

INTERIOR NOMINATION

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HEARING

BEFORE THE

COMMITTEE ON

INTERIOR AND INSULAR AFFAIRS

UNITED STATES SENATE

NINETIETH CONGRESS

SECOND SESSION

ON

NOMINATION OF EDWARD WEINBERG TO BE SOLICITOR
OF THE DEPARTMENT OF THE INTERIOR

APRIL 25, 1968

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NOMINATION OF EDWARD WEINBERG TO BE SOLICITOR OF THE DEPARTMENT OF THE INTERIOR

THURSDAY, APRIL 25, 1968

U.S. SENATE,
COMMITTEE ON INTERIOR AND INSULAR AFFAIRS,
Washington, D.C.

The committee met, pursuant to call, at 11 a.m., in room 3110, New Senate Office Building, Senator Henry M. Jackson (chairman of the committee) presiding.

Present: Senators Henry M. Jackson (Washington), Alan Bible (Nevada), Frank E. Moss (Utah), Len B. Jordan (Idaho), and Clifford P. Hansen (Wyoming).

Also present: Jerry T. Verkler, staff director; Stewart French, chief counsel; and James H. Gamble, professional staff member.

The CHAIRMAN. The committee will come to order.

This is an open hearing on the nomination by the President of the United States of Mr. Edward Weinberg to be Solicitor of the Department of the Interior.

As we all know Mr. Weinberg is a career public servant and is certainly well and favorably known by every member of this committee. He has been particularly helpful, I may say, to this committee and to our legislative program in regard to the many different problems in the area of natural resources with which we deal.

Mr. Weinberg has served as an attorney with the Federal Government, beginning in 1943, I believe, with the Office of Price Administration (the old OPA). Since 1944, he has served in the Department of the Interior. At this point I will place in the record a biographical sketch of Mr. Weinberg.

(The biographical sketch referred to follows:)

BIOGRAPHICAL SKETCH OF EDWARD WEINBERG

Born: Whitewater, Wisconsin, September 5, 1918.

Education: Whitewater High School, class of 1935; Whitewater State Teachers College, 1935-1937; University of Wisconsin, 1937-1941; B.A. (with honors), University of Wisconsin, 1939, economics major; L.L.B., University of Wisconsin, 1941; Member of Board of Editors, University of Wisconsin Law Review, 1940-41.

1941-42: Private practice, Milwaukee, Wisconsin.

1943: Office of Price Administration.

January 1944: Joined legal staff of Bureau of Reclamation, Department of the Interior, serving first as attorney and later as Assistant Chief Counsel, Bureau of Reclamation. Upon consolidation of departmental legal services in Office of the Solicitor in 1954, became Assistant Solicitor, Branch of Power.

1961-1963: Associate Solicitor, Water and Power, Department of the Interior.

1963 to present: Deputy Solicitor, Department of the Interior.

Participated in negotiation of Columbia River Treaty with Canada, 1959-1960; participated in negotiation of protocol thereto and arrangements for sale in United States of Canada's power entitlement thereunder, 1961-1964.

Received numerous commendations throughout career in Department of the Interior.

In July 1965 received the Distinguished Service Award of the Department of the Interior—the Department's highest award.

Admitted to practice in Wisconsin, District Court of the District of Columbia, and the Supreme Court of the United States.

Member of the Order of the Coif, honorary legal fraternity.

Member of Artus, honorary economics fraternity.

Member of the Federal Bar Association.

Member of the Masonic Order.

Married to former Anne Goldsmith of Genesee Depot, Wisconsin, June 10, 1943.

Children: Mark, age 22, graduate student, Urban Studies, American University, Washington, D.C.; B.A. (with honors) DePauw University, Greencastle, Indiana. Robert, age 18, underclassman, Beloit College, Beloit, Wisconsin.

The CHAIRMAN. The Chair would like to congratulate you, the President, and Secretary Udall on your nomination for this high office. I have also found you not only to be an able public servant but an outstanding lawyer and a man of high integrity.

Having said that, the Chair will be glad to have you outline briefly your professional background, your background in general, and then if any of the members would like to ask questions, they may do so.

STATEMENT OF EDWARD WEINBERG, NOMINEE FOR SOLICITOR OF THE DEPARTMENT OF THE INTERIOR

MR. WEINBERG. Thank you, Mr. Chairman. I am deeply touched by the kind words that you have had to say on this occasion this morning.

I am deeply honored by the confidence which President Johnson has evidenced by nominating me as Solicitor of the Department of the Interior. I am equally gratified at the compliment rendered me by Secretary Udall in recommending my nomination to the President.

As a career employee with over 25 years of Federal service, I believe I can say also that the President's action is testimony to his continued support of the career service.

As for my background, I am a native of Wisconsin, and for almost 25 years have been a legal resident of the State of Maryland. For the past 18 years I have resided in Silver Spring, Md.

During my children's elementary school years, I was active in the PTA movement, serving in various offices, including the presidency of Broadacres School PTA, Silver Spring.

I have two sons—Mark, 22, who received his B.A. degree with honors in political science from De Pauw University, Greencastle, Ind., in June of 1967, and is now a graduate student in urban affairs at American University here in Washington; and Robert, 18, in his first year at Beloit College in Beloit, Wis.

My wife is an active member of the Montgomery County, Md., League of Women Voters. Her most recent position in the organization was first vice president.

I received my bachelor of arts degree with honors from the University of Wisconsin in 1939, majoring in economics. I graduated from the University of Wisconsin Law School in 1941. While in law school, I was a member of the board of editors of the Wisconsin Law Review. I am a member of Artus, a national honorary economics fraternity, and of the Order of the Coif, a national honorary legal fraternity.

Almost my entire professional career has been in the service of the Department of the Interior. Before joining the legal staff of the Bureau of Reclamation in January 1944 I spent 1 year with the Office of Price Administration.

Within the Department I came through the ranks, serving first as an attorney and later as an assistant chief counsel in the Bureau of Reclamation. When all agency legal staffs were consolidated in 1954, I became Assistant Solicitor for Power, and in 1961 I became Associate Solicitor for Water and Power. In 1963 I succeeded the late Edward Fisher as Deputy Solicitor.

I am admitted to practice law in the State of Wisconsin, the District of Columbia, and before the Supreme Court of the United States. I am a member of the Federal Bar Association.

In my career in the Department of the Interior I have served in a legal capacity under every Secretary of the Interior beginning with Harold L. Ickes in 1944. This includes both Republican and Democratic administrations.

It has been my effort to advise my client agencies upon the legal problems within my sphere of responsibility fairly, honestly, and to the best of my ability.

As a career attorney I have endeavored to carry out the policies of the Secretaries under whom I have served with loyalty and fidelity. Through my service in the Department, I have developed a deep and abiding interest in resource development and conservation.

The Department now is truly national in scope and faces a new challenge in making America a better place to live and work. I am proud to have had a role in its great programs of reclamation and resource development and I hope that with the approval of this committee and the Senate I may continue to serve our Nation.

That concludes my statement and I shall be glad to attempt to answer any questions you may have.

Senator Moss. Thank you.

May I echo the statements of the chairman about the fine relationship that we have had in this committee with you during the time that you have been serving in the Department of the Interior. You have indeed always responded and assisted this committee in every way possible. I would like to add my words of congratulations to you and to the administration for your nomination to this very important office. I know of no one that would be better qualified to take over the position.

Indeed the Department has grown. We just got the press release that you are going to have a new seal now because the old buffalo no longer depicts the Department of the Interior. Although I am not sure I understand that new one—I have been puzzling about it—I guess that is the price of progress. We must learn to read new marks on the wall.

Mr. WEINBERG. I have a little trouble with that. It is the new symbolism and we have to learn a lot of new symbols now.

Senator Moss. I have had a number of occasions to visit with you on problems as they have come up. I would like to ask you a few questions this morning on the problem of land selection. I have been quite

concerned about that. As you undoubtedly know, as of January 30, 1967, which is the latest tabulation I have here, there were still 268,430 acres of school land to which the State of Utah is entitled that it has not been able to acquire as yet. Utah has been a State now for nearly a hundred years.

The only State I see on this list I have—Alaska is not on this list—shows Arizona to have more land unselected than does Utah. We two States are far behind all the others; several hundred thousand acres, in fact. Therefore, the problem is particularly pressing for us.

To what extent have you had direct supervision on this selection, the legal problems arising out of the selection process?

MR. WEINBERG. I hate to begin my testimony before the committee by answering a question in the negative. I am familiar with the Utah selection problem but I did not participate in the legal decisions that were rendered in connection with the produceable question.

Senator Moss. There was a problem about the Cain Creek land selections as to whether the area was producing or produceable.

MR. WEINBERG. Yes.

Senator Moss. This was finally solved by an opinion of the Attorney General. That part does not concern me quite as much as the policy that has been adopted on comparability of value and this point does concern me greatly. Are you familiar with the legal situation there?

MR. WEINBERG. Yes; I am. As I recall it, in connection with the opinion on Cain Creek, the Department of Justice indicated that the Secretary had discretionary authority to withhold classification of the lands for selection purposes.

Shortly thereafter it is my recollection that the Department requested legislation to provide a legislative base for meeting this problem of disparate values. The legislation did not pass. I cannot recall now to what extent the committee took action on it. I know the legislation did not pass. It is my understanding that that is where the matter rests at this particular time.

Senator Moss. The problem of classification is also pressing because at the present time the Bureau of Land Management is classifying all of the lands in my State and, as you indicated, some of them by classification are effectively removed from the area from which selection may be made. We still have 268,000 acres to select, so this heightens the problem, of course.

This matter of comparability was presented in legislation and it went before the House Interior Committee and they held hearings on the matter.

MR. WEINBERG. That is my recollection; yes.

Senator Moss. After the hearings they simply tabled the bill and said in the report, in effect, that they liked the law as it is and they didn't believe that comparability should be required—that is, comparability in classification, mineral for mineral, nonmineral for nonmineral—but the evaluation section is what they set aside. They said this should not be applied, but I know it is still being applied. That is the point that bothers me and it is a matter on which I think you will have to decide for the Department on a legal basis.

What is the administration policy when the Department says it will apply the evaluation criterion anyway?

Mr. WEINBERG. I think the question comes back to a view of what the statute means. As I indicated, it is my recollection that the Department of Justice, at the time it issued the Cain Creek opinion, indicated this avenue was open to the Department under the law as it stands at the present time.

Senator MOSS. As I recall the opinion on Cain Creek, it said the Department might seek legislation. They interpreted the law to mean that they might seek legislation. This, the Department did, and it was turned down by the House.

Mr. WEINBERG. Yes, but as I recall it, at the same time there was advice that the classification route was also open to the Department.

Senator MOSS. Yes. I know that there was a discussion at the time that the classification route could be taken. But as I read H.R. 16—that is the number of the bill introduced by Chairman Aspinall by request, and came up from the Department—it would have provided for the comparability on value.

This is the point the House turned down flatly. This is what concerns me now and this procedure is what I think holds up new selections.

Mr. WEINBERG. While I have not been directly involved either on the legal or policy decisions, it is plain that there is a problem here and I am sure that the Department would be interested in exploring with the State whatever means of reconciliation of this problem there might be. I do know that the Department has continued to hold the view that the classification authority is available on the comparability problem.

Senator MOSS. It has always been my view, and I think it is the view of the committee, that, if there is any weighing of the equities, the balance should be toward the State. But the equities have been balanced the other way for some 80 years now. We have been denied the rights to which we are entitled—rights set forth in the Constitution for the support of the public schools of this land.

This fact does give me great concern. I would hope, Mr. Weinberg, since you have not been working directly with land selection problems, that you could turn your attention to this urgent problem as you assume your position as Solicitor. I certainly will be calling on you for help to see if we can cut this Gordian knot and see if we can get this matter settled.

It is my understanding that there is a special appropriation by the State of Arizona and the State intends to have a crash program to resolve this issue, because Arizona, too, is very far behind in land selection. I probably should seek a special appropriation for Utah since we are the two laggards that have not been able to get our lands.

The CHAIRMAN. Thank you, Senator Moss.

The Chair wishes to state that in accordance with the rule of the committee, Mr. Weinberg has submitted a financial statement that shows evidence of a very modest estate. The Chair would say that there is nothing in his reported assets that either directly or indirectly represents anything remotely connected with a possible conflict of interest.

Senator Hansen, do you have any questions you would like to ask Mr. Weinberg?

Senator HANSEN. I don't think I do, thank you.

The CHAIRMAN. We can take a minute if you do.

The Chair would like to be able to report the nomination today. I think possibly we should poll the committee, as we do not have a quorum present today. Then we could get prompt action on reporting the nomination.

We will go off the record for just a moment.

(Discussion off the record.)

The CHAIRMAN. The committee will resume.

The Chair is happy to yield to Senator Hansen.

Senator HANSEN. Thank you, Mr. Chairman.

First, I would like to add my congratulations to Mr. Weinberg and I would like to say in my experience with you, sir, and in the few times I have been privileged to hear you testify before this committee, that I have been particularly impressed with your knowledge and objectivity. I call particular attention to matters relating to oil shale development and matters relating to water, both of which are of great importance to my State of Wyoming.

I think on numerous occasions you have been involved in explaining to the committee matters very complex in nature and I have been impressed by your ability to recall facets of the law. I suspect that has somewhat set you apart from what I consider to be the typical, average lawyer. I don't think you are typical or average at all, you are way above that and I am delighted with the nomination the President has made. I have every confidence you will be objective in your treatment of matters.

I have had called to my attention a Supreme Court decision that I would like to invite your comments on. On Monday, April 22, the Supreme Court handed down its opinion in the *Coleman* case (*U.S. v. Coleman*, No. 630), in which it upheld the legitimacy of the so-called marketability rule as a logical complement of the prudent man test.

The lands in issue are in California in the vicinity of Los Angeles and had been located for quartzite building stone. A patent was applied for and Interior brought an action in ejectment, contending that the quartzite deposits were subject to the Common Varieties Act, despite the provisions of the Building Stone Act (30 U.S.C. 161).

The Court said:

The Secretary's determination that the quartzite stone did not qualify as a valuable mineral deposit because the stone could not be marketed at a profit does no violence to the statute. Indeed, the marketability test is an admirable effort to identify with greater precision and objectivity the factors relevant to a determination that the mineral deposit is "valuable."

I think Solicitor Barry argued the Government's case in the Supreme Court. I would just invite your observations on the effect that you believe this administration's adopted marketability rule might have had on the development of the West, say, for the last two decades, if you care to.

Mr. WEINBERG. Yes. First, let me thank you for the kind words that you have said about me, even though I don't always live up to them, nevertheless they sound good and give me a warm feeling.

We are happy that the Supreme Court, in deciding the *Coleman* case, has confirmed the construction of the mining law the Department has used and we are particularly pleased that the decision came from a unanimous Supreme Court.

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.

The CHAIRMAN. Senator Bible?

Senator BIBLE. Thank you, Mr. Chairman.

I am very happy to see a longtime friend of mine, Edward Weinberg, moving up the ladder of the Department of the Interior and being nominated for another position. I have worked closely with Mr. Weinberg on many, many problems that have come over our desk in the field of rural land management—land problems, water problems, power problems; you name them and I think we have them. He has always been very helpful and very knowledgeable. I am only going to ask you about one problem that has bothered me personally for a long time and that is the attitude of the Department of the Interior on the geothermal steam bill.

I know you are acquainted with it because my staff people have contacted you about it. This is a bill that did pass the Congress of the United States and it was vetoed with what I thought was a very unreasonable Executive veto.

The Department does have viewpoints on it but we are trying to reach some type of accord whereby we can give some type of preference—and I think deserved preference—to the early founders and early pioneers in the industry. This is something that has been called to your attention, and I am wondering if you have any viewpoints on it.

Mr. WEINBERG. Well, it has been some months now since I have even thought about geothermal steam.

Senator BIBLE. I am advised my staff people talked to you on it sometime after March 28; namely, Stewart French.

Mr. WEINBERG. Not that I recall on geothermal steam. We had a meeting in the Department on a facet of geothermal steam that does not involve the pending legislative problem.

Senator BIBLE. Not to be mysterious about it, the question asked of you is whether or not there is any possibility of working out an area of accord between the hard line of the executive branch, including, of course that of the Interior Department, which I think is a wrong line, and the position of the legislative branch. I think our position is the correct one, in that we are trying to work out some type of recognition of, and protection for, the early pioneers in geothermal steam development. We are willing to adopt a limitation of some 25,000 acres or so for all of the States. This amount would be the maximum to be available for the preference right, with a limitation of something like, say, 6,000 acres in each of the States; that is, not to exceed 6,000 acres in any one of the States.

I am told by Mr. French that he personally talked to you about this. Maybe I am in error?

Mr. WEINBERG. I can only say if Stewart says we had a conversation, then we did, but my mind is blank on it.

Senator BIBLE. You say you had not looked at this for a long period of time and I was advised by Mr. French that he did talk to you about it. His memorandum to me shows he did. In any event, all I am interested in is your position on this new compromise proposal.

Mr. WEINBERG. The Department is willing to explore any possibility with an open mind.

Senator BIBLE. That is not a very good answer. The point is, have you taken any look at this proposal or have you not? I understand from what you are telling me is that you have not looked at this new suggestion.

Mr. WEINBERG. I have not.

Senator BIBLE. Whether or not Mr. French talked to you, he is right here. I won't burden this hearing with whether you did or didn't, but when this hearing is over I wish Mr. French would talk to you about this problem and point out what the suggestion is and then have you give us a reply very quickly. It was indicated to me that the proposal had been put before you some weeks ago.

The problem is a complicated one, I am frank to say. I thought, by reaching a plateau where you would put a restrictive limitation on the amount of acreage which could be picked up by the pioneers of not to exceed some 6,000 acres in any one of the States, we might find a basis for an agreement between the legislative and executive branches.

Mr. WEINBERG. I will endeavor to explore this proposal and see what the departmental position would be on it.

Senator BIBLE. It is very important to me. The purpose of the constant questioning is: It doesn't make much sense to pass another bill, which I think we could do in the Congress of the United States, and then have it vetoed. I want to pass something that will not be subject to veto.

Mr. WEINBERG. I agree with that. There is certainly no point in having another head-on collision with the executive.

Senator BIBLE. I will have Mr. French go into it. The problem is primarily legal, as well as one of policy and of fact. It will take a little study and research. I had hoped this would have been done. Apparently it has not and I will ask him to go over it with you and ask you to come back with a reply at an immediate, early date.

The CHAIRMAN. Senator Jordan.

Senator JORDAN. I have no questions. I have known Mr. Weinberg for 20 years. I know him to be conscientious. We don't always agree and probably won't always but I am voting for his confirmation.

The CHAIRMAN. Any further questions?

If not, the Chair will entertain a motion to support the nomination.

Senator BIBLE. I will make that motion.

Senator HANSEN. I second the motion.

The CHAIRMAN. A motion has been made and seconded to report the nomination. All in favor say "aye."

[A chorus of "ayes".]

The CHAIRMAN. Any "nays"?

I hear no "nays" so the nomination is reported.

Those members not here will be polled.

Senator HANSEN. I have Senator Hatfield's proxy.

The CHAIRMAN. Good, that will not need to be checked. I will ask that Senator Allott and those other Members on the minority side be reached so that we can report this nomination out today.

The committee will stand in recess.

(Whereupon, at 11:50 a.m., the committee proceeded to other business.)

