

C O N T E N T S

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IAM

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1970

UNITED STATES,)	
)	
Petitioner)	
)	
vs)	No. 515
)	
SOUTHERN UTE TRIBE OR BAND OF)	
INDIANS,)	
)	
Respondent)	
)	

The above-entitled matter came on for argument at 10:02 o'clock a.m., on Monday, March 1, 1971.

BEFORE:

WARREN E. BURGER, Chief Justice
HUGO L. BLACK, Associate Justice
WILLIAM O. DOUGLAS, Associate Justice
JOHN M. HARLAN, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice

APPEARANCES:

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On behalf of Petitioner

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On behalf of Respondent

1 and the current state of the Commission's business indicates
2 that it is unlikely that that business will be concluded when
3 the present life of the Commission expires in 1972, but we feel
4 that in light of the Congressional policies expressed we are
5 obliged to try to see that that business is expedited.

6 We reproduce on page 12 of our petition for
7 certiorari in this case, some statistics about the present
8 state of the Commission's business. At the time we filed the
9 petition in August of 1970 158 Commission cases have proceeded
10 to judgment of which 81 in addition to the present case, have
11 been settled by compromise and 159 cases remain to be disposed
12 of. There has, to the best of our knowledge, been a change in
13 the status of only two cases in the intervening months so that
14 now 160 of the cases have proceeded to judgment and 157 remain
15 to be disposed of.

16 Q How does this Court get into this? Are we
17 supposed to speed them up?

18 A Well, we are attempting in this case, to
19 enable the Commission's business to be concluded in accordance
20 with this Congressional policy, by asking this Court to review,
21 and the Court agreed to review the Court of Claims decision,
22 which seemed to us to undermine, to jeopardize this Congression-
23 al policy in two ways, Mr. Justice.

24 One is that it seemed to us to impair the finality
25 of the judgments which have been arrived at in these cases,

1 particularly the judgments arrived at through the process of
2 settlement and compromise. We believe the Court of Claims
3 failed to properly respect the principles of res judicata in
4 this case.

5 And the second way in which this decision seemed
6 to us to jeopardize these Congressional policies, is by imper-
7 missibly expanding the Commission's jurisdiction beyond the
8 statutory cutoff dates that Congress imposed on the Commission's
9 jurisdiction.

10 And if I may, I'll proceed first to the res
11 judicata issue in the case because, under our view of the
12 case, that issue should be dispositive of the case in this Court.

13 Now, there is a lengthy background, historical
14 background, which I think need not be reviewed in detail. I
15 have asked the Clerk to distribute a map to each of the Justices
16 which may illuminate a little bit just what we are talking about
17 here relative to the res judicata issue before us.

18 Much of the history that's reviewed by this Court
19 in a decision involving 330 U.S., written by Mr. Justice Black,
20 called "The Confederated Bands of Ute Indians against the
21 United States;" that's 330 U.S. 169. It was there noted that
22 in 1868 a reservation was established by a treaty arrangement
23 by the Confederated Band of Utes which included all of the Ute
24 Indians, and that reservation was the entire large rectangular
25 area on this map bordered in red, and also in orange at one

1 point.

2 And the treaty specified that any change in the
3 reservation must be approved by three-quarters of the males of
4 the entire Federated Band of Utes.

5 The first change that took place was in 1874, the
6 so-called "Bruno Cession," which is no in dispute in the
7 present case, and that ceded to the United States that area
8 the rectangular area marked off in yellow-orange crayon in our
9 map. And, remaining after the Bruno Cession, which was
10 approved by three-quarters of the males in the entire Confed-
11 erated Band, was the rest of the reservation, which was all one
12 undifferentiated Ute reservation at the time, as it had been
13 under the 1868 legislation.

14 The map that we have used includes numbers on it,
15 so-called Royce numbers which were later applied by Charles
16 Royce, who drew up this map. This is a copy of Charles Royce's
17 map drawn in 1896. At the time there was no such thing as
18 Royce Areas; there was only the one undifferentiated Ute
19 reservation.

20 Then, by an agreement reached in 1880 as a result
21 of the massacre which occurred at the Meeker agency in the
22 northern portion of the reservation, and this too was reviewed
23 in this Court's previous case, there was, in effect, a forced
24 sale of this entire reservation to the United States, and the
25 language of the 1880 Agreement ceded the reservation to the

1 United States.

2 We have it reproduced in our brief, in the
3 appendix to our brief, the legislation which is found in Volume
4 21 of the statutes. This is an agreement between the Confeder-
5 ated Bands of Utes, which include the Respondents in this case,
6 and the United States. And on page 44 of our brief you will
7 find the relevant that the Chiefs and Headmen -- I am reading
8 the last full paragraph now -- of the Confederated Bands agreed
9 to use their best efforts to procure the consent -- it had to
10 be the consent of three-quarters of the males -- to cede to the
11 United States, all the territory of the present Ute reservation
12 in Colorado, with the exception of provision for settlement by
13 individual Indians in severalty.

14 In the case of the Utes in the southern portion
15 that settlement was to be made along the La Plata River in
16 Colorado, which is the area shaded in in green on our map, and
17 if there was insufficient land there for the allotments and
18 severalties to the individual Indians, then they were to be
19 settled on the La Plata River and its vicinity in New Mexico.
20 That language is read at the bottom of page 44 of the statute.

21 And, repeatedly the statute refers to this proviso
22 to discussion on all of the lands as a proviso for allotments
23 in severalty. That language is used on page 45 at the beginning
24 of the third paragraph: "Allotments in severalty of said lands"--
25 and at the very bottom of that page: "The lands are to be

1 divided among the said Indians in severalty." And again at
2 the bottom of page 46 of the reference to "settlement in
3 severalty."

4 Accordingly, in this Court's previous decision
5 dealing with the treaty, at page 174 of Volume 330 of the U. S.
6 Report, after the relevant language of the treaty as quoted,
7 this Court said, quite succinctly: "This act authorized
8 specific allotments to individual Indians from the land so
9 ceded." The Court referred to these as the lands ceded; all
10 of the lands on the present reservation.

11 The dominant intent of those who sponsored this
12 legislation and this treaty, was to extinguish reservation life
13 for the Ute Indians, which is clear from the reports and from
14 the legislative history which we cite extensively in our brief,
15 which was partly for retaliatory reasons because of the mas-
16 sacre and partly it represented prevalence of the view that
17 many held at the time that it was wasteful of land to try to
18 maintain the Indians in their aboriginal state; that they should
19 be settled on homestead-sized farms to be farmers.

20 The views were expressed by some who opposed the
21 legislation, that the Indians weren't ready for this kind of
22 settlement but those views did not prevail. The act was enacted
23 and the agreement was duly ratified by the Ute Indians, by the
24 Confederated Band, including the Respondent.

25 There was subsequent legislation which was not

1 referred to in the course of the settlement agreement of 1950
2 on which we rely and on which I will refer to just briefly. In
3 the historical part of our brief we refer to the subsequent
4 legislation at some length. The 1882

5 The 1882 Act was a very short statute which
6 provided for the first time for the line to be surveyed which
7 appears at the dotted line on our map. This is necessary be-
8 cause all of the Utes in the northern part of the ceded reserva-
9 tion had been removed to Utah and therefore, that part of the
10 reservation is ready for settlement by nonIndians, but the
11 allotments have not yet been made to the Utes in the southern
12 portion, the so-called "Southern Utes," including the Respon-
13 dents and the settlements could not be made by the nonIndians
14 until the individual allotments had been made and therefore it
15 was necessary to survey a line to cut off the southern portion
16 so that the northern portion could be opened to nonIndian
17 settlement.

18 Q I thought, however, that you had told us
19 that those southern Indians were to be settled along the La
20 Plata Valley, giving them homesteads in severalty.

21 A That is correct.

22 Q And the La Plata Valley is a rather small
23 area marked in green here. If that which you have said is
24 correct, then of course the necessity of the 1882 Act --

25 A Well, the fact is that the Indians were

1 still in the entire southern area. They had not yet been
2 settled along the La Plata Valley and the southern area,
3 therefore, was not, as a practical matter, ready for settlement
4 by the white settlers. That was why Congress said that this
5 line should be drawn so that the northern part could be opened
6 for settlement, for homesteading and for sale.

7 In the 1895 legislation which then ensued, the
8 House Report, as we quote on page 9 of our brief, referred to
9 the southern Indians "Anomalous condition of having ceded their
10 reservation," that was the word used: "ceded their reservation
11 and yet remaining upon it." And for that reason Congress de-
12 cided that a reservation should be restored to the southern
13 Utes. And for the first time, a Southern Ute Reservation was
14 established by the Act of 1895 which we refer to and reproduce
15 in the appendix to our brief.

16 Q Now, where was that on this map?

17 A That would now be the lengthy, the long
18 narrow rectangle at the bottom that would be formed by extending
19 the dotted line to the Western Boundary of Colorado.

20 Q And that was cleared, and as perhaps you
21 would say, "recreated" as a reservation in 1895 for the Southern
22 Utes?

23 A Well, it was actually the left corner of
24 it. That was established as a reservation for the Southern
25 Utes by the Act of 1895, which is reproduced on page 48 of the

1 appendix to our brief.

2 Q You said the "left corner of it?"

3 A Left corner of this southern part. The
4 remainder of this southern strip, was allotted in severalty to
5 individual Indians. But a reservation was established at that
6 time, not in the entire southern strip, but in the left portion
7 or the western portion of it. Part of it was allotted in
8 severalty, as the Act of 1880 had provided. Part of it was
9 established for the first time as the Southern Reservation.

10 There was no Southern Ute Reservation as such, as
11 we read the statute --

12 Q Until 1895.

13 A Until 1895 and as we think this Court read
14 the statutes in the case that I have cited to you.

15 Now, this is of significance, because of the
16 settlement agreement that we think the Court of Claims should
17 have honored in our plea of res judicata in this case. That
18 settlement agreement, which is formalized in the Court of Claims
19 judgment, was entered into in 1950; the relevant portions of
20 it are set forth on pages 98 and 99 of the Appendix. In these
21 excerpts, these indented excerpts that appear in Judge
22 Skelton's dissenting opinion on the Court of Claims.

23 The judgment entered was entered, it was in the
24 first excerpt as "full settlement in payment for the complete
25 extinguishment of plaintiff's life title interest estate and

1 claims, demands of whatsoever nature, to the land ceded by the
2 Plaintiff to the Defendants by the Act of 1880. And after a
3 schedule of lands was included in the settlement agreement, the
4 Court on page 99 says that the judgment of res judicata not
5 only as to the land described in this settlement, but whether
6 included therein or not, also as to any land formerly owned or
7 claimed by the plaintiffs in Western Colorado, ceded to defen-
8 dant by the Act of June 15, 1880.

9 Now, the Respondents were parties to that settle-
10 ment agreement and the four cases that were settled in that
11 judgment after several years of negotiations, compromised be-
12 tween the Government and the present Counsel for the Respondents.

13 The Confederated Bands of Utes, including the
14 Southern Utes, were awarded almost \$32 million in settlement.
15 Judge Skelton estimates that this amounted to \$15,600 per
16 individual Indian -- not the family, but per individual. The
17 settlement provided, pursuant to a stipulation of the tribes
18 that 40 percent of the awards would go to the Southern Utes,
19 including the Respondents.

20 And this is recited in Section 672 of Title XXV
21 of the United Code. It seems significant to us that, although
22 the Respondents now claim that no Southern Ute lands were in-
23 volved in that settlement, their percentage of the award, the
24 40 percent, was larger than the one-third which was specified
25 in the 1880 Agreement and legislation as the share that the

1 Southern Utes were to take, in proceeds under that agreement.

2 Q Were there any reservations or claims of
3 the Southern Utes in settlement agreement?

4 A There were not, sir. As a matter of fact,
5 the settlement agreement recited very specifically, and this is
6 at page 438 of Volume 117 in the Court of Claims: "Such judg-
7 ment shall be final adjudication of all issues between the
8 plaintiffs and the defendants in the case." It recited this as
9 to each of the settlements and I quoted the one that's directly
10 relevant here. It was on page 438 of Volume 117.

11 Also, of great significance, in our view, is the
12 context in which this settlement and judgment were reached;
13 the context of contemporaneous litigation in this Court between
14 the same parties represented by the same counsel. At pages
15 11 and 12 of our brief we cite counsel for the Utes' repeated
16 emphatic representation in that case in the complaint and in the
17 briefs, in the cases in Volume 330 U. S. that the 1880 Agreement
18 had ceded to the Government all of the Consolidated Band's
19 Colorado lands except for the individual allotments and severalty
20 which were provided for.

21 And it is noted in our brief this was also the
22 view taken in previous Court of Claims cases and the Government
23 in its brief in that case in this Court, acknowledged the cor-
24 rectness of these representations.

25 Moreover, this Court, in language which we quote

1 in our brief on page 25 of our brief, and I think this is very
2 significant. This Court specifically referred to the then
3 pending Court of Claims litigation which reached settlement
4 three years later in 1950, and said, in the language that we
5 quote there in the middle of page 25 of our brief: except for
6 certain treaty lands not at issue here, litigation concerning
7 which is now pending in the Court of Claims, the only lands in
8 Colorado for which the Indians have not been paid, are those to
9 the north of and outside the 1868 Treaty Reservation and the
10 Court in that case, this Court, rejected their claim for pay-
11 ment for those lands that were north of the Treaty Reservation,
12 the original treaty.

13 And the Court went on to say: "It is conceded
14 that Petitioners, the Consolidated Utes, including the Respon-
15 dents, have either been or are currently pressing litigation in
16 the Court of Claims by which they seek to be compensated for the
17 White River Valley land; in fact, all of the land which was
18 contained in the true boundaries of the 1868 reservation' and
19 that is the entire large rectangle on the map, which of course
20 includes the lands in the southern strip for which the Court of
21 Claims upheld an additional award in this case.

22 Now, we emphasize this language; we believe it is
23 correct, but we emphasize this language, not because there is no
24 possibility that this Court could have been in error in saying
25 this, but because this language was based on representations of

1 the same counsel who then negotiated the settlement agreement.
2 They were aware of what this Court had held and had said in the
3 case in 1947 and it seems inconceivable to us, at least, that
4 Counsel, aware that the Court had said this about the litigation
5 then pending, would enter into a settlement agreement using this
6 broad language referring to all of the lands ceded in the 1880
7 Act without reservation of any other claims; a settlement which
8 recites as the final adjudication of everything that was at issue
9 in those cases, it seems inconceivable to us that counsel would
10 enter into such a settlement agreement, using that language in
11 the context of this Court's recent opinion if they had meant to
12 reserve further claims to these southern lands.

13 Q Well, you are going to, Mr. Wallace, you
14 are going to address yourself to what the doors, what doors the
15 other side claim were left open by the settlement?

16 A Well, they of course point to statements
17 that were previously made by the Secretary of the Interior and
18 by other officials in the Interior Department, the latest of
19 which were in 1938 in which, in our view there was some con-
20 fusion as to what was established by the 1880 Act --

21 Q Well, how do you -- yes, but how does the
22 other side get into this, take this settlement agreement apart
23 and say: Well, it settles some things but not others. What
24 language in it leaves anything open?

25 A Frankly, I don't see much --

1 Q Well, they only covered -- for one thing
2 it only covered lands ceded by the Act of 1880; didn't it?

3 A That is what -- that embraced all of the
4 land in their reservation.

5 Q Well, there is some argument about that;
6 isn't there?

7 A Well, of course they make that argument
8 about it, but frankly I don't see that --

9 Q Well, the majority of the Court of Claims
10 thought something was left over --

11 A Well, the majority of the Court of Claims
12 entered parole evidence on the question of the parties' intent
13 and took the Government severely to task because we raised the
14 claim of executive privilege with respect to the attorney's
15 work product, of the attorneys who negotiated the settlement
16 with the Respondents, who wanted to refer to his notes and work
17 product. He was no longer in the Government.

18 But, really, declaring executive privilege, in our
19 view, essentially is superfluous. Our basic position was that
20 this was not a situation that admitted of parole evidence.

21 Q Well, what if it were, Mr. Wallace?

22 A Well, then there would be an issue --

23 Q About what?

24 A As to whether the claim of executive
25 privilege was a proper one --

1 Q Well, let's assume it wasn't; let's assume
2 it wasn't and parole evidence is quite proper --

3 A Whether there was sufficient basis for
4 the resolution --

5 Q What would have been the evidence -- what
6 would have been suggested that was left open? In terms of
7 that settlement language. We didn't mean to do what?

8 A Well, their claim is that we had treated
9 the 1880 Act right along as reserving a reservation for the
10 Southern Utes, even though it did not, in terms, reserve any-
11 thing but individual allotments and it was not until the 1895
12 Act that anything can be found in the statute books which in-
13 dicates the --

14 Q Well, what's your answer to that?

15 A Well, my answer is: these "even though"
16 clauses. There had been some misunderstanding by some Interior
17 Department officials as to the effect of the 1880 Act, the
18 effect of the 1895 Act, but always in the context in which it
19 was immaterial whether the reservation was established by the
20 one or the other, and these matters, these expressions of con-
21 fusion which are cited and we refer to them in our reply brief,
22 were remote in time from the settlement negotiations that were
23 being conducted in 1947 through 1950 in the context of what
24 counsel, the very same counsel, had said to this Court and what
25 this Court had said which indicates completely, in our view,

1 that the 1950 settlement covered all of the land --

2 Q When did the confusion exist? Years ago?

3 A The latest expression was in the restora-
4 tion of 1938. There was also expression in the early part of
5 the 20th Century.

6 Q But then you think whatever confusion there
7 was was washed out in the settlement?

8 A Well, it seems to us clear from the con-
9 text that the attorneys who had just litigated this case in this
10 Court and were aware of the language that this Court has used,
11 if they entered into a sweeping settlement agreement as they
12 did, it seems to us the way any other judgment is treated they
13 obviously meant to settle all the claims that were issued. That
14 would certainly be the view of an anti-trust consent decree or
15 any other settlement judgments.

16 We don't think that this judgment, which is the
17 result of a compromise negotiated by very able counsel over a
18 period of several years, should be treated any differently.

19 Q What's the amount of the additional award?

20 A It has to be valued in further proceedings,
21 Mr. Justice. The claim is just for evaluation of, and an
22 accounting.

23 Q Do you have any estimate of the range of it
24 at all? Is there anything in this record that may reveal that
25 to us?

1 A I don't think the record really indicates
2 it and I don't know. This remains to be evaluated. There is,
3 of course, an additional issue as to the extent of the account-
4 ing that is properly required under the judgment in this case.
5 Should the Court disagree with us on the res adjudicata issue
6 we've developed that in our brief. It seemed to us that the
7 -- both the Commission and the Court of Claims, when waving on(?)
8 the explicit cutoff dates on the Commission's jurisdiction, in
9 accepting ten years after the accounting was rendered, excep-
10 tions which bring into issue claims other than those made dur-
11 ing the statutory limitations period and which would require a
12 general accounting up to date, which seemed to us to go way
13 beyond the statutory limitations on the Commission's jurisdic-
14 tion

15 Q If you prevail on the res judicata clause
16 those other claims would wash out.

17 A That is correct, Mr. Justice Harlan, and
18 the res judicata point that we're making would be dispositive
19 of the case.

20 Thank you.

21 MR. CHIEF JUSTICE BURGER: Thank you, Mr. Wallace.

22 Mr. Wilkinson.

23 ORAL ARGUMENT BY GLEN A. WILKINSON, ESQ.

24 ON BEHALF OF RESPONDENTS

25 MR. WILKINSON: Mr. Chief Justice and may it

1 please the Court:

2 I'm having a chart brought in, if I may, so that,
3 as Mr. Wallace says, the history of the treatment by the United
4 States of the Confederated Bands of the Ute Indians -- Con-
5 federated Bands of Ute Indians by the United States is somewhat
6 complicated. I would like to use this to give the picture as
7 we see it and as it relates to the case before the Court today.

8 Like the Government's sketch, this is adopted
9 from Royce: 1896 Bureau of Ethnology Report Interpretation of
10 Indian Land Cessions in the United States.

11 Prior to 1868 the Confederated Bands of Ute
12 Indians, who were composed of the White River Band, the
13 Uncompahgre Band and the Southern Ute Band, occupied in the
14 usual Indian fashion, a tremendous area in Colorado, New Mexico
15 and Utah.

16 In 1868 the Confederated Bands, the three units
17 comprising the Confederated Bands agreed to limit its area of
18 occupation to the outside perimeters shown on this sketch;
19 approximately or just slightly lower than 16 million acres.

20 Q Mr. Wilkinson, in 1868 approximately how
21 many people are involved in these tribes and bands?

22 A Somewhere between three and 4,000 people.

23 In 1873, as counsel has explained, there was a
24 highly mineralized area found in the location of Colorado which
25 is identified here as Royce Area 566. The United States obtained

1 from the Confederated Bands of Ute Indians an agreement to cede
2 that and it was ceded in 1873, ratified by an Act of Congress
3 of 1874.

4 The next Act, of course, was the agreement between
5 the Confederated Bands of Ute Indians and the United States an
6 agreement which was worked at by nine representatives of the
7 three bands constituting the Confederated Bands of Ute Indians
8 over a period of several weeks in Washington.

9 As indicated, it was desired by the people of
10 Colorado and probably people in Congress that the Confederated
11 Bands be removed from Colorado because of many things, but be-
12 cause eventually the Meeker Massacre, which occurred in 1879.

13 That agreement provided that the chiefs and head-
14 men of the Confederated Bands would exercise their most per-
15 suasive powers to get their people to agree to a cession of
16 land indicated in what I call the 1868 Reservation. That agree-
17 ment had to be ratified and accepted by three-quarters of the
18 male adult Utes. It was to be brought back to Congress for
19 ratification.

20 It provided for a cession of the 1868 reservation
21 with two extremely important exceptions: one was that it pro-
22 vided that the Uncompahgre Band which occupied generally the
23 middle area of the 1868 Reservation was to be provided with land
24 on the Grand River near the mouth of the Gunnison River in the
25 western portion of the middle section of this area.

1 The other important exception and the one which
2 determines this case is the fact that it reserved for the
3 Southern Ute area the area in the south which the Southern Utes
4 had used from time immemorial. The Southern Utes, as a part of
5 the agreement, agreed to remove to and remain on the La Plata
6 River and the area adjacent to it in the State of Colorado, and
7 if that was insufficient then on the La Plata River and area
8 adjacent in the territory of New Mexico.

9 This was a way of expressing where the Southern
10 Utes were living and continued to live and the first definite
11 expression of this comes from the fact that Mr. Manypenny, who
12 was Chairman of the Commission appointed pursuant to the Act of
13 1880, when he visited the Southern Utes, recommended to the
14 Department of Interior and the Congress that the area hereto-
15 fore and presently occupied by the Southern Utes should be pre-
16 served for the home of the Southern Utes.

17 There was a reaction of Congress --

18 Q One of the questions in the case is
19 whether that was a reservation or whether it was simply a
20 designation of the area to be occupied by the southern members
21 of the Confederated Ute Tribes in severalty. Isn't that one
22 issue? You stated that as a fact; isn't that some matter of
23 controversy between you and your brother Counsel?

24 A It's the key counsellor setting of this
25 case, if Your Honor please.

1 The 1880 Treaty and Agreement as I have indica-
2 ted, removed and settled the Southern Utes, for whatever pur-
3 pose.

4 Q And whether or not that was a reservation
5 at that time was a key issue in this case; isn't it?

6 A Whether it was reserved for the Southern
7 Utes; that's right.

8 The 1882 Act came along; there was concern and
9 the Attorney General had told Congress that it could not dis-
10 pose under the public land laws, the area indicated as 616 with-
11 out additional legislation.

12 Congress responded with two thoughts in the 1882
13 legislation: first, it opened area 616 to disposal under the
14 public land laws and it provided for a line to be drawn between
15 the area to be disposed of under that act and the area occupied
16 by the Southern Ute Tribes. That line was drawn, as I have
17 indicated, from the southwest corner of the Royce Area 566 to
18 the boundary of the Territory of Utah.

19 Now, from that period on, from 1882 until 1895
20 in every session of Congress, save one -- in those days most of
21 the Congresses had three sessions -- there was legislation
22 pending concerning the treatment and disposition of the Southern
23 Utes and their lands.

24 When it came along to 1888 Congress passed a law
25 which established a commission to negotiate with the Southern

1 Utes for preservation or settling of their treaty and other
2 rights, including the possibility of exchange of their reserva-
3 tion -- the word is in quotations: "their reservation". And
4 "reservation" meant only Royce Area 617. They reached agreement
5 with the Utes.

6 The Utes agreed -- the Southern Utes, to trade
7 that area for an area in Utah territory three times as large as
8 this. There was objection from the citizens in Utah. The Utes
9 were sort of unwanted people at this time, even the Territory
10 of New Mexico didn't want them to move there. But this agree-
11 ment in 1888 which provided for exchange of their reservation
12 for the exchange for the land in Utah was reached by the Com-
13 mission and it passed the Senate. It died in the House. Still,
14 there was continuation of legislative effort throughout.

15 And about 1893 or 1894 Congress started -- changed
16 its direction toward the handling of the Southern Ute Reserva-
17 tion. And I might say that during all of this time there was
18 adequate and ample administrative recognition of the ownership
19 of the area, Royce 617 involved on the part of the administrative
20 officers of the United States.

21 But, when 1895 came along, Congress paid some
22 slight heed or attention to the Act of 1880 as saying that the
23 property involved in Royce Area 617 should be handled as pro-
24 vided by the 1880 Treaty as herein provided.

25 It then changed directions considerably from what

1 it had done in the 1880 act. The 1880 Act had provided, for
2 instance, the proceeds from the lands to be sold in Royce Area
3 616 should be divided three ways: between the White River, the
4 Uncompahgres and the Southern Utes.

5 In 1895 and even though the Treaty of 1868 had
6 required that any cession of Ute land obtain permission from
7 three-quarters of the male adults of the bands involved, it
8 provided vastly different factors. First it created a division
9 between Royce Area 617. It said: those members of the
10 Southern Ute Tribe who elect and are qualified to receive
11 allotments, shall be allotted in the area at the east end of this
12 tract; as to those who did not elect or were not qualified, the
13 Government would create a reserve for them, a reservation in a
14 40-mile tract in the western end of the Royce Area 617.

15 Congress didn't require that three-quarters of the
16 male adult Utes vote for this; it required only a majority
17 vote. It also provided that within six months following the
18 passage of that act the President should arrange for the allot-
19 ments for those to be allotted in the eastern end and the
20 balance should be sold under the public land laws at not less
21 than \$1.25 per acre.

22 Q And that was in what year; 1895?

23 A 1895.

24 The proclamation was actually issued four years
25 later, in 1899.

1 Q Do you know about how many Utes there were
2 at that time?

3 A At that time the Southern Utes numbered
4 approximately 1,100.

5 Q What do they number now?

6 A There are now two different tribes, if
7 Your Honor please. This is now known as the Ute Mountain Ute
8 Band; this is known as the Southern Ute Tribe. The Southern
9 Ute Tribe latest enrollment is just under 800. The Ute Mountain
10 Ute Band is almost as large.

11 Q What was the acreage, the complete area
12 of land or miles that was allotted to them?

13 A The acreage in Royce Area 617 is approxi-
14 mately 1,070,000 acres. It was an area 15 miles wide and
15 approximately 100 miles long. It was often referred to as a
16 15 by 100 mile strip.

17 Q And there were how many at that time?

18 A There were about 1100. This is one of the
19 factors which caused Congress to give this problem so much con-
20 sideration and also caused the administrative officers to be so
21 concerned.

22 The Southern Utes were sitting on a strip of land
23 just 15 miles wide and advancing settlement was encroaching on
24 all sides, especially with the north and south. The City of
25 Durango(?) which was in the cession of 1873, around 1895

1 had reached a population of 4,000 people. The administrators
2 were concerned that friction would develop between the non-
3 Indians and the Indians and this is one of the reasons they
4 were anxious to remove the Southern Utes from what the admini-
5 strative officers considered a small slender portion of land
6 on which they had lived.

7 Now, the area on the east which was not allotted,
8 was put up for sale and in 1902 Congress passed another Act
9 which was called the "Free Homesteads Act." Now, the 1895 Act
10 which provided for the allotting in the east, provided that
11 after the deduction of the expenses of the sale the remainder of
12 the proceeds should be saved and put in trust for the benefit
13 of the Southern Utes and the Southern Utes only; another clear
14 indication of the Congressional recognition that Royce Area 617
15 was Southern Ute Territory.

16 Now, two administrative decisions came along in
17 1903 and 1920. In 1903 one man sought a homestead in that area.
18 He used as his theory the fact that this had been ceded by the
19 Act of 1880. His application was denied and reviewed and denied
20 by the Secretary of Interior. The same application, type of
21 application was made under the Minerals Act of 1920 and again
22 was denied by the Secretary of the Interior.

23 And the final main act which shows beyond any
24 doubt that this area, Royce Area 617 was preserved for the
25 Southern Utes and was not ceded by the Act of 1880, is the fact

1 that in that year the Secretary of the Interior, pursuant to
2 provisions of the Indian Reorganization Act of 1934, restored
3 to the Southern Ute Tribe in excess of 300,000 acres of land
4 in the eastern section of Royce Area 617 which had not been
5 disposed of under the public land laws.

6 In the meantime, between 1900 and 1938 the United
7 States Government had given away, free to homesteaders, in
8 excess of 225,000 acres of land. It did this in clear violation
9 of the Act of 1895 which provided for sale of that land to
10 settlers at not less than \$1.25 per acre, the balance to be
11 saved and held in trust for the Southern Utes.

12 Now, the Government says: "We ignore all of this
13 history; we ignore the recognition by Congress over a continued
14 long period of time and we do this because, in the settlement
15 of other cases unrelated to this area, involving other parties,
16 involving other issues, there is a stipulation which provided
17 in a catch-all phrase that the settlement of four cases which
18 were involved there, and only one is really important here, and
19 that is Case Number 46640, the judgment to be entered is res
20 judicata, not only as to the land described in schedule 1, but
21 whether included therein or not, also as to any lands formerly
22 owned or claimed by the plaintiffs in Western Colorado, ceded
23 to defendant by the Act of June 15, 1880.

24 Q Mr. Wilkinson, let me ask you this: if
25 this stipulation that you just referred to, is that the same one

1 that appears at page 98 of the Appendix, recited in the dis-
2 sentsing opinion in the Court of Claims?

3 A Yes, sir.

4 Q Now, if that stipulation does indeed
5 relate to the total claims, is that the dispositive factor in
6 this case?

7 A If the Court should find, contrary to what
8 we think is the fact in the language of the 1880 Act that the
9 legislative history, the administrative interpretations, that
10 this area, Royce 617 was, indeed, ceded by the Act of 1880, then
11 I'm afraid that the Southern Utes will never have an opportunity
12 to get reimbursed for the 230,000 acres given away.

13 Q Where is that language in the 1880 Act
14 which the Government relies on as having ceded the entire
15 reservation?

16 A It's in the Defendant's, the Government's
17 brief, page 43. Section 3 at the bottom of the page 44, if
18 Your Honor please, the second full paragraph: "The said chiefs
19 and headmen" agreed to do what was required by the agreement.

20 Then the language is that: "the Southern Utes
21 agreed to and settle upon the unoccupied agricultural lands on
22 the La Plata River" --

23 Q Well, I know, but do you dispute that the
24 rest of the reservation was ceded at that time?

25 A Area 616 was; yes.

1 Q Well,--

2 A It was ceded in trust.

3 Q All right, then; where was -- in this
4 language do you find a distinction between 616 and Royce 617?
5 And if it ceded one, why didn't it cede the other?

6 A Because, it treated each of the three bands
7 of the Confederated Utes a little bit differently. The White
8 Rivers who were in the northern area were moved to Utah --

9 Q Well, that may be true, but the cession
10 language applies generally to the entire area.

11 A Except --

12 Q Well, where is the "except?"

13 A It's in the paragraph before, Your Honor,
14 "except as hereinafter provided for" --

15 Q Well, I understand that, but "except as
16 hereinafter;" where is the hereinafter?

17 A That's the Southern Utes and the Uncompaghre
18 Utes.

19 Q Yes.

20 A The Uncompaghre Utes provision is dealt
21 with at the top of page 45.

22 Q Well, I know, but do you think that's an
23 exception to the --

24 A Yes, sir; we do, and we think that con-
25 clusion is very well fortified by the later Congressional

1 history and Congressional action which followed the adoption
2 of this act.

3 Q Well, you think then that -- you think
4 there is still a claim outstanding for the Uncompahgre Utes?

5 A Well, there was a claim filed for the
6 Uncompahgre Utes and that claim was successful.

7 Q You mean based --

8 A So, I say here that the United States, to
9 locate land for them on the Grand River near the mouth of the--

10 Q Well, they didn't carry out this agreement
11 but there was no question but what the land had been ceded.

12 A We think there is, and that's the basis of
13 this lawsuit and we think Congress thought so.

14 Q The paragraph upon which you rely is the
15 last full paragraph on page 44; isn't it? And you say that's a
16 reservation for the Southern Utes?

17 A Yes, sir; it's a preservation of the land
18 theretofore occupied by the Southern Utes and we say this con-
19 stitutes, as Mr. Manypenny put it: the preservation of the land
20 now and heretofore occupied by the Southern Utes.

21 Q And you dropped the "p" and you said it
22 was a "reservation;" is that right?

23 A Yes, sir; and also I might call your
24 attention to the fact that there is language in the Report by
25 the Commissioner of Indian Affairs in 1881 which provides and

1 interprets this as ceding and selling the diminished 1868
2 Treaty Reservation excepting and reserving such lands on the
3 La Plata River and its vicinity for the Southern Utes in pur-
4 suance of the Act of 1880.

5 Q Now, all these historical facts were well-
6 known, I take it, when the stipulation was made, the one that
7 appears on page 98 of the Appendix; is that correct?

8 A They were well-known to the people who
9 were involved; yes.

10 Q Why should it be necessary to go outside
11 the four corners of the stipulation to find out what the
12 stipulation meant?

13 A I don't it is. We oppose the remand, Mr.
14 Chief Justice.

15 Q Where did the idea of taking the parole
16 evidence for that explanation originate; with the Court of
17 Claims?

18 A With the Court of Claims. Both parties
19 opposed the remand, but when the remand was allowed we intro-
20 duced evidence -- we introduced evidence not only by the Chief
21 Attorney for the Utes, but also by two expert land researchers
22 who testified that before the stipulation in the settlement of
23 1950 they were working, at our request, on compilation of
24 records for the Southern Ute Tribe involving Area 617.

25 The Government, of course, as this Court is

1 well-aware, refused to offer any evidence at that time.

2 Now, if the Court please, if you feel that there
3 is some uncertainty about whether the 1880 Act did cede Royce
4 Area 617 and we submit that it did not, and we submit, as I
5 have said, that Congress and administrative did not think so.
6 Counsel has said that the Secretary of Interior in 1938 was
7 merely mistaken in his interpretation of his Act, but if he
8 was mistaken he gave those Southern Ute Indians over 300,000
9 acres of land to which they --

10 Q May I ask, Mr. Wilkinson: I gather that
11 this provision on page 45, "Allotments in Severalty" -- does an
12 allotment presuppose that the United States had land to allot?

13 A It was an allotment -- it was a method of
14 carrying out what was then the new Indian policy of --

15 Q No; my question was whether a provision
16 for allotments in severalty must be -- was or was not on a
17 premise that the United States had land to allot.

18 A No; no. The United States held this land,
19 any of this land only in trust, even as to Area 616. It held
20 it in trust only for the benefit of the Confederated Band of
21 Utes --

22 Q Yes, to hold it in trust. Why was there a
23 cession of 616?

24 A Because Congress and the people in the
25 State of Colorado wanted to get the Utes out of Colorado --

1 Q Well, why did they put title in the United
2 States?

3 A Title was already in the United States --
4 Q As trustee.
5 A Title by virtue of the 1868 Treaty.
6 Q And what did the cession accomplish?
7 A It removed the --
8 Q It removed the Indian claims?
9 A It removed the Indians personally.
10 Q It removed whatever claim on the property
11 under the act?

12 A No, sir; no sir. Like the 1868 Treaty the
13 United States was merely holding that land in trust for the
14 Indians.

15 Q Then the 1880 cession to the extent the
16 1880 cession, whatever it embraced, did not terminate the trusts
17 and was not --

18 A No, sir; in fact --
19 Q What did the cession accomplish, then?
20 A Removed the people out of Colorado.
21 Q A cession does nothing except remove the
22 people --

23 A And when the 1882 Act came along it did
24 give the United States the authority to dispose of this land
25 under the public land laws. Attorney General Brewster advised

1 Congress in 1881 that it didn't have authority even under the
2 1880 Act to dispose of this land, and I'm talking about 616,
3 without additional authority from Congress.

4 Likewise we say the same is true of Area 617
5 with respect to the Southern Utes. And whatever the motivation
6 of Congress was in 1880, it let those Southern Utes occupy that
7 area just had they had theretofore, until 1895 when it retraced
8 its steps and went in another direction and provided for the
9 allotting the separate reservation, the sale of some of the
10 eastern area and then the proclamation by the President to open
11 that up for public settlement.

12 Q The parties to this 1880 arrangement must
13 have had -- they must have thought the cession was very simple
14 because they decided that the Utes would cede but on the condi-
15 tion that the Government caused the lands so set apart to be
16 surveyed and divided among the Indians in severalty. And that
17 as soon as the consent of the Tribe, the Commission shall be
18 set to superintend any move to settle with the Utes?

19 And in consideration of the cession of the
20 territory. Now, this cession did something.

21 A Yes; it provided for the census and the
22 separation of the three bands. Two of them moved to Utah
23 eventually and the Southern Ute Band was left essentially
24 where it had lived for --

25 Q Well, Mr. Wilkinson, the title is: an act

1 to accept and ratify the agreement for the sale of the reserva-
2 tion in said state. What were they selling?

3 A Well, the Attorney General the following
4 year told them they hadn't done enough to sell it; they needed
5 one more act so they could sell tract 616.

6 I want to say --

7 Q Mr. Wilkinson, may I ask you one or two
8 questions. I'm not sure.

9 Let's suppose that the Government wins and leaves
10 the Utes only with the land which there is no controversy about
11 now. How much land would that be for each Indian; per Indian?
12 According to the population.

13 A I don't know, Your Honor. I would judge
14 there are 450,000 acres in the Ute Mountain Ute Reservation,
15 which was created by the Act of 1895.

16 Q 450,000.

17 A The population of that tribe is, I think,
18 in the neighborhood of 700. The Southern Ute Reservation,
19 which is at the eastern end of Royce Area 617 --

20 Q 700 had 450,000 acres, you say?

21 A Approximately; yes.

22 Q Even if you don't win this?

23 A They still have that and they will con-
24 tinue to have it.

25 Q Suppose you win this, how much would it

1 be per Indian?

2 A Those people will still have that. What
3 we're trying to collect for is 230,000 --

4 Q I'm trying to get how much it is per
5 Indian. I could think of it better.

6 A My arithmetic is a little too slow, Mr.
7 Justice Black, but you divide 1,000 into 400,000 and I guess
8 you get 400 acres --

9 Q About 400 acres?

10 Q Is this mountainous land or valley land
11 or farming land or --

12 A There is an elevation at various points
13 between about 6,000 feet and 12,000 feet. It's fairly moun-
14 tainous, but as has been indicated, there are five or six small
15 river valleys, also. And those are the places where the allot-
16 ments were made. Approximately 150,000 acres of land was
17 allotted pursuant to the Act of 1895. The Government gave away
18 free to homesteaders about 230,000 acres.

19 Q Mr. Wilkinson, on your theory of the case,
20 what is the explanation for the 40 percent part of the settle-
21 ment that the Southern Utes got in the 1957 --

22 A The settlement was for lands involved in
23 Royce Area 616. There were three components of the Confederated
24 Bands of Ute Indians and those judgments were all for the
25 Confederated Bands of Ute Indians. The Southern Utes received

1 40 percent; the Uncompahgre Utes received, I think, 20 percent
2 and the White River Utes, 40 percent; something on that order,
3 because all, pursuant to the Treaty of 1868, owned the land
4 involved in the tract you see before you.

5 Q Well, what is involved, the total in this
6 case?

7 A Just under 32 million and the most --

8 Q 32 million representing what?

9 A The biggest part was one case which
10 approximated \$25 million.

11 Q This suit we have before us.

12 A As Indian claims go, this is a small case.

13 Q Well, I know, but how much is involved?

14 A We don't know. This is still in the inter-
15 locutory stage. My guess would be that we're talking about
16 230,000 acres valued in different tracts as between 1900 and
17 1938 of land which is not extremely valuable and also we're
18 dealing and asking for an accounting of the proceeds from other
19 lands sold, but for which the Government has made no accounting
20 to --

21 Q And how much did the Government get for
22 that land? That's the 200-odd thousand acres?

23 A That's what shows in the report so far:
24 \$215,000.

25 Q \$215,000?

1 A That's right. So this --

2 Q This case is under \$1 million; isn't it?

3 A That is a good ball park guess, in my
4 judgment.

5 Q I still don't understand why the Southern
6 Utes on the premises you described as the 1950 settlement, got
7 the lion's share of it?

8 A They didn't, Your Honor.

9 Q Well, they got 40 percent.

10 A By that time there were two tribes and each
11 of them got 20 percent. Combined, taking the old Southern Ute
12 Tribe they got 40 percent. Likewise, the Uncompahgre Band got
13 approximately the same and the White River Band got about 20
14 percent.

15 Now, the treaty or the agreement of 1880 provided
16 for a three-way split between these bands, but the population
17 shifts that occurred up to the time of the stipulation in 1950
18 have been such that the tribes agreed among themselves upon
19 a division of the judgments, and Congress ratified that agree-
20 ment.

21 And that's the background of why that happened.

22 I might say one thing more, if I may impose on the
23 Court. If there is uncertainty about what the Act of 1880 did,
24 we are asking you to look at that Subsection of our brief in
25 which Mr. Chief Justice Marshall as early as 1832 indicated that

1 limits and treaties in the United States and tribes should not
2 be interpreted to the detriment of Indian Tribes. And we ask
3 that that tradition of this great country be continued in this
4 case.

5 I thank you.

6 MR. CHIEF JUSTICE BURGER: Thank you, Mr.
7 Wilkinson.

8 Mr. Wallace, your time has expired, but we have
9 extended Mr. Wilkinson. If you have anything pressing or urgent
10 I will give you a few moments.

11 REBUTTAL ARGUMENT BY LAWRENCE G. WALLACE, ESQ.

12 ON BEHALF OF PETITIONERS

13 MR. WALLACE: Well, just very briefly, Mr. Chief
14 Justice, I do want to call specific attention to page 8 of our
15 reply brief that we filed in this Court, in which we quote from
16 the brief that was filed on behalf of the Confederated Utes in
17 this Court in 1947, including the response --

18 Q When was the reply brief filed?

19 A Our reply brief was filed in February, 1971.
20 On the front cover it says: Petitioner's Reply Brief.

21 On page 8 of that reply brief we quote from the
22 brief that was filed by Mr. Wilkinson, Mr. Ernest Wilkinson,
23 Mr. Glen Wilkinson's law partner, in this Court in 1946 term in
24 the case that I have referred to previously, and that brief
25 said that "the central purpose of the 1880 Act" was "to acquire

all of the land of the then 'present Ute Reservation,'" and the sole "exceptions" --

Q Sale, sale.

A Well, that is a misprint; I'm sorry. The word should be "sole," and the "sole exceptions were unoccupied agricultural lands on the La Plata River, agricultural lands on Grand River, et cetera, for individual allotments." That is the representation that the Ute Band made at this time. They now claim that that reservation in the 1880 act was for a reservation for the Southern Ute Tribe.

It seems to me that in light of what they said in the 1947 litigation and what this Court has said, that the stipulation in 1950 would have run quite differently if they had meant to reserve some Ute lands from that settlement.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Wallace; thank you, Mr. Wilkinson.

The case is submitted.

(Whereupon, at 11:14 o'clock a.m., the argument in the above-entitled matter was concluded)