In the

# Supreme Court of the United States

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| THE NORTHERN CHEYENNE TRIBE, Petitioner, | |
| v. | No. 75-145 |
| WILLIAM HOLLOWBREAST, ET AL., Respondents. | |

Washington, D. C.
March 29, 1976

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THE NORTHERN CHEYENNE TRIBE,

Petitioner,

v. No. 75-145

WILLIAM HOLLOWBREAST, ET AL.,

Respondents.

Washington, D. C.,

Monday, March 29, 1976.

The above-entitled matter came on for argument at 10:03 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

STEVEN H. CHESTNUT, ESQ., 208 Pioneer Building, 600 First Avenue, Seattle, Washington 98104; on behalf of Petitioner.

STEVEN L. BUNCH, ESQ., 601 Power Block, Helena, Montana 59601; on behalf of Respondents Williamson and Bowen

LEWIS E. BRUEGGEMANN, ESQ., 256-8 Hart Albin Building, Billings, Montana 59101; on behalf of Respondents class of Northern Cheyenne Indians.

# C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments first this morning in 75-145, the Northern Cheyenne Tribe v. William Hollowbreast and others.

Mr. Chestnut, you may proceed whenever you are ready.

ORAL ARGUMENT OF STEVEN H. CHESTNUT, ESQ.,

ON BEHALF OF THE PETITIONER

MR. CHESTNUT: Thank you, Your Honor. Mr. Chief Justice, and may it please the Court:

I am Steven Chestnut, counsel for petitioner, the Northern Cheyenne Tribe. There is one issue before the Court. That issue arises from the fact that in 1926 Congress enacted a statute, the Northern Cheyenne Allotment Act, which made limited allotments of surface land on the Northern Cheyenne Reservation, withheld minerals under those allotted surface lands from allotment, and announced a plan to transfer those minerals fifty years in the future.

In 1968, Congress amended that statutory provision to withdraw the aspect of the statute which announced the plan to make a future transfer of minerals and, instead, left the minerals in the perpetual ownership of the tribe.

The precise issue before this Court is did the 1926 statutory plan for the future transfer of minerals endow the allottees or their heirs or devisees with a vested right to the consummation of that future transfer.

QUESTION: Of course, Mr. Chestnut, a good deal depends upon how you word the question when you say that all that was done in 1926 was to announce a plan. You have pretty much answered the question in your favor, don't you?

MR. CHESTNUT: Well, I think that is a fair reading of --

QUESTION: But if you ask the question, if you put it into terms of what the statute actually said, then the question becomes a question, a difficult question, doesn't it?

MR. CHESTNUT: Well, I think the statute actually --

QUESTION: The statute didn't say we hereby announce a plan?

MR. CHESTNUT: No, it didn't use the word "plan," that's true, Your Honor.

QUESTION: It used the word "become"?

MR. CHESTNUT: That's right. The statute used the term that the minerals shall become the property of the allottees in fifty years.

QUESTION: And that shall usually has some greater meaning than just an announcement, doesn't it?

MR. CHESTNUT: Well, it can be taken as a term of in futuro, and I think that when you take it with the following word "become," I think it is pretty clear that the intention was that the property right would come into existence in fifty years. Moreover --

QUESTION: In other words, it has a mandate in it, is what you are saying?

MR. CHESTNUT: No, I think it connotes the concept of future, of a future event. And I think, moreover, that the circumstances giving rise to the Act and the legislative history of the Act and the subsequent administrative execution of the Act is more or less contemporaneous with its enactment, subsequent to but contemporaneous. It clearly shows that the full understanding of the statute by the administrators charged with the duty of enforcing it and by the legislators who enacted it was that no property right was then being created, and I will go into that in my argument.

I think, moreover, that the facts and circumstances giving rise to the enactment, mainly the request by the Northern Cheyennes themselves, that they receive an allotment act, clearly shows that the Northern Cheyennes themselves neither desired nor expected that they could be acquiring a right, a property right to the minerals with the enactment of that Act.

QUESTION: Now, I gather Justice agreed with your position, didn't it?

MR. CHESTNUT: Well, the Justice Department at the trial court level, the District Court, represented one of the main respondents in the case, one of the defendants.

QUESTION: Adverse to your position?

MR. CHESTNUT: Adverse.

QUESTION: Adverse?

MR. CHESTNUT: Yes. That representation continued through the Ninth Circuit. Subsequently, Mr. Littlebird, who was the client of the Justice Department, based on his experience on the reservation, concluded that it would be in the best interests of the Northern Cheyennes for tribal ownership of all the minerals and requested a discontinuance of that representation, because of that.

QUESTION: But the Interior Department agreed with your position?

MR. CHESTNUT: The Interior Department supports us entirely and believes not only that Congress had the power to enact the 1968 amendment but, moreover, that its enactment is vital to the future survival of this Indian tribe and this unique group of people.

Our position is, of course, that the 1926 statute created no vested rights in that future distribution, and that Congress retained inherent continuing power to amend that aspect of the Allotment Act.

Looking particularly to the four constituent elements of the legislative and administrative process giving rise and surrounding this enactment, one finds I think complete support for our position that no property right was transferred at that time.

Firstly, the circumstances giving rise to the enactment

shows that the federal allotment policy itself commenced more or less in the 1870's, was formalized in 1887, with the enactment of the general allotment act, and the basic theory was that the solution to the Indian problem would be to divide up tribal ownership into individual ownership. And pursuant to that policy, individualized allotment acts were enacted for a host of reservations.

The brother reservations of the Northern Cheyenne Reservation in the State of Montana received allotment act very early under that policy, the Fort Belknap Reservation in 1888, the Flathead Reservation in 1904, the Crow Reservation in 1904, the Blackfeet Reservation in 1907, and the Fort Peck Reservation in 1908. Yet, by 1926, the Northern Cheyenne Reservation was not yet allotted in any sense and had received no allotment statute. The reasons for this arose from two factors: One, the view of the administrator charged with the responsibility for administering Indian affairs, the Secretary of the Interior, that the Northern Cheyenne people themselves and the Northern Cheyenne Reservation physically was not suitable for allotment. The other factor was that by the early 1920's, a severe reassessment of the allotment policy was under way, and in fact there was substantial public and official skepticism about the utility of the allotment policy.

In particular, the Department of the Interior felt that the Northern Cheyenne people were backward, had a long

history of resistance to the white civilization, and were not suitable for the "civilizing benefits of allotment." Moreover, the department felt that the reservation itself was not physically suitable for allotment because it was a grazing reservation and the allotment theory was really a farming theory. So there was substantial official resistance to alloting the Northern Cheyenne Reservation.

This, coupled with the emergence in the 1920's of the critical reassessment of the allotment policy, made for great resistance within the government to allotting the Northern Cheyenne Reservation. In fact, the 1926 Allotment Act that was enacted for the Northern Cheyennes was the last original allotment act ever enacted by Congress.

Moreover, these circumstances gave rise to a unique allotment act, an act far more limited than any other allotment act which Congress had ever enacted. The typical pattern for an allotment act in all these other Montana reservations, in the Osage Reservation, and throughout the country, was basically a substantial distribution of the entire corpus of tribal property. Provisions were made for alienability of distributed property and, as a result, I might add -- and this is one of the reasons for the official reassessment of the allotment policy -- ninety million acres of Indian land were lost from Indian ownership. And in fact, today, in the State of Montana, if one looks around, one will find that these allotted reservations are

substantially either in white ownership or in white use. However, the Northern Cheyenne Reservation, because of the unique allotment act, is in 98 percent Indian ownership, is 98 percent in Indian use, 85 percent of the population of the Northern Cheyenne Reservation is in Northern Cheyenne, and this is directly traceable to the unique and limited nature of that allotment act.

In any event, the Northern Cheyennes wanted -- they were concerned that their reservation rested only on an executive order, and that therefore the tribe as a whole did not have a vested confirmed property interest in that reservation. So they wanted a congressional enactment which would confirm tribal ownership of that executive order reservation. Secondly, they wanted limited allotments so that they can have a plot of land on which they could build homes. Those were the two central functions of the allotment act. The third function was to make sure that the natural resources of that reservation remained in tribal ownership, to be developed to the benefit of all the people.

The allotment plan itself, the allotment statute, announced what I maintain is a plan, a statutory plan to transfer the mineral interest under allotted lands at the end of fifty years on the theory that the fifty-year period would be adequate for development of that mineral resource. It turned out, because of external facts, that the mineral wealth of the

reservation was not developable within that fifty-year period, and in 1968 Congress amended the act to implement the central intent of the 1926 Congress that the mineal wealth of the reservation inure to the benefit of all the people.

In any event, in February of 1925, the people themselves submitted a petition to Congress requesting the enactment of the allotment act. The petition was submitted to their Senator, Senator Thomas Walsh. And the petition is very short. It is at page 56 of the appendix. It was signed by 490 members of the tribe, which, according to my conservative calculation, was 59 percent of the adult membership of the tribe at that time. The cover letter that submitted this petition indicated that there was absolutely no opposition that had been indicated on the reservation to the concept of this petition. And the petition is very short, three paragraphs.

The first paragraph says that the people want an allotment of tillable farmland. The second paragraph, which is crucial to the resolution of this case, says that these people want the following: "To reserve all mineral, timber, and coal lands for the benefit of the Northern Cheyenne Indian Tribe, said tribe to have absolute control of same." That event in that petition is what kicked off the legislative process for the formulation of an act which I submit, petitioner submits, conforms to the expressed desires and expectations of the people on the reservation.

QUESTION: Mr. Chestnut, if you were representing the other side and wanted to be sure that they had a vested interest, would you have drawn the statute any differently?

MR. CHESTNUT: I didn't hear the last part of your question, I'm sorry.

QUESTION: Would you have drawn the statute any differently?

MR. CHESTNUT: Well, I think that what Congress did in the statute was in two places an unprecedented fashion, make very broad reservations of power over the entire allotment plan in the statute. Other allotment acts, like the Crow Allotment Act, and these other Montana allotment acts, and the Osage Allotment Act, which basically were massive assaults on the tribal system, had very specific reservations of power. And I think the question may be directed to an argument advanced by respondents that the Northern Cheyenne didn't have a specific reservation of power. The Northern Cheyenne had an overall, all encompassing reservation of power, which I submit was in complete conformity with the central intent of Congress, which was that we are not relinquishing trust responsibility, we are not taking part of this reservation apart, we are maintaining the federal control, and we are doing a very limited thing.

Now, with hindsight, it might have been good to enumerate every aspect of federal control that was being retained but, on the other hand, I think those things are hard to do.

QUESTION: Well, I guess I don't get an answer to my question.

MR. CHESTNUT: Well, I think perhaps this will be responsive: I think that, as a matter of law, the Congress of the United States did not have to reserve any particular power to alter executory unconsummated aspects of that statute. It is a matter of law, and I think Congress was operating in 1926 on the basis of a body of decisions of this Court, interpreting allotment legislation, which established that Congress has an inherent authority to alter allotment distributions. In fact, in the legislative history of the Crow Allotment Act, in a supplement to the Crow Allotment Act, the 1920 provision, there was debate on the floor of Congress about whether or not it was necessary for Congress to specifically reserve a power to extend the period of a minerals reservation, and the statement on the floor of Congress in connection with that precise question was it is not necessary, we have inherent authority to do that, and I think that is completely supported by the cases.

QUESTION: Now, somewhere along the line, will you comment on your opposition's argument about state tax results?

MR. CHESTNUT: Yes, I will do that right now. The respondents argue that by extending or perpetuating the tribal ownership of minerals, the mineral estate in the tribe is thereby subjected to state taxation under a separate federal statute, and that that constitutes a divestment of tribal property in

favor of the state. There are a number of answers to that which I have set forth in the reply brief, but I will try to recall the basic ones.

Number one, that is really not the issue in this case. The issue in this case is did respondents have a vested property right, which Congress could not take away. Respondents, by this argument, tried to bootstrap themselves basically into the standing of the tribe and say that the tribe is losing some kind of vested property right. Really, it is outside the issues in this case. It is an inappropriate argument. And the basic question here is did the 1968 amendment take away some vested property right of respondents.

Secondly, the tax statute, which is 25 U.S.C., section 398(c), which respondents argue would subject this tribal estate to state taxation, is in fact not applicable to this Indian reservation. That statute is applicable purely to executive order reservations and, under a decision of this Court -- the British-American case, which I believe was decided in 1939 -- it was held that an Indian reservation which was based initially on executive order and subsequently received congressional confirmation by statute, is not an executive order reservation within the meaning of that tax statute.

Thirdly, I think the argument of respondents is really inherently circular. If they are contending that the tax statute, 398(c), subjects the tribal mineral estate to taxation

during this perpetuated ownership period, and that that was a taking, then certainly that statute was a taking when it was enacted in 1927. That tax statute was enacted in 1927, after tribal title in the entire reservation was confirmed by Congress. The tribe as a whole had a vested property right at that point. Therefore, if the statute, by taxing tribal lands, is a taking, it was a taking at that point and on that theory is not applicable, either.

Moreover, the Northern Cheyenne Act itself, the allotment act, specifically provides that leasing of tribal minerals will be conducted under the 1938 statute. This was incorporated in the subsequent amendment, and then that, we submit, makes this 1927 statute inapplicable.

There are other arguments which I won't go through, but we have made them all in our reply brief.

The petition of the Northern Cheyenne people was submitted in 1924 and the legislative process, we submit, conformed completely to the expressed desires and hopes of the people. The Department of the Interior begrudgingly responded with an allotment bill which was very limited, as I have indicated, uniquely limited, specifically reserved minerals from allotment and specifically allotted only surface lands for agricultural and farming purposes.

And finally, upon enactment in the House of Representatives of the final form of the Act, the House sponsor of the

bill, Representative Leavitt, indicated that the Act, the purpose of the Act was to make allotments so that the individual Northern Cheyennes could "have permanent homes and develop their own farms." Moreover, he indicated that the Act "offers a means for the development of any mineral resources such as oil which may be discovered on the reservation for the benefit of the tribe." Lastly, he indicated that the Act "gives the Indians the fullest possible benefit of their natural resources.

The fifty-year provision was a provision -- there is no explicit mention of the genesis of that fifty-year provision in the legislative record, but I think the fair reading of the entire legislative history is that the purpose of that provision was to ultimately unify title after the mineral reserve was developed.

Finally --

QUESTION: What did the most recent Act do? It did more than just extent the term, didn't it?

MR. CHESTNUT: The 1968 Act, which was the amendment at issue in this case, extended tribal ownership in perpetuity. It eliminated other provisions --

QUESTION: Well, then, any possibility that the allottee would ever have a unified ownership is eliminated by that?

MR. CHESTNUT: That is correct, and this was based -- the initial version of the Act, in fact --

QUESTION: This goes farther than just insuring that the mineral interest will be utilized for the benefit of the tribe?

MR. CHESTNUT: Well --

QUESTION: Because if the mineral interest were fully developed for the next twenty-five years, the tribe would still own the mineral interests?

MR. CHESTNU: That is correct. Now, the reason that it was made a perpetual extension was because the Department of the Interior pointed out to Congress that the essential purpose of this amendment was to fulfill the 1926 intent, which provides for full development of the mineral wealth to the benefit of the tribe. As a result, they indicated that the intent of Congress was not to transfer anything of substantial value to the allottees. It point out, moreover, that after a full development period were allowed, by that point in time the heirship situation on the Northern Cheyenne Reservation, which is already somewhat complicated -- 20 percent or 17 percent of the respondent class is neither Northern Cheyenne and in some cases not Indian -- that if the reservation were extended for an additional finite period of time, fifty years or a hundred years, the heirship situation would be impossible in view of the fact that nothing of value was intended to be transferred at that point, there was really no utility in imposing upon the Department of the Interior and the Bureau of Indian Affairs the

tremendous problem of sorting out the heirship difficulties. So that was the genesis of the perpetual extension.

In short --

QUESTION: Do you think Congress would have the power to change it back now? Suppose you prevail in this case, could Congress next year change it back?

MR. CHESTNUT: Absolutely, yes. It would be tribal property and the Congress has complete authority to provide for distribution of tribal property to tribal members under its plenary authority.

Finally, I would like to point to the administrative interpretation of the meaning of this Act. Immediately after its enactment, the allotments were consummated after 1926, between 1926 and 1934, by the issuance of allotment patents. These patents made a blanket reservation of all minerals and natural resources for the benefit of the tribe. It contained no mention of the fifty-year transfer, no covenant to make a fifty-year transfer. In short, there was no basis from the document itself for the Northern Cheyennes to believe -- and in fact, they didn't believe, expect or hope for that they would be acquiring a property interest in these minerals.

Thus, as a result of the enactment of the 1926 Act and the issuance of the patents, what did the allottees have in the way of an indicia of property in this mineral resource? Plainly and simply, all they had was a statute which announced a

plan to in the future create a property interest. They had no power to transfer that future interest, whatever it may be, they had no power to profit from it directly by their own transactions, no power to do anything with respect to that future provision in the statute.

Moreover, they had no physical control, they had no power of enjoyment. The 1926 Act lodged leasing authority over the entire mineral resource in the tribal council and provided that all proceeds of mineral development on the reservation would inure to the benefit of the Northern Cheyenne people as a whole, would be deposited in the United States Treasury and would be expended for the benefit of the Northern Cheyennes as Congress might deem expedient.

Lastly, this future interest that these allottees, this expectancy that these allottees had after 1926 was subject to the tribe's complete power to exhaust that reserve. And, moreover, to the statutory provision which said that the proceeds of such development of that reserve would inure to the benefit of the tribe. So, it is not possible to identify any convantional index of property arising from either the 1926 Act or the allotments patents issued subsequently.

Moving now to the strict legal question of what the state of the law is with regard to the power of Congress to alter executory unconsummated portions of statutory plans for the distribution of tribal property to tribal members, the

decisions of this Court, starting most prominently in 1912 with the decision in Gritts v. Fisher, and then a whole string of decisions up to the recent decision of United States v. Jim in 1972 consistently and uniformally reaffirm that a statutory plan which contemplates a future distribution is amendable, alterable, repealable by Congress in light of changing conditions and the best interests of the Indians. That power in those cases is founded on this Court's perception that it is crucial to Congress' historic and constitutional function to serve Indians and Indian property, that Congress maintain authority over the tribal property of tribal Indians, and furthermore that that authority is essential to the implementation of federal policy. It is founded on the notion, a legal notion, that no right, no individual right in tribal property arises until the tribal property is actually distributed.

QUESTION: Of course, Congress could in the '68 Act, it simply said that we are giving the reserve mineral rights to the tribe and if it is a taking, the allottees can sue in the Court of Claims or sue in the District Court. I take it that Congress would have had that part -- the fact that they provided that the '68 Act would be void if interest had actually vested, suggests that Congress was perhaps more concerned in that case than it might have been in others as to whether there had been a vesting.

MR. CHESTNUT: Well, I think that is a point which the

Ninth Circuit seized upon and which respondents argued, that Congress' formulation of the 1968 amendment indicates some uncertainty on the part of Congress. I think that, first of all, that particular uncertainty at that point doesn't completely mesh with Congress' prior view of this statute, this legislative statute.

In 1961, Congress amended this allotment act to make very substantial encumbrances upon this expectancy of the allottees. First of all, it provided that the tribe could enter into minerals leases which would extend indefinitely. In effect, it took away the right -- assuming there was a right -- in these allottees to themselves to transact independelty of the tribe with respect to this future interest.

Secondly, the statute added the term "devisees" to the class of future beneficiaries of this mineral right. It provided -- the original act provided that the future interest would be transferred to the allottees or their heirs. In 1961, Congress said the allottees, their heirs or devisees. In 1961, therefore, in the case of an original allottee who had died prior to 1961, and as to who there had been ascertained an existing heir, those heirs by that 1961 amendment were supplanted by the devisees; my point being that --

QUESTION: Isn't that retroactive application, then?

MR. CHESTNUT: Absolutely. Moreover, the 1961 statute specifically said that any prior transfers of that future interest

by the allottees or their heirs was null and void, and that any future transfers within the remainder of the fifty-year period would be null and void. My point is that the conservatism in 1968 was not evident in 1961, and I think the basic reason for the conservatism was a concern, an awareness that this mineral reserve was quite valuable and a concern that the United States not in fact be subjected to these kinds of claims of damages which you have referred to, Mr. Justice. I think it was a concern to absolutely eliminate any possibility that the United States would be liable and damages. And I think that the legislative history indicates that Congress felt it had the power to do it, but out of what I would consider excessive and inconsistent concern, it incorporated this very unusual provision.

Finally, I would like to make the point that this exercise in 1968 of Congress' inherent power to amend this statutory provision was -- in fact the facts involved here, was entirely -- it proves the premise on which it is based, which is that Congress needs that power. By 1968, the coal reserve on this reservation had been undeveloped. The reservation was in a poverty stricken state. The Northern Cheyenne culture was intact. The people were still speaking Northern Cheyenne, and still do, as a matter of fact. And the reservation was still a homeland for a unique fragile culture.

Suddenly the coal became commercially desirable, the

entire reservation is underlain with it. But shortly 53 percent of that reserve would be lost through this plan. In that instance, individual allottees who were lucky enough to rest atop valuable coal would become rich, and other allottees, members of the tribe who were not that lucky would stay poor. There would be have's and have not's on the reservation.

Moreover, the ownership situation would have been fractionated into an impossible situation with this complicated heirship problem. There would be impossible marketing conditions. There would be absentee ownership. You would have -- 37 percent of this class consists of people who do not live on the Northern Cheyenne Reservation. The respondents include people in Honolulu, in San Francisco and Seattle, in Florida, in Bayonne, New Jersey. These people, under this statutory plan, would be making decisions regarding strip mining of a substantial portion of this reservation.

Finally, the minority -- the impact of such development were likely to make the Northern Cheyennes a minority in their own homeland and devastate this virgin reservation which had absolutely no industrial development. Congress acted in 1968 to prevent that and to lodge in the tribal council which, after all, is the representative of all the people, and, moreover, which has pursued this 1968 legislation since 1966 and has for a ten-year period, through five administrations on this reservation, democratically elected by all the people, adhered

to the notion that it is crucial to the survival of these people that the tribal council and the people as a whole have control of this resource.

In light of those circumstances, Congress amended the Act. I think this proves the fundamental soundness of what we submit is an established legal principle that Congress must have and does have that inherent authority to alter plans for future distribution.

Thank you.

QUESTION: Mr. Chestnut, you gave us the specific legislative history of the 1926 Act and pointed out the petition beginning on page 56 of the appendix addressed to Senator Walsh and the later reluctance and somewhat grudging agreement of the BIA and the Interior Department to the allotment, the last allotment made in 1926. What is the specific history of the 1968 legislation?

MR. CHESTNUT: The specific history of the 1968 legislation is, as I have indicated, that Congress became aware that suddenly this coal reserve was for the first time commercially developable, that the tribe was going to lose control of it in a short eight years, that there would be a situation of additional wealth on the reservation as a result, you would have people remaining in intense poverty and people suddenly becoming rich -- I think it is not explicit in the legislative history, the point I am going to make now, but I think --

QUESTION: But that was my question.

MR. CHESTNUT: -- but I think -- no, that is explicit, what I have just stated is explicit.

QUESTION: And this was brought to the attention of Congress by the tribe?

MR. CHESTNUT: This was brought to the attention of Congress by the tribe and the legislative history indicates that Congress wanted to spread the benefits of any mineral development equally among all members of the tribe.

QUESTION: Of course, by this time, our whole national policy had changed vis-a-vis the Indians, had it not? For many years, beginning in the 1880's, I guess, and up through 1926 and 1930, the whole thrust had been to break up the tribes, to turn Indians into the equivalent of white farmers, and then beginning in about 1930 there was a 180-degree change and the whole thrust was to preserve the tribes and not try to integrate Indians into white society. Isn't that about right?

MR. CHESTNUT: That is --

QUESTION: And this 1968 legislation relfected the then current philosophy as the best way to treat with the Indians, i.e., by preserving their tribes or tribal ownership, their tribal organization, their tribal governments, and their tribal property, in stark contract with what had been the policy of the United States for some fifty years, beginning in the 1880's. Is that right?

MR. CHESTNUT: Well, not completely. I don't think it is accurate --

QUESTION: I don't mean if it is right, I didn't mean isthat right, is that correct. We won't argue which is right and which is wrong.

MR. CHESTNUT: Well, it is not completely correct, in reference to the Northern Cheyenne Act of 1926, which was, I think, not a product of what had previously been the view that tribal ownership should be distributed. As we pointed out, I think --

QUESTION: It was the last vestage of it. The policy was changing then?

MR. CHESTNUT: Absolutely, and in fact it was the last vestage of it, and the Act itself bears the earmarks of the fact that this was far different --

QUESTION: Correct, and a much more limited allotment and a much more drudging one on the part of the Interior Department?

MR. CHESTNUT: Absolutely, and any attempt to compare this Act and draw inferences about this Act with respect to other prior allotment acts, which had the effect of taking a reservation and taking it apart and distributing --

QUESTION: Dividing it up into fee simple ownership --

MR. CHESTNUT: Absolutely, and providing for competency provisions and taking the tribal treasury and distributing it is

totally unsound, and --

QUESTION: Except the one phrase that is absent is the one that your brothers on the other side emphasize, and all of these other cases and in most of these other similar phraseology, there is always that reservation "unless otherwise provided by act of Congress," and that is absent here?

MR. CHESTNUT: Well, I would like to comment on that, if I may.

QUESTION: That is really the key to their argument.

MR. CHESTNUT: Well, I have looked very carefully at the legislative history of the genesis of those phrases in other acts, in particular the Osage act, as a phrase. One will find -- and this is detailed in the reply brief -- one will find that that provisio was alternatively included and left out of the Osage act. The Osage act was enacted in 1906. It had a proviso of the sort you are thinking. I think a fair reading of the statute shows that the proviso only applied to a portion, in fact, of the coal reserve. In any event, Congress subsequently extended that coal ownership in 1921 to a date certain, without reserving any further power to extend it further. Nevertheless, in 1929, Congress came along and extended it to yet another date certain and this time reintroduced the proviso that it was incorporating reserve power. In the Crow act, there was specific statement on the floor of the House in reference to this pr-viso, but it was not necessary to preserve what was really Congress'

inherent power, and I think the history of the formulation of the Crow act shows that the proviso was not for the purpose of preserving an inherent power but arose from a disagreement between the House and the Senate over whether twenty-five years or fifty years was the right initial period. It arose from a compromise not over a generic inherent power of Congress but over whether or not the initial period should be twenty-five years or fifty years.

I think that those provisions on their face may be impressive, but when you go behind them, when you take a look at the actual legislative history which gave rise to their creation, and when you take a look at the basic act that they arise in and compare it to the basic act of the Northern Cheyenne Reservation, you can give no real credence to that provision. It is ludicrous, frankly, to think that Congress intended to relinquish trust responsibility in its enactment of the Northern Cheyenne Allotment Act which it did not relinquish in taking apart these other reservations, really.

QUESTION: You would be in a much more comfortable position, however, wouldn't you, if that language were in this 1926 act, "unless otherwise provided by act of Congress"?

MR. CHESTNUT: I think the respondents wouldn't have the argument that they seem to rely so heavily on, but I emphasize that I think it is not a sound argument.

MR. CHIEF JUSTICE BURGER: Very well. Mr. Bunch.

ORAL ARGUMENT OF STEVEN L. BUNCH, ESQ.,

ON BEHALF OF RESPONDENTS WILLIAMSON AND BOWEN

MR. BUNCH: Mr. Chief Justice, and may it please the Court:

The issue as stated in this case is whether the 1926 Allotment Act conferred a vested remainder type interest in the allottees and their heirs. If the '26 act did create such an interest, then of course the '68 amendment is unconstitutional as a divestment of that interest without compensating for it.

QUESTION: Well, the '68 amendment isn't unconstitutional because by its very terms it is inoperative, is it not, if the Court should decide that there was a property interest created in 1926?

MR. BUNCH: Right. Well, the way that clause is worded was that if they found it to have a vested interest which would make the government liable --

QUESTION: Then it would be null and void?

MR. BUNCH: Right.

QUESTION: Well, also, if Congress proceeded to simply take it from the allottees, the allottees' remd y is only to sue in the Court of Claims for compensation. As I understand the law, they can't say that the act would have no effect.

MR. BUNCH: Right, and that is why the section 2, I believe, of the '68 act was put in there, which specifically required the tribe to bring their suit and acquire title in the

minerals.

QUESTION: Right.

MR. BUNCH: And we submit that since Congress was so concerned that they specifically mandated this lawsuit to make sure that they were going to get stuck with this judgment indicates that they were pretty concerned that they were stepping beyond their lawful powers in passing the '68 amendment, and I feel that should be taken into consideration, in viewing Congress' intent in passing the '68 amendment.

QUESTION: You think that intent is of greater weight than the intent in 1961? They make quite a point of the fact that the 1961 statute is equally inconsistent with your -- is inconsistent with your interpretation of the 1926 act. Should we consider that that evidence --

MR. BUNCH: That is not before the Court. It is not at issue in this case.

QUESTION: But do you think it is relevant evidence of congressional intent in 1926 and, if not, why is the intent in 1968 any different?

MR. BUNCH: The '61 amendment did not divest the allottees of their interests.

QUESTION: What did the '61 amendment do? It had to do with the timber, didn't it?

MR. BUNCH: There are several of them in there that --

QUESTION: Well, for one thing, it specifically

authorized, as I recall it, the allottee to grant -- that is, the tribe -- to grant leases of duration greater than fifty years.

MR. BUNCH: Right.

QUESTION: Now, is that consistent with the ownership in the allottees after that period?

MR. BUNCH: Not if they were to give the allottees their royalties, I presume, once their estate became possessory. I assume they would be analogous to remain for the life of the estate, for a period of years, and once the remainder of a man's interest is attached that they would have to get the royalties from the development.

QUESTION: Perhaps we should put it this way: Do you construe the '61 act as consistent with your interpretation of the '26 act?

MR. BUNCH: Right, but there are constitutional problems under the '61 act in broadening the class of people who are eligible. It included, I believe, devisees --

QUESTION: Devisees as well as allottees.

MR. BUNCH: -- as well as allottees.

QUESTION: Yes.

MR. BUNCH: And to that extent, there are constitutional problems with the '61 act.

QUESTION: I am just -- the thrust of my question isn't to get into a debate about the '61 act, but I am just

wondering the extent to which it is appropriate to look at either the '61 act or the '68 act when we are trying to identify the congressional intent in 1926.

MR. BUNCH: Well, I am not really that familiar with the history of the '61 amendment. However, the '68 amendment was of considerable concern with the prospect of divesting these interests. I don't know whether that concern was there in the problem of broadening the beneficiaries in the '61 act or not, so I really can't comment on the congressional intent in the '61 amendment.

QUESTION: At any rate, the inquiry in this case is what Congress did or didn't do in 1926, isn't it?

MR. BUNCH: Right. Right. That is what they intended, that shall become property, in section 3 of the allotment act.

We feel that this did create a vested remainder type interest for several reasons. First of all is the legislative history of the '26 act, which I have outlined in pages 33 through 35 of our brief. And this legislative history indicates that Congress knowingly intended to currently vest the remainder interest in the allottees and their heirs. Our construction of this language is that it permitted a currently vested but delayed possession of the mineral estate. We feel this is so because most of the congressional consideration of this bill took place in the Senate Committee on Indian Affairs, and they

substantially rewrote the bill. And we feel that if you look at the language of the bill as it went into this committee and as it emerged from the committee, you can get an idea of what Congress was trying to do with this bill.

As the allotment of the minerals went into this committee, it provided that they would allot "only the surface." Now, this "only the surface" language could be intended as a congressional intent that they intended to allot only the surface presently and that they intended to delay allotting the minerals, they intended to delay any vesting of the minerals. However, the committee specifically rejected that language and they gave this remainder type interest to the allottees in unequivocal terms. There were no contingencies apart from the passage of the fifty-year term, and that is not really a contingency as such, as I understand. At any rate, they rejected language which would be fairly strong in favor of the petitioner's position, and rejected that and gave the allottees their interest in unequivocal terms.

Also I would point out that the grant to the allottees here is mandatory. As was mentioned earlier, the language says "shall become," and this has been interpreted to be mandatory language and was not leaving the grant to the discretion of Congress. And I submit that the term "shall," being in the future tense term, refers to the "shall" of the possession being future tense, not the vesting being future tense.

Also, it is interesting to compare the Northern Cheyenne Allotment Act with other allotment acts. As was mentioned earlier, when Congress chose to reserve the power to extend tribal ownership, they specifically did so, they expressly included provisions in the grant of the minerals. It said the minerals will be held by the tribe for "X" number of years and then passed to the allottees, but they always included the all important proviso "unless otherwise provided by Congress." They did this for the Crow Reservation, the Fort Belknap Reservation, the Blackfeet Reservation, the Osage Reservation, the Standing Rock Reservation, the Cheyenne River -- the Standing Rock and Cheyenne River as one reservation -- the Standing Rock and Cheyenne River Reservation. And all of these allotment acts were passed prior to the '26 allotment act here at issue, thus "otherwise provided by Congress" had become a standard form proviso whenever Interior or whoever was drafting these bills wanted to reserve this power, they just included this clause in the statute. However, they didn't do it in this instance, and we submit that this indicates a congressional wish not to reserve this power and not to delay the ordinary vesting process.

According to the ordinary vesting process in allotment acts, the allottee's rights and interest in that allotment vest when he files his allotment application in the normal Bureau of Indian Affairs office. And since the remainder interest in the

mineral estate was allotted as of that time, the rights of the allottee to his remainder interest in the mineral estate vested when he filed his application in the local BIA office in Lame Deer or Crow agency or whereve he filed.

The timing of the vesting is, according to this Court's decisions in Arenas v. U.S., Raymond Bear Hill, and allotment rights in Fort Belknap in San Juan County. Also in the petitioner's reply brief, they bring up the point that many of our authorities regarding the allottees vesting of rights have to do with overriding executive discretion and not congressional statutes. However, there are several of these decisions which do override later congressional statutes which attempt to abrogate the allotment rights.

For instance, the allotment rights in the Fort Belknap decision was a Department of the Interior decision in which the Indian allottee had filed his application for allotment. The trust allotment had not been issued, and the Wheeler-Howard Act took effect. The Wheeler-Howard Act said no more allotment -- we will have no more allotment of tribal land, therefore this was a congressional statute which said there would be no more allotments issued. However, the Department of the Interior said he had filed his application prior to that time, so, despite this provision of the Wheeler-Howard Act, we are going to issue this trust patent anyway.

Also, Raymond Bear Hill was this factually similar

situation in which he had filed his allotment application. There was an amendment practically identical to the one here at issue which said the tribe gets the minerals, and the Department of the Interior said, well, he filed his application before this act took effect, reserving the minerals to the tribe, therefore they would issue the trust patent giving the minerals to Raymond Bear Hill.

Also the allotment rights in San Juan County is very similar. Also the petitioner claims that there are broad reservations of power in the 1926 allotment act. It may be helpful, in viewing these in context -- the act is set out in its entirety at the beginning of the appendix -- to examine the sections, as I mention each section and discuss each section.

The first reservation of power, a very broad reservation of power -- oh, I would also like to mention that on the normal period of vesting, that the vesting on the Northern Cheyenne Reservation would have had to have taken place by 1934, between 1926 and 1934, because the Wheeler-Howard Act in June of '34 did terminate the allotment rights, where we have no exact dates on when these rights were vested, it would have had to have been that period.

QUESTION: Mr. Bunch, do you concede that during this period the federal government could have arranged lease -- however you want to call it -- for the removal of the coal and substantially depleted it?

MR. BUNCH: Oh, yes, during the fifty-year period the government --

QUESTION: What does that do to your argument about vesting?

MR. BUNCH: The allottees would have taken whatever is left over. During the fifty-year period, the tribe could exploit the coal and in theory could reduce it to nothing. Again, it would be --

QUESTION: So it would remain their interest subject to complete depletion?

MR. BUNCH: Right.

QUESTION: That isn't much of an interest, is it?

MR. BUNCH: Well, that is not the way it turned out. It is possible that they could have taken nothing by it, but --

QUESTION: Well, that is true of any remainder interest in a wasting asset.

MR. BUNCH: Right.

QUESTION: You find that all the time.

MR. BUNCH: In the oil interest or anything --

QUESTION: Any remainder interest or reversionary interest in a wasting asset may be valueless or may not be, but that doesn't affect the legal validity of the interest, does it?

MR. BUNCH: That does not nullify the interest as such.

QUESTION: It is a little bit like inheriting, having

a reversionary interest in an old car, unless it is a Rolls-Royce that has got antique value to it, but there is that possibility.

MR. BUNCH: Right.

At any rate, the first reservation of power the petitioner claims allows the -- oh, before I mention this, I would also like to emphasize that a specific reservation of power here is necessary, as indicated by the fact that Interior thought it was necessary to include this "unless provided by Congress" provided in all the other statutes. If it wasn't necessary, it would be mere surplusage, and the fact that Interior came time and time again and included it would indicate that it was necessary.

QUESTION: What kind of patents were issued to the allottee?

MR. BUNCH: Originally trust patents.

QUESTION: And was that for twenty-five years?

MR. BUNCH: The trust patent was issued as soon as the application was approved.

QUESTION: Yes, but how long did the trust last?

MR. BUNCH: Twenty-five years is the conventional period, however, it has been extended.

QUESTION: And what makes you think the Congress could extend that time?

MR. BUNCH: The line of cases dealing with that

indicate that that is not a property right as such, but that is a personal attribute of wardship. Tiger v. Western Investment is the lead case on that, and --

QUESTION: Well, now, what is the difference between that and this mineral interest?

MR. BUNCH: Well, Choate v. Trapp is the case that we have relied on extensively, and in that case the trust allotments were issued with a twenty-five year tax exemption, however, prior to the expiration of the tax exemption, Congress passed a statute repealing the federal tax exemption. In that case, this Court said the tax exemption is a property right and Congress cannot divest that property right in a trust allotment by subsequent legislation. And in that discussion, they specifically reconciled Tiger v. Western Investment. They said Tiger is a different case, it does not deal with property rights. The restraint on alienation was included because many of these Indians were just fresh in from their tribal existence, they had no concept of the white man's days of doing business in severing minerals from estates, surface estates and all that sort of thing, and so they put this restraint on alienation in there in order to keep them from being taken advantage of, also in hopes that they would settle down during that twenty-five year period and become farmers. But this whole approach to this restraint on alienation in a long line of these cases which I have cited is that the restraint on alienation is simply

not considered a property right, but it is an attribute of wardship, it is a personal status.

QUESTION: The restraint still remains?

MR. BUNCH: On some of the land, it does. They can apply for the fee patent to get the fee patent issued, but much of the land is still trust.

QUESTION: But the Choate case was a contract case?

MR. BUNCH: No, that is one place we disagree. As I mentioned -- as a matter of fact --

QUESTION: That is what the petitioner said.

MR. BUNCH: Well, I wrote up quite a section --

QUESTION: I know.

MR. BUNCH: -- and it quotes a number of authorities which disagree with that, including Felix Cohen and this Court and a number of its decisions. As a matter of fact, there is a statement in Choate which specifically disagrees with that.

QUESTION: Well, I just wanted to be sure you didn't agree.

MR. BUNCH: All right. On the top of page 23, the Atoka agreement was a contract, and the Court specifically says the question here isn't whether they are parties to the contract but whether they have rights under the statute. There have been numerous cases of this Court that have also held that statutory right and property right is not a contract right case.

But, at any rate, the section 1 language that is subject to the management and control of Congress, we submit, is simply a statement -- this was the initial recognition by Congress of the Northern Cheyenne Reservation, thus we submit that this should be interpreted that Congress is saying we recognize the Northern Cheyenne Reservation, it is a legitimate reservation, and we are going to assume our normal guardianship duties on this reservation. And it is a statement of normal guardianship duties, is what this management and control language means in section 1.

Also, I would remind you that this is an allotment act, and the very purpose of an allotment act is to vest individual rights in real property and individual Indians. And if you take the opening proviso of this management and control language, the opening proviso of the allotment act, which it is not specifically to minerals, it could be -- it is a power to abrogate otherwise vested rights -- it could be used to divest any right on that reservation. So you would have Congress in a curious position of beginning an allotment act with the proviso which would destroy the very purpose of the act. And I submit that you should not impute such a schizo legislative design on Congress without more convincing evidence which this statute does not prevent.

There is also a management and control language listed in section 3, which is right at the very end of section 3.

However, I would submit to the Court that this does not reach the allotment minerals here at issue. The only minerals here at issue are the minerals underlying the allotment land, not underlying the tribal land. The quote in section 3 says that the management and control is limited to unallotted lands or tribal land. And since the remainder interest in the tribal estate was allotted, it is not subject to that section 3 management and control language. This was the Ninth Circuit's opinion and conclusion on this matter, and I submit it should be affirmed.

Thank you.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Bunch.

Mr. Brueggemann.

ORAL ARGUMENT OF LEWIS E. BRUEGGEMANN, ESQ.,
ON BEHALF OF RESPONDENT CLASS OF NORTHERN CHEYYE INDIANS

MR. BRUEGGEMANN: Mr. Chief Justice, and may it please the Court:

The real issue here, gentlemen, I believe, is is the Indian a citizen or is he not. Are we going to permit him to own property or are we not? I thought the issue was settled by this high Court way back in 1912 in Choate v. Trapp. And there has been at least eight more decisions from that time confirming that same position.

It is the respondents' position -- and I might draw the Court's attention to the fact, they own only 38 percent of

the surface of the entire reservation. The tribal corporation already owns 68 percent of the minerals. The allottees have a mere 38 percent left. But I am going to direct the Court's attention to the treaty of 1868, which I think is the first indicia of governmental intent as to what the allottees were to take.

In that treaty, which was entered into under threat of force of arms, because martial law had been declared. Colonel Shivington slaughtered the Northern Cheyenne, men, women and children, at Sand Creek. As a result of that, the Northern Cheyenne, the Arapaho retaliated. In 1865, martial law was declared and, under threat of force of arms, the treaty of 1868 was entered into by the tribe with the government. Under that original treaty, the Cheyenne, to induce them to lay down their arms, were promised a permanent reservation and the allottees were promised tracts of land in the amount of 320 acres.

After that, another slaughter took place. A bare three months after that treaty was proclaimed to be the law of the land, the Cheyenne and the Sioux were again slaughtered, men, women and children.

QUESTION: That was what, in 1868?

MR. BRUEGGEMANN: Yes, sir.

QUESTION: The Battle of Little Bighorn was 1878 or 1876?

MR. BRUEGGEMANN: I am speaking of the Battle of --

QUESTION: But I am asking you about the --

MR. BRUEGGEMANN: Yes, sir, Your Honor, the Battle of Washita followed the --

QUESTION: But the Battle of Little Bighorn was when?

MR. BRUEGGEMANN: 1876.

QUESTION: '76.

MR. BRUEGGEMANN: June 20, 1876.

QUESTION: And the Northern Cheyenne were involved in that, weren't they?

MR. BRUEGGEMANN: Yes, sir, but that came after.

QUESTION: Some eight years after.

MR. BRUEGGEMANN: The Battle of Washita came three months following the enactment --

QUESTION: Following the treaty?

MR. BRUEGGEMANN: -- or proclamation of the treaty.

QUESTION: Yes.

MR. BRUEGGEMANN: And they had not yet had an opportunity to select their lands. And it was after that that Colonel Custer then went into the Black Hills on that expedition, which finally resulted in the Battle of Little Bighorn in 1876.

QUESTION: And that was a few miles west of where this reservation is located?

MR. BRUEGGEMANN: Yes, sir.

QUESTION: Very near it?

MR. BRUEGGEMANN: Yes, sir. Now, in that original

1868 treaty, the Indians were promised a choice of three places. One was in Oklahoma, one was elsewhere, but one was in the southeastern tip of Montana on the Yellowstone, on Otter Creek, at Crow Agency.

QUESTION: Where does Tongue River get in here?

MR. BRUEGGEMANN: The Tongue River is on the Cheyenne Reservation, Your Honor, presently, and I believe it was also mentioned there.

But the fact remains that this was the original governmental intent to vest the Indians, the individual Indians with tracts of land in the amount of 320 acres. Then, in 1926, came the act giving them only 180 acres. Finally, the government said, by executive order, President Chester A. Arthur, gave them a reservation. This was enlarged by President McKinley in 1900.

Finally, in 1926, came the allotment act, and now Congress said, well, we are not going to give you 320, but I will tell you what we will do, we will give you 180 acres, and they did so under that act. It is the respondent's position that they were entitled to 320, but in the event that the treaty had no significance whatsoever -- and that is what petitioner alleges -- he wants this Court to ignore completely the 1868 treaty, which was the first time the Northern Cheyenne had ceded any lands to the United States of America, and here they laid down their arms and ceded over 51,210,000 acres in return

for these promises which were never kept. This is shocking, gentlemen.

The 1926 act at least gave them half of what they promised. Now, the tribe says, the tribal corporation, with 62 percent of the minerals, says, well, we still don't have enough. So the United States of America enacts the 1968 amendment to the 1926 act and says, now we give you the minerals not for fifty years but in perpetuity, that should certainly give you enough time to remove all the minerals. I've always been taught you revert to principle. There is nothing that can be made right in practice if it is wrong in principle, and there is no way that the petitioner can convince me -- and I certainly hope cannot convince this Court -- that this is justice. If it were my minerals, I certainly wouldn't want to divide it among someone else, and my clients don't want their minerals divided among the tribe who already have 62 percent.

There are certain rules of --

QUESTION: How do those figures evolve? You have told us, you said at the beginning that the tribe itself already had 62 percent of these minerals and the individual allottees, even if you are right, 38 percent only, is that correct?

MR. BRUEGGEMANN: That is correct.

QUESTION: And how does that come about?

MR. BRUEGGEMANN: Because the original surface of the reservation was divided that way. The allottees were given

their allotments --

QUESTION: Only 38 percent of the surface was ever allotted, is that right?

MR. BRUEGGEMANN: Yes, sir, that's correct.

QUESTION: Is that your representation?

MR. BRUEGGEMANN: Yes, sir. There are certain rules of construction I think this Court would concede that are applicable to both treaties, statutes and executive orders, and one of those is that they must be construed in pari materia, in other words, the Court must consider all these things, the treaty, the statute, the executive orders, because they all involve the same subject matter. And it is certainly the individual and not the tribal corporation that is in most need of the protection of this Court.

In any contract, it is the words of the contract itself that govern and not what may have preceded or what might have been, as petitioner would have this Court believe. He says the policy of Congress was in a flux, about to change. I don't see that this is material at all. It was not changed. The policy of the Congress at that time had been the same, especially where the Cheyenne were concerned, from the treaty of 1868 until the enactment of the 1826 act itself, and that was to give the allottee an undisputable fee title estate.

The 1926 act, disputing the ignoring the treaty, as petitioner would have this Court do, says that the tribe is to

have the minerals for fifty years. Well, the tribe sat on their rights for fifty years and did nothing and did not develop these minerals. And it says at the end of fifty years, the minerals shall become the property of the allottee, heir and devisee. Well, he wants it now. It is this year. He has been waiting for it. He wants it now.

There was no qualifying phrase, as there were in five other allotment acts that all preceded the Northern Cheyenne Allotment Act, starting in 1902 or '06, all the way up until the 1926 act, five prior acts. And petitioner would have this Court believe that the Congress just dropped the phrase, he just forgot, or he added it some place else, when he makes reference to not allotted lands but unallotted lands, tribal lands. Yes, the United States retains plenary power over tribal lands, but he didn't say that about allotted lands, and here I think is the crucial salient point. This is where the Congress can be said to have intended, just as the government intended in the original 1868 treaty, to convey to the Indian his minerals.

The Indian has been kept, gentlemen, a psychological cripple for many, many years. He now wants to determine where he's going and when. If you reverse the decisions of this Court which clearly indicate that Choate v. Trapp is controlling, you will set the Indian back two-hundred years.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. The

case is submitted.

[Whereupon, at 11:07 o'clock a.m., the case in the above-entitled matter was submitted.]

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