The Burger Court Opinion Writing Database

Andrus v. Shell Oil Co.

446 U.S. 657 (1980)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University

To: Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: The Chief Justice

Circulated: APR 9 1980

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 78–1815

Cecil D. Andrus, Secretary of Interior, Petitioner, *v.* Shell Oil Company et al. } On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

[April —, 1980]

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

The general mining law of 1872, 30 U. S. C. § 22 *et seq.*, provides that citizens may enter and explore the public domain, and search for minerals; if they discover "valuable mineral deposits," they may obtain title to the land on which such deposits are located.[1] In 1920 Congress altered this program with the enactment of the Mineral Leasing Act. 30 U. S. C. § 181 *et seq.* The Act withdrew oil shale and several other minerals from the general mining law and provided that

[1] Discovery of a "valuable mineral" is not the only prerequisite of patentability. The mining law also provides that until a patent is issued a claimant must perform $100 worth of labor or make $100 of improvements on his claim during each year and that a patent may issue only on a showing that the claimant has expended a total of $500 on the claim. 30 U. S. C. §§ 28, 29. See *Hickel* v. *Oil Shale Corp.*, 400 U. S. 48 (1970). In addition, a claim "must be distinctly marked on the ground that its boundaries can be readily traced." 30 U. S. C. § 28; *Kendall* v. *San Juan Silver Mining Co.*, 144 U. S. 658 (1892). If the requirements of the mining law are satisfied, the land may be patented for $2.50 per acre. 30 U. S. C. § 37. There is no deadline within which a locator must file for patent, though to satisfy the discovery requirement the claimant must show the existence of "valuable mineral deposits" both at the time of location and at the time of determination. *Barrows* v. *Hickel*, 447 F. 2d 80, 82 (CA9 1971).

To: Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

CHANGES AS MARKED: 6, 8

From: The Chief Justice

Circulated: _____

2nd DRAFT

Recirculated: APR 17 1980

SUPREME COURT OF THE UNITED STATES

No. 78–1815

Cecil D. Andrus, Secretary of Interior, Petitioner, *v.* Shell Oil Company et al. } On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

[April —, 1980]

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To: Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

6, 8, 15 Some FN's renumbered

From: The Chief Justice

Circulated: _____

Recirculated: APR 29 [illegible]

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 78–1815

Cecil D. Andrus, Secretary of Interior, Petitioner, *v.* Shell Oil Company et al. } On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

[April —, 1980]

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

The general mining law of 1872, 30 U. S. C. § 22 *et seq.*, provides that citizens may enter and explore the public domain, and search for minerals; if they discover "valuable mineral deposits," they may obtain title to the land on which such deposits are located.[1] In 1920 Congress altered this program with the enactment of the Mineral Leasing Act. 30 U. S. C. § 181 *et seq.* The Act withdrew oil shale and several other minerals from the general mining law and provided that

[1] Discovery of a "valuable mineral" is not the only prerequisite of patentability. The mining law also provides that until a patent is issued a claimant must perform $100 worth of labor or make $100 of improvements on his claim during each year and that a patent may issue only on a showing that the claimant has expended a total of $500 on the claim. 30 U. S. C. §§ 28, 29. See *Hickel* v. *Oil Shale Corp.*, 400 U. S. 48 (1970). In addition, a claim "must be distinctly marked on the ground that its boundaries can be readily traced." 30 U. S. C. § 28; *Kendall* v. *San Juan Silver Mining Co.*, 144 U. S. 658 (1892). If the requirements of the mining law are satisfied, the land may be patented for $2.50 per acre. 30 U. S. C. § 37. There is no deadline within which a locator must file for patent, though to satisfy the discovery requirement the claimant must show the existence of "valuable mineral deposits" both at the time of location and at the time of determination. *Barrows* v. *Hickel*, 447 F. 2d 80, 82 (CA9 1971).

Supreme Court of the United States
Washington, D. C. 20543

5/25

CHAMBERS OF
THE CHIEF JUSTICE

ANDRUS v. SHELL OIL CO., No. 78-1815

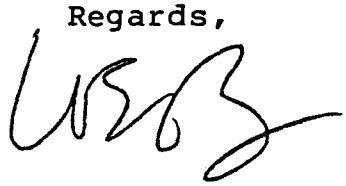
I will add the following footnote at the end of my opinion in this case.

12 The dissent overlooks the abundant evidence that Congress has consistently viewed oil shale as a "valuable mineral" under the general mining law. In two casual sentences, the dissent dismisses the 1931 hearings and the 1956 Act as irrelevancies: as for the 1931 hearings, we are told that "not a single remark by a Senator or Representative" approved the Freeman standard; as for the 1956 Act, we are informed that Congress "dealt with a totally unrelated subject." Ante at 3. Neither of these observations is correct. The 1931 Senate hearing was called specifically to review the Freeman case for fear that another Teapot Dome scandel was brewing. Rarely has an administrative law decision received such exhaustive Congressional scrutiny. And following that scrutiny, no action was taken to disturb the settled administrative practice; instead "a Senator" advised the Interior Department to continue patenting oil shale claims. Similarly, to characterize the 1956 Act as "totally unrelated" is to blink reality. The patentability of oil shale was an essential predicate to that legislation; if oil shale land was non-patentable then Congress rendered a useless act.

The dissent fails even to mention that beginning in 1920 and continuing for four decades, the Interior Department treated oil shale as a "valuable mineral." In paying deference

to the doctrine that a "contemporaneous [administrative] construction ... is entitled to substantial weight," ante at 3, the dissent wholly ignores this contemporaneous administrative practice. The best evidence of the 1920 standard of patenability is the 1920 Interior Department practice on the matter. Finally, the suggestion that "future events [such] as market changes" were not meaningful data under the Castle v. Wombley test , ante at 5, is simply erroneous. As a leading treatise has observed "[t]he future value concept of Freeman v. Summers is nothing more than the 'reasonable prospect of success' of Castle v. Womble, and the reference to 'present facts' in Castle v. Womble ... relates to the existence of a vein or lode and not to its value." 1 American Law of Mining, § 4.76 at 697 n. 2.

Regards,



Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

May 29, 1980

MEMORANDUM TO THE CONFERENCE:

Re: ANDRUS v. SHELL OIL CO., No. 78-1815

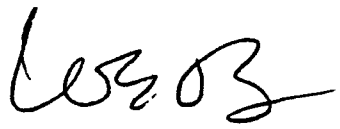
Below is a revision in the final footnote of my opinion; the changes are stylistic only.

[12] The dissent overlooks the abundant evidence that since 1920 Congress has consistently viewed oil shale as a "valuable mineral" under the general mining law. The dissent dismisses the 1931 hearings and the 1956 Act as irrelevancies: as for th 1931 hearings, the dissent states that "not a single remark by a Senator or Representative" approved the Freeman standard; as for the 1956 Act, we are informed that Congress "dealt with a totally unrelated subject." Ante at 3. Neither of these observations is correct. The 1931 Senate hearing was called specifically to review the Freeman case for fear that another "Teapot Dome" scandal was brewing. Rarely has an administrat law decision received such exhaustive Congressional scrutiny. And following that scrutiny, no action was taken to disturb th settled administrative practice; rather Senator Nye advised th Interior Department to continue patenting oil shale claims. Similarly, to characterize the 1956 Act as "totally unrelated" is to blink reality. The patentability of oil shale land was an essential predicate to that legislation; if oil shale land was non-patentable then Congress performed a useless act.

The dissent also overlooks that beginning in 1920 and continuing for four decades, the Interior Department treated oil shale as a "valuable mineral." In paying deference

to the doctrine that a "contemporaneous [administrative] construction ... is entitled to substantial weight," ante at 3 the dissent ignores this contemporaneous administrative practice. The best evidence of the 1920 standard of patentability is the 1920 Interior Department practice on the matter. The suggestion of the dissent that "future events [such] as market changes" were not meaningful data under the Castle v. Wombley test , ante at 5, is not accurate. As a leading treatise has observed "[t]he future value concept of Freeman v. Summers is nothing more than the 'reasonable prospect of success' of Castle v. Womble, and the reference to 'present facts' in Castle v. Womble ... relates to the existence of a vein or lode and not to its value." 1 American Law of Mining, § 4.76 at 697 n. 2.

Regards,



HAB

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 18, 1980

MEMORANDUM TO THE CONFERENCE

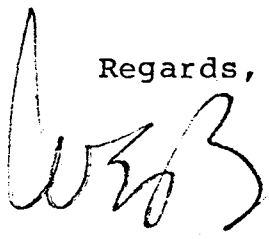
Re: Cases held for No. 78-1815, Andrus v. Shell Oil Co.

The only case held for Andrus v. Shell Oil is Strawberry Water Users Ass'n v. United States, No. 79-1399. That case was also held for Bryant v. Yellen, Nos. 79-421, et al., and its facts are set out in the Yellen "hold memo," which Byron circulated yesterday.

The petition was held for Shell Oil because one of the issues it presents is whether estoppel can be invoked against the Government. However, Shell Oil was decided solely on statutory grounds with no mention of estoppel; hence it sheds no light on this case.

I will vote to deny for the reason stated by Byron in his circulation.

Regards,



Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

January 22, 1980

RE: No. 78-1815 Andrus v. Shell Oil Co.

Dear Potter:

Would you be willing to undertake the dissent in this case?

Sincerely,

Bill

Mr. Justice Stewart
copy to Mr. Justice Marshall

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

May 28, 1980

RE: No. 78-1815 Andrus v. Shell Oil Co.

Dear Potter:

Please join me.

Sincerely,

Bill

Mr. Justice Stewart

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

January 22, 1980

Re: No. 78-1815, Andrus v. Shell Oil Co.

Dear Bill,

As I indicated to you at our Conference, my view is that the dissenting opinion in this case can appropriately be very short -- three or four paragraphs. If you and Thurgood share this view, I shall be glad to undertake the preparation of the dissent after a proposed Court opinion is circulated.

Sincerely yours,

P.S.

Mr. Justice Brennan

Copy to Mr. Justice Marshall

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

April 21, 1980

Re: 78-1815 - Andrus v. Shell Oil Company

Dear Chief:

I shall in due course circulate a dissenting opinion.

Sincerely yours,

P.S.

The Chief Justice

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Stewart

Circulated: 2 MAY 1980

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 78–1815

Cecil D. Andrus, Secretary of Interior, Petitioner, *v.* Shell Oil Company et al. } On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

[June —, 1980]

MR. JUSTICE STEWART, dissenting.

Oil shale was patentable under the general mining law from 1872 until 1920.[1] In 1920, Congress enacted the Mineral Leasing Act, 30 U. S. C. § 181 *et seq.* That legislation withdrew oil shale and certain other minerals from the general mining law, but preserved "valid claims existent at date of the passage of this Act and thereafter maintained in compliance with the laws under which initiated, which claims may be perfected under such laws, including discovery." Act of Feb. 25, 1920, ch. 85, § 37, 41 Stat. 451, as amended, 30 U. S. C. § 193.

The question presented in this case is whether oil shale claims brought under this savings clause of the Mineral Leasing Act must satisfy the usual standards of patentability, or instead may be patented through the use of a "discovery" standard different from that which generally applies. The Court's answer is that a different and more relaxed standard is applicable. I disagree. Since I believe that pre-1920 oil shale claims must fulfill the then firmly established requirements of patentability for all valuable minerals under the general mining law, I respectfully dissent from the opinion and judgment of the Court.

[1] Act of May 10, 1872, ch. 152, 17 Stat. 91, as amended, 30 U. S. C. § 22 *et seq.* See *Union Oil Co.* v. *Smith*, 249 U. S. 337, 345–346.

— 1, 4

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Stewart

Circulated: _____

Recirculated: 2 0 MAY 1980

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 78–1815

Cecil D. Andrus, Secretary of Interior, Petitioner, *v.* Shell Oil Company et al. } On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

[June —, 1980]

MR. JUSTICE STEWART, with whom MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL join, dissenting.

Oil shale was patentable under the general mining law from 1872 until 1920.[1] In 1920, Congress enacted the Mineral Leasing Act, 30 U. S. C. § 181 *et seq.* That legislation withdrew oil shale and certain other minerals from the general mining law, but preserved "valid claims existent at date of the passage of this Act and thereafter maintained in compliance with the laws under which initiated, which claims may be perfected under such laws, including discovery." Act of Feb. 25, 1920, ch. 85, § 37, 41 Stat. 451, as amended, 30 U. S. C. § 193.

The question presented in this case is whether oil shale claims brought under this savings clause of the Mineral Leasing Act must satisfy the usual standards of patentability, or instead may be patented through the use of a "discovery" standard different from that which generally applies. The Court's answer is that a different and more relaxed standard is applicable. I disagree. Since I believe that pre-1920 oil shale claims must fulfill the then firmly established requirements of patentability for all valuable minerals under the general mining law, I respectfully dissent from the opinion and judgment of the Court.

[1] Act of May 10, 1872, ch. 152, 17 Stat. 91, as amended, 30 U. S. C. § 22 *et seq.* See *Union Oil Co.* v. *Smith*, 249 U. S. 337, 345–346.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

April 10, 1980

Re: 78-1815 - Andrus v. Shell Oil Co.

Dear Chief,

Please join me.

Sincerely yours,

The Chief Justice

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

May 28, 1980

Re: No. 78-1815 - Andrus v. Shell Oil Company

Dear Potter:

Please join me in your dissent.

Sincerely,

T.M.

Mr. Justice Stewart

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

April 17, 1980

Re: No. 78-1815 - Andrus v. Shell Oil Company

Dear Chief:

Please join me.

Sincerely,

HAB.

The Chief Justice
cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

April 10, 1980

78-1815 Andrus v. Shell Oil Company

Dear Chief:

Please join me.

Sincerely,

Lewis

The Chief Justice

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

April 21, 1980

78-1815 Andrus v. Shell Oil Co.

Dear Chief:

This refers to changes made in the second draft of your opinion (at pp. 6 and 8), to the effect that the Coleman rule does not apply to claims for any minerals - not just shale oil - covered by the Mineral Leasing Act. Perhaps you are right, and yet I have reservations about going this far when it is unnecessary. My preference would be to limit what is said about Coleman explicitly to shale oil.

Sincerely,

Lewis

The Chief Justice

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

April 16, 1980

Re: No. 78-1815 - Andrus v. Shell Oil

Dear Chief:

Please join me.

Sincerely,

WHR

The Chief Justice

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

April 10, 1980

Re: 78-1815 - Andrus v. Shell Oil Company

Dear Chief:

Please join me.

Respectfully,

The Chief Justice

Copies to the Conference