

The decision deals with a fundamental rule of property. It is, therefore, in my view, highly important that there be no uncertainties in these matters and a unanimous decision by the Supreme Court, at a time when unanimity on the Supreme Court is a very rare occurrence indeed, underscores the firmness with which this rule is written into the mining laws.

As to what I think its impact on the developments of the West would have been had it always been in effect, I think that one of the reasons perhaps that led to the litigation in the *Coleman* case, which came as a **surprise to the Department**, was the fact that it has not always been **understood that the marketability rule is not a new rule.**

The marketability rule was first given expression in those specific terms, I believe, in the thirties. The rule was challenged once before in the District of Columbia circuit back in Secretary Seaton's time and upheld.

As to the requirement of economic feasibility or profitability, while the Supreme Court did not refer to those cases in its opinion, it apparently considered the matter open-and-shut and really not worth delving into. The fact of the matter is there are Supreme Court decisions going back into the nineties and eighties in which the Supreme Court spoke about profitability and in those cases they spoke in terms of hard-rock metals, not building materials.

These cases spoke of the fact that underlying the right given to occupy and purchase public lands of the United States under the mining laws was the element of profitability. The purpose of the mining law, as the Supreme Court expressed in the *Coleman* case, is that the mining law represented an exercise by Congress of its powers over the public domain for the purpose of encouraging the actual mining of the minerals in the public lands. The Supreme Court, in the *Coleman* case, said that these lands are available under the mining laws for the purpose of extracting the mineral and for no other purpose.

So actually, Senator Hansen, I think the court dealt with something that has been in the mining law continuously. The Supreme Court has stressed it in the past and the West has developed under a rule which in its application to hard-rock minerals is not really fundamentally different from the marketability rule in relation to sand, gravel, and building stone.

Senator HANSEN. Thank you very much, Mr. Weinberg.

I know there have been some expressions of concern about the possible effect of this rule on the development of oil shale. Do you see any threat posed to the development of oil shale lands?

Mr. WEINBERG. One of the problems brought out in the oil shale hearings, one of the things the Government is going to have to do—perhaps it should have started long ago—is to remove the title clouds on the oil shale land and get them decided one way or the other. Either the Government has to have clear title or the mining locators have to have clear titles. This never-never land, in which the lands are public lands yet they are plastered with old mining locations is something that has to be cleared up or it will be a formidable impediment to development of an oil shale program.

Any light the Supreme Court can shed on the mining law which will help resolve these problems I think is a plus in enabling an oil shale program to get underway.