In the

Supreme Court of the United States

AFFILIATED UTE CITIZENS OF THE STATE OF UTAH, et al.,

Petitioners,

v.

UNITED STATES OF AMERICA, et al.

Docket No. 70-78

Pages 1 thru 63

Washington D.C.
October 18, 1971

HOOVER REPORTING COMPANY, INC.
Official Reporters
Washington, D. C.
546-6666

IN THE SUPREME COURT OF THE UNITED STATES

AFFILIATED UTE CITIZENS OF THE STATE OF UTAH, et al., Petitioners,	:	
v.	:	No. 70-78
UNITED STATES OF AMERICA, et al.	:	

Washington, D. C.,

Monday, October 18, 1971.

The above-entitled matter came on for argument at 1:20 o'clock, p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice [presiding]
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:

PARKER M. NIELSON, ESQ., 320 Kearns Building, Salt Lake City, Utah 84101, for the Petitioners.

A. RAYMOND RANDOLPH, JR., ESQ., Assistant to the Solicitor General, for Respondent United States.

MARVIN J. BERTOCH, ESQ., 400 Deseret Building, Salt Lake City, Utah, for Respondent First Security Bank of Utah, N.A.

C O N T E N T S

- - -

P R O C E E D I N G S

MR. JUSTICE DOUGLAS: No. 70-78, Affiliated Ute Citizens vs. United States.

MR. GRISWOLD: Mr. Justice Douglas, --

MR. JUSTICE DOUGLAS: Mr. Griswold.

MR. GRISWOLD: -- and may it please the Court:

I move the admission pro hac vice of A. Raymond Randolph for the purpose of arguing this case. Mr. Randolph is a member of the bar of the State of California and a member of my staff, and I recommend him to the Court.

MR. JUSTICE DOUGLAS: Your motion is granted.

Mr. Nielson, you may proceed when ready.

ORAL ARGUMENT OF PARKER M. NIELSON, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. NIELSON: Mr. Justice Douglas, and may it please the Court:

The matter now at bar involves the seemingly unrelated provisions of the Securities Exchange Act of 1934, and the Ute Termination Act of 1954. These two seemingly unrelated statutes are drawn into focus in this case because both of them involve prohibitions against overreaching, and both of them create limited fiduciary obligations with respect to those who are subject to their provisions.

The Ute Termination Act of 1954 had the effect of dividing the Ute Indian Tribe of the Uintah and Ouray

Reservation into two entirely artificially created groups, and directing that all of the assets of the reservation, including in particular, as far as the facts of this case are concerned, beneficial interests in the mineral estate, were to be divided between the two groups and to be distributed to the Indians about to be terminated.

Now, I note in passing that those who are responsible for the drafting of this law have referred to the group that was about to be terminated as mixed-bloods. The term "mixed-blood" is itself a slur, and it is offensive to the petitioners in this case, who prefer to be referred to by the term, Terminated Utes.

The petitioner, Affiliated Ute Citizens of the State of Utah, is the authorized representative of all the Terminated Utes, which was formed in the manner specified in Section 6 of the Ute Termination Act by a constitution and bylaws, which was duly ratified by the majority vote of all of the adult Terminated Utes at a special election called by the Secretary of the Interior.

Q Why do the --the statute, of course, talks about mixed-bloods, and the only Terminated Utes are those who were referred to in the statute as mixed-bloods; is that true?

MR. NIELSON: That is correct, Mr. Justice Stewart. When I made reference to that circumstance, what I had in mind is that in reality if we want to talk in terms of the ancestry

of the Indians on this reservation, all of them are indeed mixed-bloods. They are mixed --

Q Well, while you were talking, I thought it might be helpful to talk in terms of the statute.

MR. NIELSON: Yes.

Q And the statute does use that phrase throughout.

MR. NIELSON: It does, Mr. Justice Stewart; and my point simply was that the term itself is offensive to the petitioners, and they have designated themselves otherwise in these proceedings.

Q And yet, I gather that full-bloods could become by choice mixed-bloods; is that correct?

MR. NIELSON: The statute did so provide.

No one in these proceedings disputes that the Affiliated Ute Citizens was the organization which was formed in the manner specified by statute. There is, however, a rival organization, which we will discuss in some detail in these proceedings, known as the Ute Distribution Corporation.

The Ute Distribution Corporation is a corporation formed under the corporate laws of the State of Utah. It was not formed by the adoption of a constitution and bylaws, it was not ratified by a majority vote of all Terminated Ute Indians, nor was it considered at a special election called by the Secretary for that purpose.

Thus, the crux of the problem in this case, vis-a-vis

these two rival organizations, is the question of how the powers of the authorized representative could have been transferred from the Affiliated Ute Citizens, who, admittedly, were originally invested with those powers to the Ute Distribution Corporation.

It is thus a conveyancing problem, plain and simple. And I invite the Court to pay particular attention to the manner in which it is proposed that those powers were shifted from one organization to the other.

The question turns on the definition of authorized representative, as contained in the Act. We're not concerned, for the purpose of that definition, with the question of ownership of property. Section 10 of the Ute Termination Act, which is the section which defines the authorized representative powers, refers exclusively to the question of powers to manage the jointly held and restricted assets of the two groups of Indians in the mineral estate. It does not speak in terms of ownership of property.

The United States has proposed that the powers were transferred from AUC to UDC by virtue of the provisions of Section 13 of the Termination Act. Section 13, by contrast, speaks only, and speaks exclusively, of powers with respect to the ownership of property. The authorized representative powers were not powers that had any relationship to the ownership of property and in particular to the ownership of

property by the individual mixed-blood or Terminated Ute Indian, which is all that Section 13 relates to.

The individual petitioners in these proceedings are members of the Affiliated Ute Citizens who have brought a fraud claim based upon their sale of stock in the Ute Distribution Corporation.

Now, for the purpose of their fraud claim, and this distinction must be kept in mind, the question of the regularity of the formation of the Ute Distribution Corporation is not an issue. It is not an issue because the proceeds from the management of this joint mineral estate over the period of time that we're here concerned with has been paid, in the form of dividends through the Ute Distribution Corporation.

The recognition at this point that the Affilited Ute Citizens is the proper authorized representative will not have the effect of restoring to the Terminated Utes the dividends, or the royalties which they have lost by reason of those practices. Thus, the regularity of Ute Distribution Corporation is an issue with respect to the Affiliated Ute's part of the claim; it is not an issue with respect to the individual Indian's fraud claims in the Reyos side of this case.

The defendants in the fraud claims are the First Security Bank of Utah and two of its officers. The United States is not a defendant in the fraud claims.

The conduct of the bank and its officers arises by reason of its conduct in executing its duties under a business agent agreement which contemplated that they were to act as stock transfer agent to keep the books and records of the corporation and to perform certain incidental services.

It is the common elements of the conduct of the bank, pursuant to that practice, which are important as far as the fraud claims are concerned.

These common elements affected every Indian sale. It doesn't really matter who the sale was negotiated with, the common elements affected,necessarily affected every sale. By common elements, I refer to the fact that every Indian stock certificate, which had bold red-letter legends warning him of its value and of restrictions on its transfer, were locked up in the bank's vaults and the bank refused to make those certificates available to any Indian prior to August 27, 1964, even when he requested them. And made no alternate effort to convey the purport of those warnings to the Indian who desired to sell his stock.

That practice affected every Indian. The bank and its officers were also acting in a capacity which we could loosely refer to as a market-making function; that is, they were encouraging purchasers of the stock, many of whom were located throughout the United States, they were encouraging the sale of stock, and in many cases they were doing these things through

the medium of agents on both sides. That practice affected every Indian sale, notwithstanding who he may have sold to.

In every Indian sale there was also a deviation from the regulatory provisions which had been promulgated by the Secretary of the Interior. Specifically, the regulations require that any sale must be by endorsement of the certificate itself; never in the history of the Ute Termination Act, at least prior to August 27, 1964, was a sale negotiated in that fashion.

The regulations also required that the Superintendent of the Reservation supervise the price and the terms of the sale according to the terms of the offer, which require payments by cashier's check, certified check, or postal money order; never was a sale supervised in that fashion.

Those practices affected every Indian's transaction.

Also, the bank and its officers neglected and failed to disclose to any of these Indians that they were acting in this dual capacity as market maker in relation to this stock.

Now, it is true that there are also a large number of other facts which affected any particular Indian's stock, and the petitioners certainly take the position that those dissimilar facts, standing alone, would be sufficient to give rise to a fraud claim. And the bank, in its briefs in this case, has attempted to focus on those dissimilar facts.

The petitioners take the position that it is not

necessary to get involved in the dispute over whether any particular Indian got a car, whether economic pressures were applied to any particular Indian, and, if so, in what fashion the economic pressures were applied, for the simple reason that the common element which necessarily affected every transaction are sufficient to give rise to the fraud claim and were so determined by the trial judge.

The claim against the United States, with respect to the sales of the Ute Distribution Corporation stock is bottomed on negligence. It is the claim of the petitioners that the United States negligently permitted a deviation from the regulations which had been promulgated, permitted a deviation from the requirement that the endorsement of the stock certificate be the only way in which this stock could be transferred, substituted in its stead the transfer of the stock by means of a separate stock power.

That may seem unimportant on the surface, but the effect of that deviation from the regulations was to withhold from the Indians the warnings which were printed on that stock for his benefit.

The United States also, even though, as we read the statute and regulations, Congress plainly directed that the superintendent was to regulate the price and terms of sale, instead of doing so the superintendent adopted a practice of receiving a certificate from the Indian himself, the selling

Indian, who was legally in the position of a ward, that he had in fact received his money.

Thus, there was a complete abdication of the responsibilities of the United States in that regard, and the person who was legally in the position of the ward was the one who the United States looked to to satisfy those regulatory obligations, whereas Congress, I think a fair reading of the Act would bear me out on this, plainly contemplated that the BIA should --

Q Isn't it true that that statute itself decided that ward status?

MR. NIELSON: That is true, Mr. Justice Marshall, that was the dominant purpose of the statute. But it's also true that Congress recognized, in adopting this statute, as it did in all of the Termination Acts, that these people were going to have some trouble. They were not accustomed to managing property, because they had been under the protective wing of the United States for so many years, and so Congress wisely, I think, directed that there be a phased period in which services and protections would be withdrawn from them, and that that period was to extend for a full ten years.

Now, experience has proven that even that wasn't enough, that these people needed protections even beyond what Congress contemplated.

But the thing we're here complaining about is that

the protections which Congress directed were not secured to these people, and that, by reason of that, they were deprived of their property.

Now, in many ways the complaint of these petitioners seem based upon fine distinctions in the law. We've presented an awful lot of complex legal arguments in the briefs. In reality, however, we're talking about a very fundamental proposition, a very practical and fundamental proposition.

We could analogize, I think, to a situation where, say, a person were to buy an annuity and pay for it throughout his life, and when that annuity were to mature, instead of the insurance company paying the proceeds of the annuity to the annuitant, simply took the proceeds and invested it for his benefit, we'll say, in a mutual fund.

Now, it is not a question of whether that investment is a good one or a bad one, it's not a question in this case as to whether the Ute Distribution Corporation is a good idea or a bad idea, it's not a question of whether Ute Distribution Corporation was well-managed or whether it was mismanaged; the problem, really, is the indignity of the Act itself to take a group of people, such as these terminated Utes, and say to them, by way of congressional enactment, that we're going to remove restrictions on your person and on your property and you're going to be treated like any other citizen in this country; and yet before that property ever gets into that

Indian's hands to take it and assign it, to have BIA assign it to this corporation, and not only to assign it but to make the assignment, or purport to make the assignment irrevocable, so that it would bind himself and his heirs forever.

Now, Congress plainly declared in the statute that they were to receive their property in such a fashion that it could be inherited and bequeathed. That is the language of the statute.

But BIA attempted to completely frustrate that, the congressional intent, by making this assignment to the Ute Distribution Corporation.

Now, turning to the Rule 10b-5 aspects of the case, this case represents the first time in which this Court has had occasion to speak with reference to the fundamental ingredients of a cause of action under Rule 10b-5.

I submit that the case is a very good one. It's a very good vehicle for this Court to consider the elements of a fraud action under Rule 10b-5, because of the wide variety of misconduct which is alleged in this case, which affords this Court an opportunity to consider the whole array of possible conduct which could be considered as a violation of Rule 10b-5.

It's also a good vehicle because the petitioners themselves have a peculiar need for the sort of protections which are afforded under Rule 10b-5, and this Court many times in the past, in the capital gains case and other cases which

it has considered on related issues, has said that the need for investor protection is a relevant consideration which should be taken into account in determining whether any particular fact situation falls within the proscriptions of Rule 10b-5.

Q Would there be any other forum for claims of this kind? State courts, for example?

MR. NIELSON: Not for the Rule 10b-5 claims, not for the private claims. The federal courts are vested with exclusive jurisdiction under the Exchange Act, of a cause of action under Rule 10b-5.

Q But does this alleged conduct -- is that the basis for any other claim in the State courts?

MR. NIELSON: There is no other claim pending, Your Honor.

Q But could there be?

MR. NIELSON: I don't think that -- well --

Q In other words, could these petitioners have sued in a State court on these claims?

MR. NIELSON: I suppose it would have been possible for them to bring an action under the State Blue Sky law on the fraud claims. I think that it would have been impossible to bring the Indian law claims in the State court; even with respect to the State Blue Sky law, however, the very reason that most of these securities fraud cases wind up in the federal court is because the remedy under the State Blue Sky

laws is inadequate. It's inadequate for a number of reasons.

First of all, the States are plagued with short statutes of limitations, which frequently bar a fraud claimant. Secondly, the State procedure affords the opportunity for devices such as non-resident cost bonds, and things of this sort, which are employed by defense attorneys to discourage the bringing of a legitimate claim.

And so, in general, as a practical matter, --

Q But did you suggest that as an Indian claim, that that fact alone would be a bar to any State court action?

MR. NIELSON: No, I don't suggest that.

Now, as I read Rule 10b-5, it basically requires, in addition to the jurisdictional elements, the showing of two elements,, and they are as follows:

First of all, there must be one of the prohibitive actions. That is, there must either be a deceitful scheme or there must be a misstatement of a material fact, or omission to state a material fact, or a course of business which, if pursued, might result in a fraud.

Secondly, that conduct, whatever it might be, must be accomplished "in connection with" the purchase or sale of a security. Now, I stress the words "in connection with" because, as Professor Bromberg has said in his treatise on the subject of Rule 10b-5, the words "in connection with" are the loosest, and we must assume intentionally the loosest linkage which is

prescribed in any of the Federal Securities laws.

Section 17(a) of the 1933 Securities Act, for example, uses the term -- the fraudulent practice, which is substantially the same -- "must be in the offer or sale of a security"; it must be "in" the offer or sale.

This Act says "in connection with" the offer or sale of a security.

The lower federal courts, during the period of time that implied liabilities have been developing under the Exchange Act, Section 10 and Rule 10b-5, have wrestled with the question of whether additional elements may be engrafted onto those prescribed by the rule. They have considered a wide assortment of additional elements, including scienter, proximate cause, reliance, I think are the principal ones which they have considered.

The error of the court below in this case was that it went far beyond even what has been required in other courts which have considered these elements and required, in this case, that there be a direct participation as a purchaser or seller; and that direct participation must be for a profit.

Thus, the lower court in this case imposed upon these plaintiffs a standard which is far higher than even that which is prescribed in Section 17(a) of the 1933 Securities Act, and, I might add, even higher than was required at common law.

We submit that the limiting factors which are

prescribed in the statute and rule itself are entirely adequate and are the only ones which ought to be considered.

I refer in particular to the requirement of a showing of materiality. The respondent bank itself has noted that even the courts which talk in terms of reliance quite often come up defining reliance so that it comes out sounding just about like materiality.

The other limiting factor which is prescribed by the statute and rules is that of causation. I note that the rule itself does not use the term "causation", but I have cited some legislative history in my brief which indicates that Congress, in considering the 1934 Act, did make reference to the fact that any person who is injured by these practices, or whose injury was caused by these practices, ought to be able to recover; and therefore, I submit that causation in the "but for" sense would be an appropriate limiting factor.

I think that that construction is borne out by the language of the Act, and I note in particular that in this Act Congress attempted to proscribe <u>any</u> misconduct of the type which is defined by the rule in connection with <u>any</u> purchase or sale of securities.

I think the use of the term "any" in both of those contexts was a calculated one, and that it should be given effect.

As I say, the common law in cases most analogous

to the facts now at bar did not impose a requirement nearly as high as that required by the Court of Appeals in this case. I have cited in my brief some common-law deceit cases, which were -- which arose in the context of market sales of securities, and what those cases stand for. And also some writings of Professor Thompson, the noted expert on corporations. What those cases stand for is the proposition that if a person makes a misstatement, we'll say by means of a prospectus, and he distributes to the public at large, in one case that is cited, by means of leaving it at a bank, so that any member of the public could pick it up and read it; if there are lies in that prospectus, any member of the public should be permitted to recover, because it was directed to any member of the public. Thus, they come within the ambit of responsibility.

By contrast, if the misrepresentation is made to a limited group, why, then, also, the ambit of responsibility would be further restricted.

That was the rule at the common law, and it is universally recognized that Rule 10b-5 is an extension of the common law and therefore I submit that we should at least read this rule as broadly as the provisions of the common law.

Now, as I say, the facts of this case and the legal questions are complex, I would like to reserve an ample amount of time for rebuttal, because I think that I will have a lot of

things that I will want to respond to, in relation to the government in particular; if there are no questions by the Court at this point, I'll reserve the balance of my time, then, for rebuttal.

Q Mr. Nielson, I have one question. Am I correct in concluding that Judge Christensen at the district court level came up with a figure of $1500 for the shares?

MR. NIELSON: That's correct, Mr. Justice Blackmun.

Q Do you feel that there is evidence in the record sufficiently supporting that figure?

MR. NIELSON: I think there's no question, Mr. Justice Blackmun. I think we have to understand what Judge Christensen did. Judge Christensen considered all of the evidence which was presented, including, in particular, the evidence of the appraisal of the mineral estate, which, if divided by the number of shares involved here, would have -- and capitalized -- would have given rise to a damage figure in excess of $28,000 per share.

Now, Judge Christensen felt that that would be -- that would not be a proper result because of the position of those shareholders who had not sold, and he -- I cited his comments in the Appendix, where he makes reference to this; that it would seem unfair to, in effect, penalize those who did not sell by giving those less prudent, who did sell, the full value immediately, whereas the others may have to wait

for decades, maybe centuries, to recover that amount.

Now, I think that was a wise approach. The trouble with it is that it leaves the benefits, the remaining value of this mineral estate in the hands of the wrongdoers, and that was the very reason why the Affiliated Ute's case was initiated. And it was initiated, I might say, prior to the time of judgment. So that there would be a way that that windfall to the fraudulent parties could be avoided and the mineral estate could be vested in those -- the remaining mineral estate could be vested in those properly entitled to it.

Q Well, then, I understand, at the moment anyway, you're not complaining about the $1500, are you?

MR. NIELSON: I think that if the Court were to grant a remedy such as I have suggested, we would have to remand this case for a further hearing on what the proper amount of damages should be. We'd have to have some evidence on what the distributions were during the period of time that the terminated Utes have not been in possession of their share of the mineral estate.

MR. JUSTICE DOUGLAS: Mr. Randolph.

ORAL ARGUMENT OF A. RAYMOND RANDOLPH, ESQ.,

ON BEHALF OF THE RESPONDENT UNITED STATES

MR. RANDOLPH: Mr. Justice Douglas, may it please the Court:

These two consolidated cases raise quite different

issues with respect to the liability of the United States.

The issue in the Affiliated Ute case is whether the district court properly dismissed the action for lack of jurisdiction, finding that it was an unconsented-to suit against the United States.

The issue in the Reyos case, on the other hand, is whether the Court of Appeals properly found that the United States had no to prevent terminated mixed-blood Indians from selling their shares at less than fair market value.

Although the cases raise quite different issues, as counsel for the petitioners has said, both relate to the Ute Partition Act of 1954. And I think the history of that Act and the working of that Act is necessary to an understanding of the claims in these cases.

In 1954 the Ute Indian Tribe of the Uintah and Ouray Reservation in Utah consisted of approximately 1800 members. There were two distinct groups: the full-blood Indians and the mixed-blood Indians. The mixed-blood Ute Indians consisted of approximately one-quarter of the 1800 members of the Tribe.

For a number of years preceding 1954 there had been considerable friction among the mixed-blood and full-blood Indians. The reason for this was quite understandable. Many of the mixed-bloods did not live on the reservation; many of the mixed-bloods were already integrated within the non-Indian society; their standard of living was virtually indistinguish-

able from the non-Indian society in which they lived, and their educational status was the same.

The friction between these two groups reached its peak in 1950 and 1951, when this group of Indians on the Uintah and Ouray Reservation became entitled to 60 percent of a $31 million judgment against the United States.

The full-blood Indians, also quite understandably, wished to use this money to improve their reservation, to build schools and hospitals. However, many of the mixed-bloods wished to have the money in cash, and had no interest in spending it on the reservation where, of course, they never lived, and had not lived.

The groups met in Tribal Council over a period of approximately one year, to work out these differences. The Ute Partition Act of 1954 is the result of their compromise. It represents, more than anything else, a treaty of peace between these two groups. Because the Act itself was drafted and hammered out by the Indians, and then introduced, at their request, in Congress. And while the Act was being considered by Congress, both representatives of the mixed-blood and full-blood group went to Washington and supported, fully supported the bill, and said that it had been submitted to a vote of their respective memberships and approved overwhelmingly.

There are three main features of the Ute Partition Act. One is a division of the Tribal assets, and of course it

did not affect the individual assets held by the individual members of the Tribe; only the Tribal assets.

The second feature is the termination of the mixed-blood Indians. They were defined as having not more than one-half Ute Indian blood.

The third feature is that the full-bloods would -- that the trustee relationship between the United States and the full-bloods would remain.

The way the Act was administered, and the way this partition took place, of course, was quite complicated.

The one thing that can be said about it is that it was done by the groups themselves, because the Act provided that the groups would, first of all, first the mixed-blood and full-blood groups would meet together and devise a plan for dividing their assets between them on the basis of their relative numbers in the groups.

This turned out to be, when the final rolls were published, 27 percent mixed-blood and 73 percent full-blood.

The next step in the process was to have the mixed-bloods meet by themselves and determine a plan for distributing these assets.

The plan of distribution and the plan of division are contained in the record in this case.

One of the difficulties, of course, the group ran into was how to distribute assets that were not easily,

equitably divided, such as oil, gas, and mineral rights.

When the Ute Indians were considering drafting this Act, they of course realized that it would be inequitable to split up just solely on the basis of geographical considerations and mineral rights. The Tribe owned at that time approximately one million acres of mineral rights, which is approximately the size of Delaware.

So what they did, and what they decided to do, was to retain the mineral rights, the oil, gas, and mineral rights, as Tribal property and to split up only one thing, or only two things: the proceeds from the minerals rights and the management.

The management was to be joint; the proceeds were to be distributed on a 27 percent and 73 percent basis.

As plans worked out, of course, both groups needed representatives to negotiate the plans and work them out for them. The Tribe had its own Tribal Council, and that was no problem. However, the mixed-bloods, first of all, adopted a constitution and formed an organization known as Affiliated Ute Citizens.

In the constitution of Affiliated Ute Citizens, it provided for delegating authority irrevocably to corporations in order to manage certain of the assets of the mixed-blood group.

Three corporations were formed: the Rock Creek

Cattle Company; the Antelope Sheep Range Company, which dealt with grazing lands; and the other, the Ute Distribution Corporation, which is involved in this case.

The Corporation was formed in 1958. It issued ten shares of stock to each individual mixed-blood Indian; and the mixed-bloods totaled 490 at that time.

This, then, is the posture of the case.

Q Did the Affiliated Ute Citizens specifically authorize the formation of the --

MR. RANDOLPH: They specifically authorized it, Mr. Justice White.

Q -- of this Corporation?

MR. RANDOLPH: The resolution --

Q The constitution may have provided for it, but was there also an action of the Affiliated Ute Citizens --

MR. RANDOLPH: Yes, they adopted a resolution.

Q -- to authorize this?

MR. RANDOLPH: There were two actions, actually.

Q Well, first, was that a general membership meeting, or a meeting of the board of directors, or what?

MR. RANDOLPH: It was a general membership meeting, and it was a quorum under their constitution.

Q What was the quorum?

MR. RANDOLPH: How many people required for a quorum, Mr. Justice Brennan?

Q Yes.

MR. RANDOLPH: Thirty.

Q How many?

MR. RANDOLPH: Thirty.

Q And there were 490, you say?

MR. RANDOLPH: Yes.

Q And how many attended the meeting?

MR. RANDOLPH: I don't know; it's not in the record.

The issue in the Affiliated -- I will talk first about the Affiliated Ute case, and then turn to the issue in --

Q Well, did the membership meeting ever -- did the general membership ever take any other action which ratified the formation of the corporations or its conduct?

MR. RANDOLPH: There were two actions taken, actually. The first thing was when they devised a plan of distribution, the plan of distribution had, I believe it's Section 10 -- and it's printed in the Appendix to the amicus brief by the Tribe; printed in full -- they contemplated forming a corporation, to handle the mineral rights.

That plan was unanimously adopted by the membership, or at least so it's reported in a resolution by Affiliated Ute Citizens.

The next step in the process was the actual delegation, the delegation of the authority according to the constitution, and that was the second resolution I was talking to there to you,

Mr. Justice White, about a moment ago.

As I said I'll turn first to the issue in the Affiliated Ute case and then discuss the issue in Reyos.

The Affiliated Ute case was brought -- the suit was brought by this unincorporated association purporting to represent all of the terminated mixed-blood Indians.

Q May I just interrupt there?

MR. RANDOLPH: Yes, sir.

Q Was there any responsibility in the Bureau of Indian Affairs to supervise these procedures that went on?

MR. RANDOLPH: They were supervised throughout, until 1961 when termination took place, yes; of course, there was constant consultation. And I might add there was a contract with the University of Utah which provided for educational services, training, relocation, and other factors.

Q Well, I am thinking particularly of the procedures you've been describing for us, by which the distribution of --

MR. RANDOLPH: Yes.

Q -- the share of the mixed-bloods was to be affected.

MR. RANDOLPH: Yes. The plan was --

Q The organization of the corporations, the approvals of the membership --

MR. RANDOLPH: Yes. The plan was worked out --

Q -- and that was all supervised?

MR. RANDOLPH: All supervised, yes.

Q But the plan, I take it, had already been agreed upon in advance by the Tribe?

MR. RANDOLPH: Well, it was rather an informal arrangement; it wasn't the Tribe, it was the mixed-bloods who determined their own plan for distribution. It was the full-bloods that --

Q Did the Act provide for this manner of going forward?

MR. RANDOLPH: Yes, the Act provided for the plan of distribution and the plan of division of the Tribal assets, yes.

Q And it provided for the formation of Affiliated Ute Citizens?

MR. RANDOLPH: Yes, oh, yes; no question. 677e of the Act provided specifically for that.

In the Affiliated Ute Citizens case, the suit was brought against the United States in name and form, and in the complaint the claim was that the individual members of this organization were entitled to "an individual undivided pro-rata share of 27 percent of approximately 1,200,000 acres of mineral lands subject only to the right of the Association to manage that property jointly with the Tribal Business Council."

Jurisdiction was invoked primarily under 25 U.S.C.

345. The district court dismissed for lack of jurisdiction and for failure to state a claim upon which relief could be granted.

The Court of Appeals affirmed on the basis that this was an unconsented-to suit against the United States and that Section 345 did not supply the necessary consent to be sued.

Unlike many recent cases in this Court, where the question was whether a suit against an officer of the United States was really a suit against the United States, in this case there is no such question. It's brought directly against the United States in name and form, and it's long been held in this Court that a suit relating to government property against the United States cannot be brought without the United States' consent.

This principle applies equally to Indian land held in trust by the United States, and applies also when the suit is brought by a group of Indians claiming the beneficial interest in that land.

In this case there is no dispute whatsoever that the United States holds title in trust to the mineral assets on the reservation.

Therefore, plaintiff's action, in order to go forward, has to be based on some specific statute, federal statute, authorizing this kind of suit. They've invoked Section -- 25 U.S.C. 345.

That section, which is set out on pages 90 to 91 of our brief, provides that any persons who are in whole or in part of Indian blood or descent who are entitled to an allotment of land under an Act of Congress, or who claim to be so entitled, or under any allotment Act or under any grant made by Congress, or who claim to be unlawfully denied or excluded from any allotment or any parcel of land, to bring an action in the district court to determine -- and the jurisdictional section is after the semi-colon -- where the district court may determine any action, suit, or proceeding involving the right of any person to an allotment of land.

We think this case does not fall within that statute.

Q In the Affiliated Ute case, don't the plaintiffs ask for pro-rata --

MR. RANDOLPH: Yes.

Q -- distribution?

MR. RANDOLPH: They ask for --

Q Or the equitable interest in the allotted land?

MR. RANDOLPH: Yes, I'm not exactly clear how this could be done, but I quote: they claim to be entitled to individual undivided pro-rata share of 27 percent of approximately 1,200,000 acres of the mineral estate.

The merits of that question have never been reached, you see.

Q Yes.

MR. RANDOLPH: Allotment is a term of art in Indian law. In the latter half of the 19th Century it was the policy of the United States, as particularly expressed in the General Allotment Act of 1887, to shift the rights of Indians in real property from simply participation in Tribal property to rights of individual ownership in particular tracts.

The land, or the mineral estate involved in this case is the very antithesis of an allotment of land; because it's never been divided, it's Tribal property, there's no question about that. There's no individual ownership of this land involved.

In the usual allotment situation, a reservation would be surveyed, a tract of a certain number of acres set aside, the Indian would make a selection, and the Secretary of Interior would issue a patent.

Section 345 relates only to those kinds of situations. We think this is not a suit regarding an allotment of land, by any stretch of the imagination.

I turn now to the Reyos case. In Reyos there were 12 designated mixed-blood plaintiffs who claimed that during 1963 --

Q Of course, if there was a suit for allotment, I suppose that would be inconsistent with a suit for damages?

MR. RANDOLPH: Yes. We've pointed that out in our brief, Mr. Justice Douglas. It was stipulated, I might point

out, in the Reyos case, that the corporation was a validly formed corporation, and the district court so found.

The whole point of the Reyos case was that the stock had substantial value.

In the Affiliated Ute case, on the other hand, the claim was that the corporation was invalid and that it should never have been given the assets to manage to begin with. We think they're basically inconsistent.

Q And if they're right in that contention, then the stock wouldn't have any value.

MR. RANDOLPH: That's right.

In Reyos, the 12 designated mixed-blood plaintiffs sold their stock during 1963, 1964, and 1965. They sued the United States under the Federal Tort Claims Act, and their claim was that the government was negligent by failing to prevent them from selling their own shares for less than fair market value.

We think the Court of Appeals correctly held that the trust relationship between the government and each individual mixed-blood terminated in 1961, before any of the sales took place, and that the government therefore had no duty to supervise mixed-blood sellers disposing of their stock.

As I pointed out, under the Act, the oil, gas, and minerals were owned by the Tribe and were not divided. But the proceeds were, and the management rights were divided.

The mixed-bloods formed UDC in 1958, and they issued stock.

Under 677v of the Act, the Secretary of Interior, on August 27, 1961 -- and this is on page 40 of our brief -- issued a termination proclamation, stating that with respect to each and every individual mixed-blood federal restrictions on the property have been removed, the federal trust relationship to such individuals terminated, and such individual shall not be entitled to any of the services performed for Indians because of his status as an Indian; and all statutes of the United States which affect Indians because of their status as Indians shall no longer be applicable.

We think that after this period the Secretary of Interior had no duty to say, or had, indeed, no right to say to an Indian, "You can't sell your stock for that amount" or "I will only let you sell your stock if you really need the money at this time" or even, as he might have said if this were restricted Indian property, "You can only sell your stock if you spend the money and proceeds for food and clothing for you and your family."

We think that after 1961 he not only had no duty to do that, I think the mixed-bloods would have been infuriated if he had tried to do that.

The plaintiffs have claimed, however, that there was a right of first refusal, and that they claim that this right

of first refusal somehow created the duty on the part of the United States, particularly the Bureau of Indian Affairs, to supervise their shares even after 1961.

Q Well, what do they suggest as the source of their right of first refusal?

MR. RANDOLPH: It's not entirely clear, Mr. Justice Brennan. We think the right of first refusal stems from Article VIII of the Articles of Incorporation of the Ute Distribution Corporation, which provides that any mixed-blood who sells his shares before August 27th, 1964, must first offer them to members of the Tribe. If there's no acceptance of that offer, he may then sell at the same or greater amount under the same terms and conditions offered to the members.

The Secretary of Interior was required, under the Articles of Incorporation to certify to one thing: that the offer to members of the Tribe was made in accordance with the law and regulations of the Secretary of Interior. That is the original offer, which, if not accepted, would allow the mixed-blood to sell to whomever he pleased.

This is contained on page 6 of the exhibit; also the regulations.

Finally, I might point out, that under the Act, under 677n of the Act, there is a similar right of first refusal for land. And so when the Secretary promulgated regulations dealing with the right of first refusal for land, the very

last clause of those regulations stated that, as far as practicable, these regulations should apply to sales of stock in the corporation formed by the mixed-bloods.

The bank operated as transfer agent for the stock, and the Ute Distribution Corporation and the bank worked out a procedure in September of 1963. I might point out at this point that there were no sales of stock until the late summer of 1963. From the time the corporation was formed until the summer of '63 there were no sales of stock. The first sale took place, I think, approximately August of 1963.

But the Bank worked out a procedure --

Q Let me ask you, just for a moment, sir, on this right of first refusal: Looking at the summary of your argument on page 23 of your brief, "Before a mixed-blood could sell his stock to a non-member of the Ute Indian Tribe, he was required first to offer the stock to members of the Tribe at a price not less than that for which he intended to sell to the outsider"?

MR. RANDOLPH: Yes.

Q Shouldn't that be "not more"?

MR. RANDOLPH: Yes, it should be.

Q "Not more", isn't it?

MR. RANDOLPH: That's right.

Q He could not sell it to an outsider for less.

MR. RANDOLPH: That's right. Right.

Q Well, may I take the liberty of changing that in pencil on my copy?

MR. RANDOLPH: Yes, will you please do that.

Q Thank you.

MR. RANDOLPH: I'm very sorry about that error.

In any event, the Bank operated as transfer agent for the stock, and they worked out a procedure with the Ute Distribution Corporation whereby -- and this is contained on pages 29 and 31, 29 to 31 of the Exhibit Appendix -- whereby, after the offer had been made and not taken up by a member of the Tribe, the seller, when he completed his sale, would furnish an affidavit and a stock power to the Superintendent of the Reservation, and then the Superintendent of the Reservation would issue this certificate stating that the offer, the original offer had been properly made to the bank, who then transferred the stock to the buyer.

Apparently the main thing, according to petitioners, that the Superintendent did wrong here was that he failed to investigate whether the plaintiffs in this case were telling the truth in their affidavits. The Superintendent apparently thought that the regulations in the Ute Distribution Articles of Incorporation required him only to certify that the original offer was proper.

And I think maybe that was too strict an interpretation of the regulations.

However, the one thing that seems perfectly clear is that the right of first refusal did not create any duty to the people that were selling the stock, and who apparently had not told the truth on their affidavits. Because the right of first refusal, if anything, was for the benefit of the people who would buy, was for the benefit of the people who remained in the Tribe and also for the mixed-bloods, so that they could retain control of their corporation.

The seller, obviously, cannot accept his own offer, and we think, therefore, that this created no duty to the people who are bringing this suit, the mixed-blood sellers, who claim to have sold for less than fair market value.

We don't think they are entirely without protection, however; and Part III of our brief deals with that question, whether they're entitled to protection under the Securities Exchange Act.

MR. JUSTICE DOUGLAS: Mr. Bertoch.

ORAL ARGUMENT OF MARVIN J. BERTOCH, ESQ.,
ON BEHALF OF RESPONDENT FIRST SECURITY BANK
OF UTAH, N.A.

MR. BERTOCH: Mr. Justice Douglas, and if the Court please:

I represent the respondent, the bank and the two individuals that are employed by the bank, Gale and Haslem. Of course it is our desire that this Court sustain the decision

of the United States Circuit Court of Appeals.

One difficulty in this case from the beginning has been this: that counsel for the plaintiff,and now the Securities and Exchange Commission, in connection with its brief, has constructed hypothetical facts that do not relate to the particular individuals who are the petitioners in this case.

It is the suggestions made here today that seem to be that somehow we polluted the atmosphere with some kind of fraudulent fluvium which is breathed by everyone who had this stock to sell, by all of the mixed-bloods.

And the question, of course, is whether or not Gale and Haslem, our employees, violated 10b-5. And the only way that can be ascertained, whether or not that affected, whether it caused damage to any of these 12 petitioners is to be found in the facts and the law related to those 12 individuals. It is not to be found out here in the abstract somewhere.

Plaintiffs' counsel, or petitioners' counsel has consistently and repeatedly tailored a coat of many odious colors, which has never been worn by, and which does not fit any of the particular petitioners in this lawsuit.

So I can only appeal to the Court in deciding this case that it can only be determined whether or not these 12 individuals have been injured or any of them have been caused damage because of a violation of 10b-5 is by examining the facts

and the law with respect to each one of these individuals.

Now, let's go to the acts which have been considered or which have been considered violations of 10b-5. Today, with respect to the wrongful acts of the Bank or its corporate self, my friend, colleague, Mr. Nielson has said that they retained these stock certificates in the Bank so the Indians couldn't read, the mixed-bloods couldn't read this notation on it that it was valuable.

Well, of course, that was done by the Bank at the request of the Ute Distribution Corporation, at the request of the Bureau of Indian Affairs, the agreement of all three, believing that would be helpful to the Indians so they wouldn't lose their shares of stock. That is hardly a fraud and hardly a part of this pollution of fraud which fills the air.

As far as the market-making is concerned, which has been mentioned, the Circuit Court of Appeals specifically said there was no evidence that the Bank did anything about making market. And on these gentle matters it is of no help to this Court if Mr. Nielson and I just stand up here and he says you did, and I say you didn't; all he and I can do is refer you to the record, and that is what I do. I just categorically deny that there were all these actions by the government which created an atmosphere of fraud.

But let's talk about specific things: that even the

Circuit Court of Appeals said they did impose a possibility of violation of 10b-5 in connection with the action of a couple of these petitioners; and I think we ought to examine those.

And I'm willing to examine those where the circuit said maybe you did maybe your men did violate Section 10b-5. Let's take Mr. Gale.

It should be kept in mind, first of all, that of these 12 petitioners, Mr. Gale bought stock from only two; he bought five shares from Mr. Reed and five shares from Mrs. Wopsock; and that's all he bought.

With respect to the other ten, he didn't buy any shares from them; he had nothing to do with encouraging the sale, with participation in the sale, or getting any benefit from the sale, nothing at all to do with them except in connection with some of them he signed -- notarized an affidavit or he guaranteed the signature on stock bars. And that's all he had to do with it. And some of them he had nothing to do with at all; didn't even know about it.

With regard to Mr. Haslem, on the other hand, he bought from only two of these. One of them was again Mr. Reed, he bought his other five shares, from Glen Reed.

Q He bought these as principal?

MR. BERTOCH: As principal, yes. Of course none of these were bought by the Bank or sold by the Bank; the Bank got nothing out of it.

Q How did all these used-car dealers get into the picture?

MR. BERTOCH: Well, the used-car dealers got in the picture on their own, and there were many used-car dealers in on the picture.

Of the approximately 1300 shares of stock sold during the period of '63 and '64 and '65 -- we're dealing with the 1300 shares of stock sold -- there were 32 different white men who purchased stock.

As a matter of fact, Gale and Haslem bought 113 shares, the two of them together; only 8 and a third percent of all those that were bought and sold.

But some of these were to used-car dealers. Now, the evidence doesn't show whether the used-car dealers themselves committed fraud on these people. They may have. But the record doesn't show because the used-car dealers paid some money and ran, got out of the case; were settled out of the case. So we cannot say. But it may well be that some of these used-car people did take advantage of some of these people, and got some of their stock and gave them less than desirable considerations.

Q There was a total of 113 individual non-Indian buyers of this stock over the period involved, is that right?

MR. BERTOCH: No. No, there were 32 non-Indian buyers that I know of. There were 113 shares of stock bought

by Gale and Haslem.

Q I see.

MR. BERTOCH: Out of 1300 shares that were sold by the mixed-bloods.

Q To a total of 32 buyers?

MR. BERTOCH: Right.

Q Non-Indian buyers.

MR. BERTOCH: That's right, Your Honor.

Q And the buyers were not all people from this locality, were they, some of them were from elsewhere in the United States?

MR. BERTOCH: Yes. I think the record shows there were about seven of them who were outside of Utah.

Q How far away, for example?

MR. BERTOCH: One from Illinois, one from New Orleans, one from Arizona, a couple from Colorado, that I can remember.

Q How would people that far away be likely to know about the availability of these shares, to purchase them?

MR. BERTOCH: I don't know. They may have known from relatives. I will say it wasn't the Bank who advertised it. I don't know how the individuals found out. I know that some of them came in and they contacted the Bank, because the Bank was the transfer agent; but I don't --

Q Of course it is the allegation that the Bank and its employees made a market for these shares.

MR. BERTOCH: Yes. And we submit that that is just utterly false, and the record will not support it; and the circuit said that specifically, that the record did not support the contention that the Bank was a market-maker.

Q Is there any showing of how somebody from Illinois would know about the availability of this stock for sale in a little village in Utah?

MR. BERTOCH: I don't know how the man in Illinois knew about it. It may be in the record, Your Honor, but I don't know.

Now, the Circuit Court of Appeals said that Gale, in connection with the sale, purchased the five shares of stock from Mr. Reed. I mention this because I think this is my most dangerous case. If there's a violation, it's here.

That when he bought five shares from Glen Reed, the circuit puts it that he made, they think, both a misrepresentation and perhaps a non-disclosure.

He bought the shares for $350 and he sold them, sometime later, to another white man for $530. This is ten shares.

Now, as the circuit says, and I certainly won't quarrel with the circuit on it; they said, there is in effect a misrepresentation here because he indicated to this man Reed, or certainly implied, that $350 was the market value of the stock at that time, when it wasn't, because he could turn around

and sell it for $530. He may be guilty of a non-disclosure because he did not reveal to Mr. Reed that he was going to sell it later for $530.

Now, this is my worst case. And then the circuit said: However, there is no evidence, even if this is a misrepresentation and a non-disclosure, which would be in violation of 10b-5, there is no evidence that there was reliance here, that this was the cause, this misrepresentation or this non-disclosure was the cause of the sale.

Now, that -- I'll go on with that, except I want to put Haslem in focus here, too, because there is something that he did that the circuit said might also have been a violation. They said that if Haslem indicated when he purchased some stock that that was the market price, he made a misrepresentation.

However, with Haslem, there is no evidence in the record that he ever sold it to anybody else at any profit. So there cannot be found to be a violation of 10b-5 as far as he's concerned.

But now going back to Mr. Gale, the question -- we get down to the real question that is raised by the Securities and Exchange Commission, and that is this subject of reliance. Now, I think we all get down to chewing on the bone, that it's the real bone of contention in this matter.

What is this Court going to say about reliance? Is

reliance to be assumed, if the representation or the non-disclosure is material?

Now, the reason we brought that up is because of the case of Mills vs. Auto-Lite, which is a case decided by this Court last year, and it's a case which deserves attention on this subject.

It is a case which I believe is right, and with which I do not quarrel at all. It is just that the facts are entirely different in that case and this one.

In the Auto-Lite case, you will recall, it was a matter of minor stockholders suing as a class to set aside a merger, on the grounds that a statement and a proxy -- a proxy statement failed to disclose that those of the merging corporation, the directors of the merging corporation who sent out the proxies were completely controlled by the corporation into which it was to be merged.

And so the lower courts -- well, as a matter of fact, there were thousands, according to Justice Harlan's opinion. There were thousands of stockholders involved; and these were minority stockholders. And the problem was, in the trial and in the circuit court: how are we going to determine whether or not they relied on the non-disclosure or they were influenced by the on-disclosure in the proxy statement? Whether or not they would have voted otherwise, had this fact been included in that statement?

And the circuit court, you recall, came up with a rather fictitious formula, saying, well, this is a tough thing to do because there are thousands, and we can't inquire into the reliance of each one; causation with each one. So we will adopt this formula: If it appears from the evidence that the merger was a good move, then we can assume that if they had known all the facts they would have voted for it.

Well, this Court, and I think quite properly, said: that doesn't prove anything and we're not going to accept that formula.

And this Court said -- and these, I think, are Justice Harlan's words almost exactly. Quoting the circuit court, he said that: reliance of thousands can scarcely be inquired into. And so this Court decided that in a case like that, where the non-disclosure was something that everybody knew and they knew what it was, where it was certainly material or, as Justice Harlan said, had a propensity to cause someone to vote one way or another, then we're going to assume that there was reliance, that there was causation. And the causation and the reliance and the materiality were merged.

I think that was proper in that case, that these people could not have been protected any other way; when there are thousands of them, you can't put them on the stand.

This is an entirely different case. In this case there were 12 petitioners, every one of them took the stand,

and all a lawyer had to do to Mr. Reed was say: Would you have sold your stock if you had been given this information? And he could have said yes or no.

Every one of them could have been asked, in effect, if they relied, or if they didn't rely; if this caused them to sell. But that evidence was never in the record, never put in the record. Perhaps it was because counsel didn't know what they were going to say, or they were going to say the wrong thing, or they forget to ask. We don't know.

But the fact is it could easily be in the record. And I don't think this Court wants to take the position for posterity that when you can determine whether there's reliance or causation without any doubt, that in those cases we should assume it when we don't have to; I think that would be dangerous jurisprudence.

Q Were these -- there's some reference in here that these plaintiffs were bellwether plaintiffs.

MR. BERTOCH: Yes, Your Honor.

Q Is this a class action, or was this just --

MR. BERTOCH: It started as a class action, Mr. Justice, and then Judge Ritter decided it was not a class action on the ground that the individual problems were more extensive than the common problems, and so then, in conference, counsel with Judge Christensen, it was decided that we should take 12 cases and Judge Christensen called them bellwether

cases and we should try those. And then all of the information that was adduced, the evidence adduced, would be common and usable in the other cases, could be used in the other cases if they ever were tried.

That we should go ahead with these 12, have it tried and appealed and so on.

Q So these are 12 separate plaintiffs?

MR. BERTOCH: Right.

Q And the district court decided it was not a proper class action?

MR. BERTOCH: Right.

Q But they did have common, a good many common issues in them?

MR. BERTOCH: There are some common issues; that is true.

Incidentally, the 12 were chosen this way: six were chosen by the plaintiffs and six were chosen by the defendants. And that's the way the 12 were chosen.

Q I had just never heard that as bellwether; a bellwether case is somewhere between an individual case and class action.

MR. BERTOCH: Yes; apparently. I think so. A twilight zone.

Now, of course, what we relied on is the List vs. Fashion Park case, and that where it says there needs to be

reliance, and they describe reliance in that case, in case of a representation the court in List vs. Fashion Park, Second Circuit, says:

"The proper test is whether the plaintiff would have been influenced to act differently than he did act if the defendant had disclosed to him the undisclosed fact."

Now, that's in the case of a non-disclosure. In the case of a disclosure -- or false representation, the court said:

"Insofar as is pertinent here, the test of 'reliance' is whether 'the misrepresentation is a substantial factor in determining the course of conduct which results in the recipients' loss'."

And of course this was the case, Fashion Park, where there was an individual involved who could be put on the stand and could be questioned as to whether he relied or he didn't rely. It's a case again where he sold his stock for $18.50 a share, in the corporation, and shortly later the company sold all the other stocks for $50; and he sued. And the court said, well, there isn't evidence that you -- the non-disclosure that they were going to sell, there is no evidence, if they were going to sell, that that had any effect upon your sale; you may have done it anyway.

I will close by just --

Q What did the Court of Appeals decide with

respect to the liability of the Bank?

MR. BERTOCH: In this case, Your Honor, they decided that there was no evidence of reliance.

Q On the Bank? This is about the Bank?

MR. BERTOCH: The Bank and as far as the two individuals are concerned. Since there was no reliance, there was no liability. But they said, We will send it back for action to be taken in accordance with this opinion.

Now, if the Court wants to ask me what I think that means, I'm not sure I could give an accurate answer, but I think it means --

Q To give somebody an opportunity to prove reliance?

MR. BERTOCH: I think that it means it would give them opportunity, that those who were involved in the sales to Gale and Haslem, to prove their cases and to prove reliance. I don't think it means that these 12 should go --

Q But they did say there was conduct on the part of the individuals that violated 10b-5?

MR. BERTOCH: Right. In the ones --

Q Right?

MR. BERTOCH: -- that I have mentioned, the two cases; yes. The two cases that --

Q But not the Bank?

MR. BERTOCH: Well, they said the Bank would be

responsible for it.

Q They did?

MR. BERTOCH: They did. They attributed their guilt to the Bank because they --

Q So there's been conduct prescribed by 10b-5 but no liability because of no reliance?

MR. BERTOCH: Right. That's right, Your Honor.

Q But now there's a remand?

MR. BERTOCH: Yes, Your Honor.

Q And the measure of damage is set?

MR. BERTOCH: Yes. They set what they thought the measure of damage should be. They said the cases to be considered are those cases where a mixed-blood sold to Gale or to Haslem, and the measure of damages is how much -- the difference between what they sold to Gale and how much Gale got from somebody else.

Q Did you cross-petition here?

MR. BERTOCH: No. No.

Q Are you attempting to sustain the judgment below on the grounds that the conduct involved did not -- was not within the reach of 10b-5?

MR. BERTOCH: That's right, Your Honor. We're willing to accept the challenge of the circuit court to go back and let them see if there was reliance.

Q Well now, wait a minute, what's right? You

concede that the conduct by the Bank and by the individuals is the kind of conduct that's barred by 10b-5?

MR. BERTOCH: I concede in the one case that I mentioned, Your Honor, the purchase from Mr. -- by Mr. Gale from Mr. Reed. In that one case I'll concede, if you accept the facts as the circuit saw them; and I will do that for this purpose, in the one case only.

Q Now, let's -- if an individual comes in and wants to sell his stock and the Bank, an employee of the Bank is going to buy it himself at a certain price, and he knows he's going to resell it; if he just keeps quiet, it's a misrepresentation. Is that it?

MR. BERTOCH: If he is going to -- if he knows at that time that he's going to sell it to somebody else for --

Q Yes, all right.

MR. BERTOCH: -- some more money.

Q All right, what if another fellow comes in and wants to sell his stock to somebody else, and the Bank doesn't tell him what the going price is?

MR. BERTOCH: Well, I would say no. The circuit didn't say that that would be a violation.

Q Well, the government contends that it would be, doesn't it?

MR. BERTOCH: The SEC?

I think they contend that, if I understand them

correct.

Q If the Bank knows what the going price is on the open market, and permits the Indians to proceed on false assumption -- to sell at considerably less than that.

MR. BERTOCH: Right. You're right.

Q If the Bank knows that there's a thousand-dollar price on stock and permits the Indians to sell it at five hundred.

MR. BERTOCH: That's right, Your Honor, they do; on this basis, that there was a fiduciary relationship. And of course I attack that in my second brief in reply to them. But as to --

Q But you don't concede that at all?

MR. BERTOCH: Not at all.

Q All right. Thank you very much.

MR. BERTOCH: Yes. Thank you.

MR. JUSTICE DOUGLAS: You have 12 minutes, Mr. Nielson.

REBUTTAL ARGUMENT OF PARKER M. NIELSON, ESQ.,
ON BEHALF OF THE PETITIONERS

MR. NIELSON: Thank you.

Mr. Justice Douglas, and may it please the Court:

Before I get into my argument as such, I might comment, for the benefit of Mr. Justice Stewart, that this term "bellwether" is not a legal term as such, it's a sheep-

herder's term is what it is. It refers to the fact that when the sheepherder discovers what the lead sheep is, the one that the other members of the flock follow, why, he ties a bell around it, and then of course if it's dark or the weather is bad or something of that sort, why, he can follow the sheep. This really is a procedure which Judge Christensen has devised to handle these -- it's just another device to handle --

Q As cattlemen put bells on cows.

MR. NIELSON: -- multiple -- Right. Right.

Now, I note from Mr. Randolph's argument that he had nothing to say about the Securities aspect of the case. I remind the Court, however, as I think the Court is aware, that the Securities and Exchange Commission has taken a position in this case. I think it's regrettable that Mr. Randolph did not speak to that issue, because I know that this Court has expressed the attitude in the past, in cases such as the National Securities case, that it is not desirable to decide these important securities issues without receiving the benefit of the thinking of the Securities and Exchange Commission.

However, they have appeared by way of their amicus brief, and I invite the Court to pay careful attention to the position which they have taken and which, I might say, I subscribe to completely.

As far as this matter of the legends on the stock, which Mr. Bertoch referred to, and indicated that the stock was

locked up in the bank at the request of the corporation, I think this Court ought to consider for a moment just what was going on here.

Why would they ever even put that legend on the stock if it wasn't going to be given to the stockholder, so that he could read it and understand it; why would they take the position that these people were fully competent and capable of managing their affairs and that they should be held to the strict standards of accountability that Mr. Randolph would now like to impose upon them, and still at the same time take the position that they weren't even competent to handle that piece of paper?

It's almost as if there was some guilty knowledge involved here. It's almost as if that legend was printed on the stock to try to mitigate the circumstances that these people were being placed under. Certainly that's the view that the petitioners take, and we feel that there was a complete abdication of responsibilities here that gives rise to liability on the part of both the Bank and the United States.

Now, with respect to this matter of reliance, I don't think we can gloss over the matter of reliance as easily as Mr. Bertoch would like to, and say that, well, it just ought to be an element of the Rule; it ought to be an element of the statute. Because if we look at the statute, the construction of the statute and the construction of the Rule, it seems that

Congress had a particular thing in mind.

Congress, if it meant to say reliance, knew how to say that. And did so in other contexts. I have directed the Court's attention in my brief to the provisions of Section 18 of the very same Act that we're talking about. Now, Section --

Q Do you suggest, then, that List is wrongly decided?

MR. NIELSON: I think that the Commission's position in the List case was substantially right, that, as I recall, they took the position that it was not really a problem in List as a factual matter. I have cited in my petition for certiorari, the brief that the SEC filed in the List case, in which they took the very position that I am now espousing, which is that reliance should not be an element because it leads to confusing doctrines.

How are you going to prove the negative of these undisclosed facts? That's what Mr. Bertoch suggests that we should do when we go back to the trial court. How am I going to ask one of these people if they relied upon something they didn't know about?

You see, that's the problem you get into, and that's why reliance is not an appropriate concept.

But in Section 18, which deals with reports filed with the Commission, there is cause of action that was prescribed there for people who rely upon statements contained in those

reports. Now, that's the very same Act, and in that context Congress said that you've got to show reliance.

Also in Section 11(a) of the 1933 Securities Act, which this Court has held is in pari materia, Congress said that when a person brings an action based upon a prospectus he must show reliance.

Now, in this Act, in Section 10 Congress didn't say "reliance", they substituted something else. They said what you've got to show is that it was material.

Now, "material" is a very nice limiting factor, too. And, as Mr. Bertoch has correctly pointed out, sometimes it means the same thing as reliance and sometimes it doesn't. But that is the term which Congress selected. I think it's the one that this Court should apply. And I think that it isn't the business of this Court to be writing terms into the statute which Congress didn't put there, particularly when it appears in the context that Congress knew how to supply that term if they thought that it should be an element of the cause.

Now, I'd like to turn to the Indian law aspects of this case, and I'd like to start off by making reference to the dialogue between Mr. Justice White and Mr. Randolph relative to the authority for the establishment of the Ute Distribution Corporation.

Mr. Randolph indicated that there was statutory authority for the formation of the Ute Distribution Corporation;

I submit that he was in error. There was no such statutory authority. Section 677e, which is the section which Mr. Randolph directed Mr. Justice White to, does not provide authority for a corporation. It provides authority for the adoption of a constitution and bylaws. Now, that's quite a different thing. A membership association is quite a different thing from a corporation.

A corporation, the stock in a corporation may be sold; one cannot sell his right to membership in such an unincorporated association. It's almost as if one were to form a corporation for citizens of the United States and then permit them to sell their citizenship to aliens who would come to this country.

It's, to me, an absurdity, and I think that Congress had a definite thing in mind; by substituting the corporation for the organization which Congress prescribed, a very substantial change was wrought in the statutory scheme, and it was one which resulted in the loss to these people.

Now, Mr. Randolph said that it was approved by the Indians. It was approved at a meeting of a quorum of 30. Congress said that such an organization must be approved at a special meeting called for that purpose by the Secretary and by a majority vote of the adult mixed-bloods. That was far in excess of 30. I'm not sure exactly what the number was, but it was something like about 140.

So, you see, by substituting the procedures under the plan of distribution and the constitution of AUC for the procedures which Congress prescribed, the intent of Congress was emasculated. Congress said a majority of the adult mixed-bloods.

Instead of doing that, they used the provisions in the constitution which permitted a vote of a mere 30.

There's another important thing here, too, Mr. Justice White, that I think ought to be considered, and that is --

Q The Act did authorize the mixed-bloods to form a -- to get together and have a constitution?

MR. NIELSON: Constitution and bylaws.

Q And --

Q It was unincorporated, was it?

MR. NIELSON: It doesn't -- well, the word "unincorporated" is not in the statute. I think that's a fair construction of it, however.

Q But it could have been incorporated?

MR. NIELSON: Well, they use the term "corporation" in other sections: I suppose that if they meant corporation, again they knew how to say it, and they said it in Section 13. The fact that they said it in Section 13 and they didn't say it in Section 6 is persuasive that they didn't mean it in Section 6.

There's another --

Q So that the statute would authorize the constitution to provide for the selection of authorized representatives of the Affiliated Ute Citizens?

MR. NIELSON: That is correct. And that gets us into a whole different question, which is brief --

Q Well, the Tribe was authorized to form -- or the mixed-bloods were authorized to form a constitution.

MR. NIELSON: Yes.

Q And the statute authorized the constitution to provide for the choice of authorized representatives.

MR. NIELSON: Yes. And that was proved --

Q And your claim is that in using a corporation as an authorized representative, that was inconsistent with the statute?

MR. NIELSON: If we want to consider it in that way, Mr. Justice White. I'm not saying, in that sense, that it's inconsistent with the statute; I'm saying that, as a factual matter, it didn't happen. Because the constitution and bylaws provided that the authorized representative powers were those defined in Article V, Section 1(a), and those powers were never delegated to anyone.

Thus, if those were the powers, they still reside where they originally were placed, with the Affiliated Ute Citizens. There is no showing that there was ever any delegation of that power. That's a factual question, however;

it's not a legal question.

But the point I wanted to get to here, which I think is maybe even more fundamental than that, and that is simply this: this statute provided that upon publication of the rolls, every terminated Ute would have his rights in severality, inheritable and such a condition that they could be bequeathed. Now, that's Section 10. It says that just as plainly as can be.

But, at the time of this purported resolution, which Mr. Randolph refers to, there was no power for the general membership to dispose of any particular person's property, because that had already vested in the individual, including the beneficial interests in the undivided assets.

I'd like to just read that section, because --

Q So the whole scheme for authorized representative was just a mirage.

MR. NIELSON: No.

Q Well, you say the undivided interest vested directly in the individual.

MR. NIELSON: The beneficial interest.

Q And you say -- no -- well, the beneficial interest. All right. And no one in the Tribe had no business attempting to authorize anybody to deal with those beneficial interests.

MR. NIELSON: No. Absolutely not, Mr. Justice White.

Q Well, who could they have authorized to do it?

MR. NIELSON: Pardon me, I didn't catch that?

Q Well, who could they have authorized to represent the individuals?

MR. NIELSON: Well, I suppose they could have authorized a person to do it or a bank to do it or --

Q Or a corporation?

MR. NIELSON: Or possibly even a corporation. If, in fact, they had done that. But they did not.

You see, the statute, Section 10 provides that all unadjudicated and unliquidated claims against the United States, gas, oil, and mineral rights of every kind, and all other assets not susceptible to equitable andpracticable distribution shall be managed jointly. You see, we're talking about management powers; we're not talking about ownership powers. We're talking about management powers. The statute --

Q Or disposition powers, yes.

MR. NIELSON: Or disposition powers, right.

Q So nobody -- they had no authority to authorize anybody to dispose of any property?

MR. NIELSON: Not to dispose of any individual member's property. They could execute leases, to exploit these resources, but they had no power to dispose of any individual member's property, because they didn't own it, the individual member did.

I see my time is up --

MR. JUSTICE DOUGLAS: Your time is up, Mr. Nielson.

MR. NIELSON: -- I appreciate the indulgence of the Court.

MR. JUSTICE DOUGLAS: The case is submitted.

[Whereupon, at 2:43 p.m., the case was submitted.]