation both by the Secretary and by Congress  
19 since passage of the Stock-Raising Homestead Act in that  
20 case.

21          QUESTION: Well, how can you refer to a  
22 consistent interpretation when you have the gravel  
23 opinion sometime in the early teens, I think it was, and  
24 then the turnabout in 1929?

25          MR. GARVEY: I -- I qualified my statement by

1 saying that the consistent interpretation since the  
2 passage of the act. There is no doubt that in Zimmerman  
3 against Brunson the Secretary held that gravel deposits,  
4 much like the gravel deposits in this case, would not  
5 disqualify land from being homesteaded because they  
6 should not be considered to make the land valuable for  
7 minerals.

8 I would suggest that when Congress passed the  
9 act in 1916, it may well have thought differently had it  
10 addressed the question about whether gravel was --

11 QUESTION: But that, Zimmerman was on the  
12 books when that was passed.

13 MR. GARVEY: That's correct. Zimmerman was on  
14 the books for 6 years at the time the act was passed.  
15 But I might say that the decisions of this Court in  
16 cases like Northern Pacific against Soderburg had held  
17 that granite was a mineral reserved from the lands given  
18 to the Northern Pacific Railway, that the U.S.  
19 Geological Survey in 1913, 3 years after Zimmerman, had  
20 said that the presence of gravel deposits on land could  
21 make them lands valuable for minerals and so disposable  
22 under the mining laws.

23 Even the other decisions of the Secretary of  
24 the Interior at the time Zimmerman was decided suggested  
25 that materials like pumice and granite, which like



1 gravel are now held as disposable under the Common  
2 Varieties Act, would make the land valuable for minerals.

3 But quite apart from all of that, the question  
4 in Zimmerman against Brunson was whether the land should  
5 be used for homesteading purposes or for mining  
6 purposes. At that time if you got a homestead or a  
7 mining location, you got everything, the surface and the  
8 minerals. And so by contrast, under the Stock-Raising  
9 Homestead Act the presence of gravel will not disqualify  
10 the land from being homesteaded. Under those  
11 circumstances --

12 QUESTION: You think Congress intended a  
13 different definition of mineral in the Stock Raisers Act  
14 than it did in the Mining Act of 1872?

15 MR. GARVEY: I don't want to press the point  
16 too strongly.

17 QUESTION: Can't you answer any question yes  
18 or no, Counsel?

19 MR. GARVEY: I think that Congress certainly  
20 meant to include in the Stock-Raising Homestead Act  
21 those minerals that were locatable under the mining  
22 law. I also think in the second sentence of the act  
23 that Congress intended to leave open the possibility  
24 that the mineral reservation would be elastic in the  
25 sense that it could expand or contract.

1           QUESTION: What about the granite that you  
2 just mentioned, what is the status of granite?

3           MR. GARVEY: I assume that it is now  
4 locatable, that it is now subject to disposal under the  
5 Common Varieties Act, which speaks of common varieties  
6 of stone. Granite deposits in uncommon varieties would  
7 now be still locatable under the Mining Act.

8           QUESTION: Well, what is the consequence of  
9 that? Would they be classified as minerals or not?

10          MR. GARVEY: The passage of the Common  
11 Varieties Act in 1955 did not act as a quit claim to the  
12 government's interest in these kinds of minerals.

13          What it did, rather, was simply to change the  
14 method of disposal of these minerals from location under  
15 the mining law to sale, because Congress expressed a  
16 concern that people who were locating common varieties  
17 of minerals weren't developing them in the way in which  
18 the Mining Act intended, much as, if I may draw an  
19 analogy, in passing the Mineral Leasing Act in 1920,  
20 what Congress did was to change the method of disposal  
21 of oil deposits, for example, from location under the  
22 mining law to leasing under the Mineral Leasing Act of  
23 1920. It didn't give up the government's interest in  
24 those minerals, it simply provided a different method  
25 for disposing of them.

1           QUESTION: May I ask one other question while  
2 you pause. As I understand it, the government's view is  
3 that although it will only assert a trespass claim when  
4 the gravel has commercial value, in fact it retains an  
5 interest in gravel that does not have commercial value?  
6 That's correct, is it?

7           MR. GARVEY: No.

8           QUESTION: I thought that --

9           MR. GARVEY: I am sorry. It may -- my  
10 discussion with Justice Rehnquist may have confused that  
11 matter.

12          QUESTION: That's what I thought your yes  
13 answer indicated.

14          MR. GARVEY: There are two kinds of  
15 distinctions, and I was speaking about the other one.

16          What the government asserts an interest in  
17 this -- in in this case --

18          QUESTION: Well, I understand what they assert  
19 an interest in in this case. It's commercial, you say  
20 there's commercial value there.

21          MR. GARVEY: That's correct.

22          QUESTION: I am interested in physically  
23 identical gravel in which there is no commercial --

24          MR. GARVEY: The government does not assert an  
25 interest in that.

1 QUESTION: It does not. Does it acknowledge  
2 it does not have an ownership interest in such gravel?

3 MR. GARVEY: Yes.

4 QUESTION: I see.

5 QUESTION: In other words, the farmer, the  
6 rancher can use it for whatever he wants to?

7 MR. GARVEY: That's correct.

8 QUESTION: Or he can ignore it?

9 MR. GARVEY: That's correct.

10 QUESTION: He owns it.

11 QUESTION: He owns it.

12 MR. GARVEY: That's right.

13 QUESTION: But he loses his ownership as soon  
14 as it acquires commercial value?

15 MR. GARVEY: I would say so, yes.

16 QUESTION: So that his -- the title to that  
17 gravel is -- fluctuates as economic conditions fluctuate?

18 MR. GARVEY: Yes.

19 QUESTION: Is that your so-called free-use  
20 theory, or is that something else?

21 MR. GARVEY: No. What we were speaking of  
22 when we talked about free use were commercially  
23 exploitable deposits of gravel which in fact belong to  
24 the United States and not to the rancher.

25 QUESTION: And in those, your position is that



1 the patent owner can make free use of the commercially  
2 valuable minerals?

3 MR. GARVEY: Not the patent owner. The  
4 stock-raising homesteaders who use them for purposes  
5 related to the purposes of the act may make free use of  
6 them.

7 QUESTION: But not subsequent patent owners;  
8 for instance, someone who now has a hotel on the  
9 premises?

10 MR. GARVEY: That's correct. It's not a --  
11 it's not a distinction between prior and subsequent  
12 patent owners but rather the use to which the gravel is  
13 put. The fact that the government is willing to allow  
14 ranchers to make free use of gravel doesn't mean that if  
15 a cement company acquires the surface estate it's  
16 entitled to use the gravel, for instance.

17 QUESTION: Kind of like a springing use?

18 MR. GARVEY: More like a -- kind of. It's a  
19 little like a determinable fee or an estate on condition  
20 subsequent with respect to these kinds of materials.

21 QUESTION: Is there any physical limit on this  
22 concept? Now supposing we have black dirt rather than  
23 gravel, which one could say is a mineral in some sort of  
24 sense, and also might sometimes be used by the landowner  
25 and sometimes be sold?

1           MR. GARVEY: No. It has to be a mineral which  
2 is the kind of mineral recognized by the mineral land  
3 laws of the United States. Black dirt is not a mineral,  
4 no matter how valuable it is. Peat is not a mineral, no  
5 matter how valuable it is.

6           QUESTION: How about sand?

7           MR. GARVEY: Sand is a more difficult  
8 question. There are some kinds of sand which have been  
9 held to be minerals locatable under the Mining Act and  
10 may well be --

11          QUESTION: Would the quality -- would the  
12 character of sand also turn on its economic or the  
13 economic conditions just like gravel?

14          MR. GARVEY: Yes.

15          QUESTION: Are there any other, other than  
16 gravel or sand in which there is this kind of springing  
17 use?

18          MR. GARVEY: It's true of any kind of mineral.

19          QUESTION: Well, what about coal. Doesn't the  
20 government hold coal even when it has no commercial  
21 value?

22          MR. GARVEY: I don't think the government has  
23 an interest in coal when it has no commercial value.  
24 Let me give you another example. When you grow  
25 hydrangeas, the blue color in hydrangeas is caused by a

1 compound of aluminum. To say that the stock-raising  
2 homesteader couldn't grow hydrangeas because he's using  
3 aluminum in the land would make it impossible to  
4 implement the --

5 QUESTION: Well, we aren't asking you whether  
6 the owner could use it. I am asking you whether as a  
7 matter of legal theory you think the government has an  
8 ownership interest. Assume there is aluminum in the  
9 soil. Would you say that the government does not have  
10 an ownership interest in the aluminum?

11 MR. GARVEY: I would say that the government  
12 does not have an ownership interest in the aluminum  
13 unless there is some -- unless it is there in sufficient  
14 quantities to make it possible for the government to  
15 dispose of it.

16 The reason the government is taking this  
17 position is that in passing the Stock-Raising Homestead  
18 Act, what the government intended to do was to make  
19 multiple use of these semiarid lands in the West. One  
20 use that it wanted to make of the lands was to encourage  
21 stock-raising homesteads. What the -- section 2 of the  
22 act says that the Secretary in classifying lands for  
23 entry under this act shall set apart lands that are  
24 chiefly valuable for grazing and forage farming.

25 Section 3 of the act says that in order to get

1 a patent, what the entry man has to do is to improve the  
2 value of the land for stock-raising purposes. It says  
3 in the reports. It suggests that he ought to do things  
4 like building fences or building silos or digging  
5 wells. That's one use that the government wanted to  
6 make of the lands.

7           And the reports say that the farmer-stockman  
8 is not seeking and does not desire the minerals, his  
9 experience and efforts being in the line of stock  
10 raising and farming. That's one use the government  
11 wanted to make.

12           And the other use that the government wanted  
13 to make was to develop the mineral estate. There was a  
14 lot of concern expressed at the time of the passage that  
15 the -- that the lands being given away, 640 acres or one  
16 square mile, might, again in the words of the report,  
17 might withdraw immense areas from prospecting and  
18 mineral development.

19           And so whenever they talk about the size of  
20 the estate being given away, they're careful to say that  
21 all minerals are reserved.

22           Now, what the government tried to do in making  
23 multiple use of the lands like that was to define the  
24 estates that it was giving to the -- to the surface  
25 owner and to the mineral entry man in terms of the



1 intended use to be made of the property.

2           It doesn't make sense for the government to  
3 claim that it retains and can prevent any use by the  
4 stock-raising homesteader of minerals that appear on the  
5 land in traces insufficient to justify disposal by any  
6 means.

7           QUESTION: Well, let me question that. The  
8 literal language reserves to the United States all the  
9 coal, but you say that doesn't really mean all the coal,  
10 it only means all the commercially valuable coal. Is  
11 that correct?

12           MR. GARVEY: That's correct.

13           QUESTION: So with each time a stockyard  
14 patentee comes across any trace of coal on his land,  
15 he's got to wonder whether it belongs to the government  
16 or belongs to him, and he's got to make a judgment  
17 whether it's, quote, commercially valuable?

18           MR. GARVEY: That's correct, although I should  
19 say that with respect to coal, as with respect to gravel  
20 in this case, even under the Coal Lands Acts, like the  
21 Act of 1909, 1910, 1912, the government recognized  
22 explicitly in the case of the 1909 and 1910 Acts and by  
23 decision of the Secretary in the case of the 1912 Act,  
24 that people on the land could make use of the coal for  
25 domestic purposes. They were simply not allowed to sell

1 it, make commercial use of it. So in a lot of cases,  
2 that concern wouldn't arise.

3 QUESTION: Is a mineral reservation, or was  
4 the mineral reservation, the same in these grants to the  
5 Great Northern and Northern Pacific and the other  
6 railroads to every other section?

7 MR. GARVEY: I believe that the language may  
8 have been similar. I think they spoke then of mineral  
9 lands in the third section of the Northern Pacific.

10 QUESTION: I vaguely recall in some other case  
11 a great concern in Congress at the time they were making  
12 these grants, that there was some objection on the  
13 grounds that this was a give-away of very valuable  
14 public property.

15 MR. GARVEY: That was in fact the reason for  
16 making the mineral reservation, and the railroads were  
17 entitled to choose other lands when --

18 QUESTION: So that the railroads could use it  
19 for running a railroad and the farmers and ranchers were  
20 given this grant free in order to use it for farming or  
21 ranching purposes but not other purposes. Is that an  
22 oversimplification?

23 MR. GARVEY: I think that's essentially  
24 correct, although the government doesn't maintain that  
25 the patentee has to keep it as a stock-raising homestead

1 forever. Patentees are entitled to make whatever use  
2 they want of the land once they get the patent. And  
3 their title to the land doesn't depend on maintaining it  
4 as a ranch. It's just that the use they may be entitled  
5 -- that they may be permitted by the government to make  
6 of the minerals.

7 QUESTION: Under the terms of the patent, the  
8 patent didn't issue until they had worked the land for  
9 some period of time of several years, wasn't it?

10 MR. GARVEY: That's correct; and increase the  
11 value of the land in something like \$1.25 an acre for  
12 stock-raising purposes.

13 QUESTION: Yes.

14 QUESTION: How many acres have been patented  
15 under this act that we're talking about?

16 MR. GARVEY: Something more than 33 million  
17 acres.

18 I would like to reserve the rest of my time  
19 for rebuttal.

20 CHIEF JUSTICE BURGER: Mr. Shaver.

21 ORAL ARGUMENT OF HARLEY W. SHAVER III, ESQ.,  
22 ON BEHALF OF RESPONDENT, WESTERN NUCLEAR, INC.

23 MR. SHAVER: Mr. Chief Justice, and may it  
24 please the Court:

25 What we are attempting to ascertain in this

1 case is whether or not the 1916 Congress specifically  
2 reserved gravel in its mineral reservation of all coal  
3 and other minerals.

4 I think the case law and the legislative  
5 history is particularly important to look at, the  
6 condition of the country at the time and what Congress  
7 was intending to do when it passed the 1916  
8 Stock-Raising Homestead Act. You will recall that  
9 between 1900 and 1910 President Roosevelt withdrew  
10 approximately 150 million acres of public lands from  
11 entry, both agricultural and mineral.

12 Subsequent to that time, in 1907, President  
13 Roosevelt urged Congress to pass legislation which would  
14 provide for a distinct title to the surface and reserve  
15 to the government underlying fuel and minerals.

16 Congress commenced passage of legislation in  
17 1909. The 1916 Stock-Raising Homestead Act was the last  
18 of the large land grants to settle the West, provided,  
19 as has been stated, for 640 acres rather than the normal  
20 160 or 320, because that type of land, that barren  
21 semiarid West, required an acreage of that nature to  
22 support the plucky homesteader who could go out there  
23 and try to make a living.

24 Did Congress in 1916 intend to reserve gravel  
25 under that mineral reservation? Congress --



1           QUESTION: Well, isn't the question a little  
2 broader than that? Did they intend to reserve  
3 everything except what was essential for the purposes of  
4 the grant; that is, grazing and farming, raising crops?

5           MR. SHAVER: I think when one looks to the  
6 legislative history of the act, one sees it replete with  
7 the phrases: What we are attempting here is to settle up  
8 to one-fourth of the remaining public domain. What the  
9 West needs is settlers, people, homes, communities,  
10 churches, railroads.

11           The Stock-Raising Homestead Act was a means to  
12 that end. It was a means to settle the West. I don't  
13 believe the Stock-Raising Homestead Act was just a means  
14 to graze stock. The cattle barons had been grazing  
15 stock on the Western lands, the public domain, long  
16 before 1916. And in fact, the lands were overgrazed at  
17 that time.

18           This was a means to get people out there, to  
19 tie them to communities, to build towns, to add to the  
20 tax rolls. This was shortly after these Western Rocky  
21 Mountain states joined the Union, became states. They  
22 needed people to add to the tax rolls. The only way to  
23 get that was to get them out there to build cities, to  
24 make improvements.

25           I think that was the underlying purpose, the

1 driving force behind the passage of the Stock-Raising  
2 Homestead Act.

3 QUESTION: Who drafted the act?

4 MR. SHAVER: The act was drafted or --

5 QUESTION: Was it proposed by --

6 MR. SHAVER: It was proposed by First  
7 Assistant Secretary Jones from the Land Department. I  
8 mean, he was the person from the Land Department who was  
9 responsible for the drafting. He is a person who had  
10 written the decision in Hughes v. Florida in 1913,  
11 quoting from the language in Zimmerman v. Brunson. And  
12 he submitted the first draft about 5 or 6 months to the  
13 congressional committee who later reported it out in  
14 essentially the same form.

15 Congressman Taylor of Colorado was also  
16 regarded as a sponsor of the act and was later the  
17 author of the Taylor Grazing Act, in further answer to  
18 the question.

19 QUESTION: Well, I take it your argument is  
20 that -- that Congress necessarily had in mind the  
21 Zimmerman decision. Is that it?

22 MR. SHAVER: Well, I would think so. I would  
23 point also to the fact that the case the government  
24 cited recently of Northern Pacific Railroad v.  
25 Soderburg, a 1903 case, there was one Mr. Ballinger who

1 argued before this Court on reargument for the  
2 successful appellee. That was the same Mr. Ballinger  
3 who was Secretary Ballinger who wrote the decision in  
4 Zimmerman v. Brunson. Secretary Ballinger was a noted  
5 expert on mineral law at the time. I don't think that  
6 case can be regarded as an aberration.

7 QUESTION: Well, didn't the -- didn't the  
8 Secretary have some regulatory authority under the act?

9 MR. SHAVER: Under the 1916 act?

10 QUESTION: Under the Stock-Raising -- yes.

11 MR. SHAVER: I don't believe at that time that  
12 there was regulatory authority such as we know it today.

13 QUESTION: Well, would he have any -- I  
14 suppose by adjudication he would --

15 MR. SHAVER: Justice White, absolutely by Land  
16 Department decisions, yes.

17 QUESTION: He would certainly have some  
18 authority to say what a mineral was or wasn't.

19 MR. SHAVER: It has long been regarded that  
20 the department or agency interpreting the law that it  
21 administers is given the weight of quasi-judicial  
22 authority, and the interpretation by that agency would  
23 be the interpretation --

24 QUESTION: Are you saying that any -- that any  
25 -- any interpretation, anything that the Department of

1 Interior had called a mineral or had said was not a  
2 mineral, any of those decisions were automatically cut  
3 in -- put in granite by the -- by the 1916 Act?

4 MR. SHAVER: I don't know as if I could extend  
5 it to that extreme. I would say, yes, that Congress  
6 would be presumed to know what those decisions were and  
7 that that was the status of the --

8 QUESTION: And there could never be another  
9 decision by the land -- in the Land Department that was  
10 contrary to any prior decision adopted before the act?

11 MR. SHAVER: Well, obviously, there was. So,  
12 yes, there could be. There could be.

13 QUESTION: No; I mean it would be they would  
14 -- they should be --

15 MR. SHAVER: Justice White, I don't think it  
16 could have been contemplated by Congress, no.  
17 Obviously, judicial tribunals sometimes reverse  
18 themselves.

19 QUESTION: Do you --

20 MR. SHAVER: The situation in the case that  
21 overruled Zimmerman v. Brunson, Layman v. Ellis, was a  
22 case that arose in 1929.

23 QUESTION: Right.

24 MR. SHAVER: It was a case that arose in  
25 California, in southern California, during the



1 population explosion of southern California at that  
2 time. It was decided in or about Los Angeles. The  
3 record in that case, the description in that case by the  
4 writer is filled with facts and figures about the  
5 production of gravel and about how much more valuable it  
6 has become in 1929 than it was in the prior decade.

7           So that administrative tribunal I think was  
8 persuaded by some excellent advocacy on perhaps -- on  
9 behalf of the mineral claimant when the mineral claimant  
10 kept stressing that it had now become valuable, it had  
11 now become valuable, and therefore decided it was a  
12 mineral sua sponte and forgot to worry about deciding  
13 whether it was a mineral ab initio but just decided it  
14 was because it was valuable.

15           QUESTION: You think as a matter of law Layman  
16 was just wrong or that they -- the tribunal was without  
17 authority to decide that way because -- because  
18 Zimmerman -- that Zimmerman was beyond reach?

19           MR. SHAVER: Well, it can be taken in two  
20 contexts. I don't know as a matter of law it can be  
21 said that it was wrong. I think it was a mistake. I  
22 think that at that time that --

23           QUESTION: Well, they were without authority  
24 to overrule Zimmerman. That's what your submission is,  
25 I take it?

1           MR. SHAVER: I think that the Land Department  
2 was -- did have authority to overrule its own case.

3           QUESTION: Oh, it did?

4           MR. SHAVER: Yes. I believe it did.

5           QUESTION: What would be the situation at that  
6 time with respect to all of the components that make up  
7 the ore from which uranium is now extracted? Would  
8 there have been any way for the people in the Department  
9 of the Interior to anticipate that that might be of  
10 future enormous commercial value?

11          MR. SHAVER: I think that in 1916 as well as  
12 in 1872, if you will allow me, Mr. Chief Justice, to  
13 give a little bit longer answer to a short question,  
14 that one cannot say the mineral reservation contemplated  
15 only those things known to be mineral at the time of the  
16 reservation. Therefore, if uranium oxide or U308, from  
17 bauxite or whatever source -- and it's found also in  
18 granite outcroppings -- was not known to be valuable in  
19 concentrated forms at the time, I think it could  
20 subsequently be a reserved mineral.

21          But the difference is, as one court has  
22 pointed out, and several tribunals, that gravel and its  
23 uses have been known since time immemorial. It was  
24 known in 1872, it was known at the time of the Zimmerman  
25 decision, it was known at the time of Hughes v. Florida,

1 it was known at the time in 1916, and it is known today.

2 QUESTION: Are you suggesting that the uses  
3 never undergo any changes in terms of reflecting the  
4 greater economic value?

5 MR. SHAVER: I am certain that the uses do  
6 undergo some changes, but the consistent use for gravel  
7 throughout this period has been for road, road building  
8 and concrete aggregate.

9 QUESTION: Oil shale, for example, wasn't  
10 worth anyone's attention at one point in history. Is  
11 that not so?

12 MR. SHAVER: Oil shale at one time attracted  
13 attention prior to 1920 because claims were entered on  
14 the oil shale lands. And there was a department  
15 decision that upheld those. And later this Court upheld  
16 them. But they were thought to be of value in the  
17 future, and the department recognized that and did not  
18 apply in the oil shale cases the present marketability  
19 test. But that was not the same as deciding whether or  
20 not it was a mineral in the first instance. Oil was a  
21 mineral, gas was a mineral. These were the essence of  
22 hydrocarbons, and so they were regarded as minerals. It  
23 was getting the same product although and albeit from a  
24 different means. It is not the same at all as talking  
25 about gravel.

1           QUESTION: Mr. Shaver, do you agree with the  
2 Solicitor General, however, that under the 1872 Mineral  
3 Location Act that valuable, commercially valuable,  
4 gravel deposits could have been located under that act  
5 even at the time of Zimmerman?

6           MR. SHAVER: Absolutely not, Justice  
7 O'Connor. What the mining law provided and what was in  
8 the departmental decisions is the common varieties of  
9 special distinct characteristics could be located under  
10 the mining laws. We can see an example today. Clay has  
11 never been locatable under the mining laws. However,  
12 bentonite may be. Sand and gravel has never been  
13 locatable under the mining laws until Layman, and sand  
14 has probably not been locatable unless it possesses  
15 special and distinct characteristics such as for the  
16 making of lead crystal.

17           That has always throughout the mining law been  
18 the differentiation. Ordinary gravel was never  
19 locatable until the Layman decision. So, no, I do not  
20 agree that just because it's commercially exploitable  
21 equates to special and distinct characteristics. In  
22 fact, the Secretary has gone to great lengths to point  
23 to the contrary.

24           QUESTION: Is the Layman decision the kind  
25 that would not be expected to be judicially tested



1 itself in the ordinary course of things since it's a  
2 decision granting an application for a mineral patent?

3 MR. SHAVER: Well, that was a contest between  
4 the entry man for agriculture and a mineral claimant.  
5 And I --

6 QUESTION: So the agricultural entry man could  
7 have appealed it as well as the mineral claimant?

8 MR. SHAVER: I imagine that they could have.  
9 They had a contract between themselves, in reading the  
10 case. The mineral claimant and the agricultural  
11 claimant, before the thing was taken for an  
12 administrative decision, had a contract. I am not privy  
13 to all of the terms of the contract, but it did provide  
14 that one would stay away from the other's domain pending  
15 the case. I don't know the rest of it.

16 The case does make reference to the fact that  
17 the Secretary in following Zimmerman in the initial  
18 administrative decision -- or rather the Commissioner of  
19 Public Lands in following Zimmerman in the Layman case  
20 was concerned that this land was being acquired, that  
21 the mineral claimant was just trying to jump the claim  
22 of the agricultural entry man.

23 QUESTION: It seems strange that -- that there  
24 would be this difference of opinion between you two on  
25 whether gravel was locatable prior to Layman.

1 MR. SHAVER: I -- Justice White, it may --  
2 QUESTION: Is that just a matter of -- is it  
3 just a matter of opinion? I would think it would be a  
4 matter of experience.  
5 MR. SHAVER: I think it's a matter of settled  
6 policy that common varieties or common surface  
7 constituents which make up much of the earth are only  
8 locatable if they possess special and distinct  
9 characteristics.  
10 QUESTION: Well, does -- did gravel ever?  
11 MR. SHAVER: Not to my knowledge.  
12 QUESTION: Not to your knowledge but --  
13 MR. SHAVER: There are no cases and no claims  
14 that I am aware of in my research where a successful  
15 claimant for gravel has been able to persuade the  
16 department on the basis that gravel possessed that.  
17 Now, caliche, maybe yes. In other words --  
18 QUESTION: What did Zimmerman say?  
19 MR. SHAVER: Zimmerman said that there was not  
20 a standard American authority which recognized gravel as  
21 a mineral, that in the absence --  
22 QUESTION: Do you think Zimmerman is evidence  
23 that gravel was not locatable?  
24 MR. SHAVER: I think absolutely.  
25 QUESTION: Yes.

1           QUESTION: When is the first time that the  
2 government began to issue patents under the mining  
3 claims laws for common varieties of commercially salable  
4 gravel? When did the government --

5           MR. SHAVER: Justice O'Connor, I am not aware  
6 of the first patent issued, but I would assume that it  
7 would have been shortly after the Layman v. Ellis case  
8 if that were a commercially viable gravel deposit  
9 because that was the first case where gravel had been  
10 held to be locatable in a contest. Up until then it was  
11 not.

12           QUESTION: Well, it has been some years now  
13 that that's been the practice of the Federal Government,  
14 the Department of the Interior, to issue patents on  
15 common varieties of gravel; is that right?

16           MR. SHAVER: No, I don't believe I would  
17 characterize it as such, Justice O'Connor. I would say  
18 that what happened is that in Layman v. Ellis the patent  
19 had to issue for the 40 acres involved or such part of  
20 it as was mineral in character. Following that period  
21 of time, the --

22           QUESTION: Under the mining location?

23           MR. SHAVER: Under the mining law, under the  
24 mining law of 1872. But what transpired, as this Court  
25 is well aware from its decision in Coleman, is that as

1 time went on, individuals attempted, pursuant to the  
2 mining laws, to make locations of sand and gravel  
3 deposits and therefore to receive a patent to them --

4 QUESTION: Right.

5 MR. SHAVER: -- although there was no reason  
6 to receive a patent except for to build a fishing ranch  
7 or a home or have a place in the mountains or to acquire  
8 acreage that could not otherwise be acquired. And it  
9 was these abuses in the law that Congress was concerned  
10 with in --

11 QUESTION: In 1955.

12 MR. SHAVER: -- in 1955.

13 QUESTION: When it went to its sale.

14 MR. SHAVER: When it went to the -- to the  
15 Common Varieties or the Surface Resources Act. And I  
16 think a brief history of that is interesting to --

17 QUESTION: Well, but --

18 MR. SHAVER: -- analyze.

19 QUESTION: -- the fact -- I mean you have to  
20 recognize that in 1955 Congress took the action it did  
21 because the Department of the Interior had been  
22 patenting land for common varieties of gravel, had it  
23 not?

24 MR. SHAVER: That's --

25 QUESTION: Isn't that why they passed the '55



1 Act?

2 MR. SHAVER: I think that that is one of the  
3 reasons, but if we will take and look at the legislative  
4 history of common varieties, gravel was not specifically  
5 considered nor were other common surface constituents  
6 specifically considered until -- by Congress until  
7 1943. In 1943 Senator Hatch brought a bill before  
8 Congress under the Emergency Wartime Declaration Act,  
9 providing for the disposal from public lands of sand,  
10 gravel, mesquite, clay, et cetera.

11 Those particular substances were referred to  
12 by Senator Hatch in the proposed bill as substances or  
13 materials. Senator Harold Ickes at the same time wrote  
14 a letter to Congress setting forth that he was in accord  
15 with this legislation and also referred to these  
16 substances as materials.

17 Congress passed that act in 1944, and it  
18 provided for the disposal of surface materials. One of  
19 those materials was gravel. One was sand. One was also  
20 clay. And I might point out that clay has never become  
21 locatable.

22 In 1947, because the '44 Act had expired by  
23 its terms because World War II was over, it was thought  
24 necessary for Congress to pass some additional  
25 legislation to reimplement these provisions. The 1947

1 Act, as initially passed, was what was referred to as  
2 the Materials Act of 1947. That is one of the things  
3 that was cited in the trespass notice to respondent.  
4 The 1947 Act, as initially passed, referred to surface  
5 materials, clay -- excuse me -- sand, gravel, stone,  
6 manzenite, et cetera.

7           It was not until 1955, when the Surface  
8 Resources, or Common Varieties, Act was passed, which  
9 you made reference to, Justice O'Connor, that the 1947  
10 Act was amended, the Materials Act, so that it would  
11 complement the '55 Act.

12           At that time, Congress adopted an approved  
13 classification system, on the one hand for mineral  
14 materials, on the other hand for vegetative materials.  
15 You line up the vegetative materials over here and the  
16 mineral materials over here. It's the first time that  
17 the word "mineral" materials qualified the term  
18 "materials" as opposed to vegetative.

19           So now the government in 1975 has come full  
20 circle. They started out with substances and materials.  
21 In '47 they were materials. In '55 they were mineral  
22 materials. And now in '75 all of a sudden we have  
23 gravel as a mineral. And that's the legislative  
24 history. And the only way it became a mineral is by  
25 administrative imagination. It was always before that a

1 material.

2 QUESTION: Is the gravel involved in this case  
3 the so-called common variety?

4 MR. SHAVER: Well, I would have to call it -

5 QUESTION: Contrary to what the Solicitor  
6 General explained --

7 MR. SHAVER: I would call all gravel common  
8 variety, as Congress has, as has been regarded in the  
9 history of the mining laws. Ordinary gravel is ordinary  
10 gravel.

11 QUESTION: Mr. Shaver, may I ask, in your  
12 brief you have argued that the question presented by the  
13 government is really not here, was not raised below.  
14 Have you abandoned that argument?

15 MR. SHAVER: No, Justice Brennan. I -- I  
16 believe --

17 QUESTION: I mean you have been arguing the  
18 merits.

19 MR. SHAVER: Yes. I pointed out in the brief  
20 that I believe that the issue of whether or not the  
21 government reserved gravel susceptible to commercial  
22 exploitation has been an anomaly to this case. It  
23 hasn't been passed upon by the tribunals below. There  
24 was no evidentiary hearing in this case at any step of  
25 the way. One was requested before the IBLA, and it was

1 disallowed. This whole case has gotten to this Court as  
2 essentially an argument on the law.

3 QUESTION: But if we agreed with you, what  
4 should we do with the case?

5 MR. SHAVER: I would suggest that the decision  
6 of the Tenth Circuit stand.

7 QUESTION: But the remand that you referred to  
8 at least tangentially here would be to determine whether  
9 -- to determine something which had not been argued or  
10 presented; namely, is there a difference by virtue of  
11 the commercial value? Is that the basis of a remand  
12 that you were referring to?

13 QUESTION: Did you request a remand?

14 QUESTION: No, no.

15 MR. SHAVER: I don't believe so, Justice  
16 Rehnquist.

17 QUESTION: The hypothetical that was suggested  
18 was that that has not been decided by any court. It is  
19 now raised in this on appeal for the first time.

20 MR. SHAVER: It was not raised by the  
21 respondent, and I don't believe it need be addressed.  
22 But I thought that it was obligatory upon counsel to  
23 point out to the Court that this particular issue, as  
24 phrased by the government in the issue presented to this  
25 Court, was not raised nor passed upon by the tribunals



1 below and --

2 QUESTION: Well, if that's so, Mr. Shaver,  
3 what you're asking us, I gather, is you say let the  
4 Tenth Circuit decision stand, is that we dismiss this  
5 petition as improvidently granted. Is that it?

6 MR. SHAVER: Yes, Your Honor, that would --  
7 Justice Brennan, that is exactly what I suggested in  
8 that particular phase of the brief.

9 QUESTION: Mr. Shaver, you say that the  
10 government has come full circle. It may have done it  
11 twice. But since Layman at least they have considered  
12 gravel to be locatable as a mineral.

13 MR. SHAVER: Since Layman they have considered  
14 that gravel could be, yes.

15 QUESTION: And you don't think any of the  
16 legislation that took place changed that, do you?

17 MR. SHAVER: I think largely --

18 QUESTION: I mean in the sense that it  
19 certainly never -- never said that gravel could never be  
20 locatable as a mineral?

21 MR. SHAVER: No, nor would I contend that it  
22 never could be, Justice White, if it possessed special  
23 and distinct characteristics.

24 QUESTION: Well, no, but common -- common  
25 varieties of gravel, whatever you want to call them--

1 MR. SHAVER: Yes.

2 QUESTION: -- were locatable as as mineral  
3 under Layman?

4 MR. SHAVER: That's correct.

5 QUESTION: And there has never been any  
6 legislation that indicates that common varieties of  
7 gravel can never be locatable as a mineral?

8 MR. SHAVER: Well, the legislation by  
9 inference, I believe, would have to indicate that.  
10 There would have been no need for the '44 Act nor the  
11 '47 Act if Congress had believed gravel to be  
12 locatable. There would have been no need --

13 QUESTION: Well, certainly there is many ways  
14 of disposing of property other than through the mining  
15 laws. They may want to dispose of them by a less  
16 complicated technique or a more complicated technique,  
17 for all I know.

18 MR. SHAVER: The legislative history in those  
19 acts suggests that there was no means for disposal  
20 available at all for gravel, and therefore this  
21 legislation was necessary.

22 QUESTION: Well, how could Congress believe  
23 that if they knew about Layman?

24 MR. SHAVER: I -- they chose not to regard it  
25 because of the fact that the only -- all of the history

1 of mining law and what knowledgable people in the mining  
2 law business would consider to be a mineral excluded  
3 gravel.

4 QUESTION: Well, Layman was just a derelict?  
5 It overruled Zimmerman.

6 MR. SHAVER: That's correct.

7 QUESTION: And it was the -- it represented  
8 the view of the authorities that were administering the  
9 relevant laws.

10 MR. SHAVER: What had happened is that rather  
11 than considering whether or not it was a mineral ab  
12 initio is that the department got carried away -- and I  
13 think that the courts adopted this test in some  
14 instances in subsequent cases -- deciding first whether  
15 a substance was valuable. Once they found it to be  
16 valuable, then they assumed that it was mineral. And I  
17 think that the cart's before the horse a little bit.  
18 And I think that's the perspective that Layman must be  
19 viewed in.

20 QUESTION: Mr. Shaver, how many cases in the  
21 -- like Layman have there been? Do we know?

22 MR. SHAVER: Justice Stevens, do you make  
23 reference to one case overruling another?

24 QUESTION: No, no, no. I mean it was -- was  
25 Layman followed repeatedly at the administrative level?

1           MR. SHAVER: It was, but what occurred as time  
2 went on that the department kept applying a tighter and  
3 tighter test because of so many applications for mineral  
4 entry on sand and gravel claims, which was the  
5 unintended abuse that Congress had to step in and  
6 correct in 1955. So, yes, a lot of claims came up, but  
7 most of them, although I have not made a count, it's my  
8 opinion that most of them have been disallowed over a  
9 period of time and --

10           QUESTION: But not because they weren't  
11 mineral?

12           MR. SHAVER: They were found not to be mineral  
13 on the basis of whether or not they were valuable, not --

14           QUESTION: Right.

15           MR. SHAVER: -- vice versa.

16           QUESTION: Right.

17           MR. SHAVER: The issue here I don't believe is  
18 one of discussing the location or location requirements  
19 pre or since Coleman, but deciding what the intent of  
20 the 1916 Congress was. And it seems impossible to  
21 consider that in preserving the mineral estate to the  
22 government, that the 1916 Congress or anyone could have  
23 ever thought that miners would go out West to mine a  
24 valuable gravel deposit. And mind you that gravel is  
25 normally referred to as gravel pits, not gravel mines.



1 The whole history of it would denote that it's not  
2 considered a mineral.

3 QUESTION: Well, of course, up in Minnesota we  
4 refer to those great iron ore areas as open pit mining.

5 MR. SHAVER: Open-pit mines, because the ore  
6 is extracted by open-pit method. But gravel pits in  
7 fact --

8 QUESTION: It's not very much different from  
9 -- how does that help you very much?

10 MR. SHAVER: Just the common ordinary --

11 QUESTION: The fact is it's an open pit --

12 MR. SHAVER: -- association --

13 QUESTION: -- gravel mine as well, is it not?

14 MR. SHAVER: Mr. Chief Justice, I was just  
15 trying to make reference to the common ordinary  
16 association of the term in every-day use. One digs  
17 gravel, one has gravel pits. One has open-pit mines but  
18 one doesn't normally refer to open-pit gravel mines,  
19 just refer to gravel pits.

20 I would also point out that the case in this  
21 instance where this gravel was dug, as the government  
22 pointed out, from a ranch which Western Nuclear  
23 acquired, this wasn't just a piece of ground acquired to  
24 obtain the gravel, it was a ranch that Western Nuclear  
25 acquired. And the government has made the assertion in

1 its brief that the ranch was acquired specifically to  
2 obtain the gravel.

3 This is less than the \$13,000 case. The  
4 respondent did not acquire a several-thousand-acre ranch  
5 for the devious purpose of just acquiring a gravel  
6 deposit. It just doesn't stand to reason.

7 QUESTION: May I ask one other question. Do  
8 you attach any significance to the fact that the  
9 original grant in this case was in 1926, 3 years before  
10 the Layman decision?

11 MR. SHAVER: I attach no significance to --

12 QUESTION: You don't?

13 MR. SHAVER: -- to what -- to that. I think  
14 the controlling date is 1916 and the intent of Congress  
15 at the time the reservation was in the legislation.

16 QUESTION: Mr. Garvey, do you have anything  
17 further?

18 ORAL ARGUMENT OF JOHN H. GARVEY, ESQ.,  
19 ON BEHALF OF PETITIONERS, JAMES G. WATT,  
20 SECRETARY OF THE INTERIOR, ET AL. -- REBUTTAL

21 MR. GARVEY: I would just like to make three  
22 brief points. The first is in the Court of Appeals,  
23 respondent's brief at page 2 said, in March of 1975 in  
24 order to obtain a ready and convenient source of gravel  
25 and for other purposes, Western Nuclear acquired in fee

1 a substantial piece of ranch property which included the  
2 subject land.

3           The second point that I would like to make is  
4 there has been some uncertainty about the purpose and  
5 effect of the Materials Act of 1947 and its predecessor,  
6 the Act of 1944, for disposing of gravel which could not  
7 otherwise be disposed of.

8           Justice Rehnquist asked at the beginning of my  
9 argument whether the government claimed all gravel under  
10 its reservation in the Stock-Raising Homestead Act. And  
11 I hesitated because until 1944 gravel in deposits,  
12 gravel useful for purposes of fill or riprap or uses  
13 like that rather than gravel useful for making concrete  
14 and hot-mix aggregate was not locatable under the mining  
15 laws and there was no way of disposing of that kind of  
16 gravel at the time.

17           The reason I hesitated in saying that the  
18 government does -- needn't claim all gravel in this case  
19 is that the kind of gravel which is at stake in this  
20 case is the kind of gravel that was locatable under the  
21 mining laws and could be disposed of before 1944.

22           Justice O'Connor, you asked whether the  
23 government was saying that this kind of gravel was not  
24 common variety gravel. The government does -- the  
25 government admits that it was common variety gravel in

1 the sense in which the 1955 Act uses the word "common  
2 variety." That is not to say that it was not locatable  
3 under the Mining Act of 1872.

4 The third point I would like to make relates  
5 to Justice Brennan's concern about this question not  
6 having been raised before. In the District Court the  
7 government stated -- this is in the appendix to the  
8 respondent's brief in opposition -- what the United  
9 States is concerned about are commercial gravel  
10 operations. The United States does not see how a  
11 commercial gravel operation in any way, shape, or form  
12 lends itself to --

13 QUESTION: What page did you say that was?

14 MR. GARVEY: This is in page 5A.

15 QUESTION: Thank you.

16 QUESTION: Mr. Garvey, was the government's  
17 statement there made in the connection with an oral  
18 argument?

19 MR. GARVEY: It was made in connection with a  
20 post-judgment motion by the Wyoming Stock Growers  
21 Association for motion for a new trial or a motion to  
22 alter or amend the judgment. The Wyoming Stock Growers  
23 Association was concerned that the District Judge's  
24 opinion did not address their claim to use of the  
25 gravel. The government said, we are not deciding that



1 question in this case. We don't contend that they're  
2 not allowed to use it. And the government and the Stock  
3 Growers thereafter stipulated that the decision by the  
4 District Court would have no res judicada effect on  
5 claims by ranchers to use --

6 QUESTION: Was there a stipulation as to the  
7 fact of whether or not there was commercial gravel  
8 involved, commercially usable gravel?

9 MR. GARVEY: No, there was not a stipulation,  
10 although there was never an issue about that. The  
11 Bureau of Land Management took the position that it was  
12 only salable gravel deposits that they were concerned  
13 with. They appraised the land and decided that the fair  
14 market value in that market for the gravel was 30 cents  
15 a cubic yard.

16 The Interior Board of Land Appeals, page 65A  
17 -- 65A of the government's appendix -- Interior Board of  
18 Land Appeals said that it is thus clear that gravel in a  
19 valuable deposit is a mineral reserve to the United  
20 States in patents issued under the Stock-Raising  
21 Homestead Act, and went on to say that the respondent  
22 had introduced no evidence which led it to question the  
23 appraisal which had been made by the Bureau of Land  
24 Management, and for that reason, because there was no  
25 factual evidence to contradict the appraisal, would not

1 -- would not give them a hearing.

2 Just one last point. In the Court of Appeals,  
3 the government's brief, as the first issue presented,  
4 said the issue is whether the District Court correctly  
5 concluded that the Stock-Raising Homestead Act in its  
6 legislative history show that Congress intended to  
7 reserve all gravel deposits susceptible to commercial  
8 exploitation on lands patented under the act.

9 CHIEF JUSTICE BURGER: Thank you, gentlemen.

10 The case is submitted.

11 (Whereupon, at 11:00 a.m., the case in the  
12 above-entitled matter was submitted.)

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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the Matter of:

James G. Watt, Secretary of the Interior, et al., Petitioners  
v. Western Nuclear, Inc. #81-1686

and that these attached pages constitute the original transcript of the proceedings for the records of the court.

BY

Pine Hammond

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