OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 84-262

TITLE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY, Petitioner V. PUEBLO OF SANTA ANA

PLACE Washington, D. C.

DATE February 20, 1985

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IN THE SUPREME COURT OF THE UNITED STATES

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MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY, :

Petitioner : No. 84-262

v. :

PUEBLO OF SANTA ANA :

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Washington, D.C.

Wednesday, February 20, 1985

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:51 o'clock p.m.

APPEARANCES:

MS. KATHRYN MARIE KRAUSE, ESQ., Denver, Colorado; on behalf of the Petitioner.

SCOTT E. BORG, ESQ., Albuquerque, New Mexico; on behalf of the Respondent.

C O N T E N T S

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PROCEEDINGS

CHIEF JUSTICE BURGER: We will hear arguments next in Mountain States Telephone Company against Pueblo.

Ms. Krause, you may begin whenever you are ready.

ORAL ARGUMENT OF KATHRYN MARIE KRAUSE, ESQ.

ON BEHALF OF THE PETITIONER

MS. KRAUSE: Mr. Chief Justice, and may it please the Court:

For over 50 years Section 17 of the Pueblo Lands Act was considered to authorize the public conveyance of a right-of-way across their lands, provided only that that conveyance was approved by the Secretary of the Interior. No further congressional authorization or legislation was deemed necessary. That was the interpretation of the Department of Interior. It was based on the language of Section 17 and it was an interpretation that was put into practice and concurred in by the Pueblos.

The Department of Interior practice resulted in over 60 grants of rights-of-way across the lands of the Pueblos in the State of New Mexico and spanned a period of time of over 30 years.

Mountain Bell holds such a Section 17 right-of-way. It was granted to it by the Respondent Pueblo Santa Ana in 1928. It was approved that same year by the Secretary of the Interior.

Prior to 1928, in the fall of 1927, Mountain Bell was named in a quiet title action that had been brought under Section 3 of the Pueblo Lands Act. That action was styled United States of America as guardian for the Pueblo of Santa Ana versus Charles Brown.

The complaint alleged that the Defendants held right titles and interests to the lands of the Pueblos or at least claimed such interest and asked that those interests be declared null and void.

The complaint also alleged that the Defendants were trespassing across the property of the Pueblo and asked that the trespass be enjoined by an injuction.

Mountain Bell was dismissed from that lawsuit. It secured a right-of-way from the Pueblo in February of 1928 and within six weeks the legal representative representing the Pueblos moved to dismissed Mountain Bell from the Brown action on the grounds that since the institution of the suit Mountain Bell had secured good and sufficient title to its right-of-way over the premises and controversy under Section 17 of the Pueblo Lands Act.

The order of dismissal by the District Court Judge recited substantially similar statements.

In 1980, the Pueblo of Santa Ana sued Mountain Bell again.

QUESTION: Ms. Krause, am I correct, however,

no answer was ever filed in that suit?

MS. KRAUSE: You are right, Justice Blackmun, there was no answer filed.

In 1980, the Pueblo again sued Mountain Bell, arguing that Mountain Bell was in trespass.

QUESTION: Before you leave your earlier suit, may I just ask this question about it? Do you contend that that suit adjudicated the right of Mountain Bell at the time the suit was filed or at the time the suit was dismissed?

MS. KRAUSE: I am sorry, Justice Stevens --

QUESTION: In other words, you claim that was an adjudication that Mountain Bell had previously acquired the right-of-way or that it was an adjudication that the conveyance that was approved by the Secretary of Interior was a valid conveyance? What did they decide? You rely on res judicata.

MS. KRAUSE: That is right.

QUESTION: What is it that you say they decided?

MS. KRAUSE: I think the order was a final judgment on the merits to the effect that Mountain Bell had good title to its right-of-way.

I think the Pueblos had the opportunity through their legal counsel if they wanted to litigate the question of whether Mountain Bell had legal title or had been in trespass prior to the time of that order to have litigated

it but they did not.

QUESTION: Then you are saying that that adjudication was to the effect that Mountain Bell had good titles before the lawsuit was filed?

MS. KRAUSE: Well, the order is dated, I think, May 31, 1928.

QUESTION: I understand that, but --

MS. KRAUSE: And it does not address whether it is speaking about before or after.

QUESTION: I understand that. I am just trying to understand what your theory is of what it was that the court adjudicated.

MS. KRAUSE: I think the court adjudicated the fact that Mountain Bell had good title as of that date for certain and did not actually address whether it had it before or not. I think our argument would be that the Pueblo is precluded probably from raising whether we had it before or not because they had a full and fair opportunity to litigate that question at the time.

QUESTION: I am still not sure I understand your position. You say then that it was an adjudication that the 1928 conveyance was a valid conveyance or an adjudication that they previously had good title? I just don't know what you are saying.

MS. KRAUSE: Okay. Let me back up a minute.

QUESTION: I know you say that it means as of the date of the entry of the order they owned the property. I am just trying to figure out on which of two alternative theories do you think that the judgment rests?

MS. KRAUSE: I think the judgment rests on the fact that we had secured a valid right-of-way from Pueblo of Santa Ana that was approved by the Secretary. I am sorry if I am being obtuse. I don't think I understand the question exactly.

QUESTION: Well, let me try and rephrase it. There are two theories on which you could have acquire title at the date that order was entered.

MS. KRAUSE: Right.

QUESTION: One was that you got it back in 1905 or whatever the date of your original position.

MS. KRAUSE: Right.

QUESTION: The second theory was that after the lawsuit was filed the Secretary approved the conveyance to you. One of those two theories must support the order. I am asking you which do you think supports the order.

MS. KRAUSE: I think the theory that we had acquired the right-of-way as of 1928 supports the order. I think that an argument could be made, however --

QUESTION: So you are saying that this was an adjudication not of any issue tendered by the complaint,

rather of the validity of the post-complaint conveyance?

MS. KRAUSE: Well --

QUESTION: That is what I understand you to be saying.

MS. KRAUSE: I think that the principles of res judicata support that it bars something that could have been litigated as well as those things that were litigated. And so to the extent that the order on its face states that Mountain Bell has a good and sufficient right-of-way and has perfected title to a right-of-way, that it actually is an adjudication as to Mountain Bell's status as of that time which covers Mountain Bell's status back to 1904 frankly. It could have been litigated at that point in time and it was not.

QUESTION: Thank you.

MS. KRAUSE: The Pueblo in 1980 reputed its right-of-way grant to Mountain Bell arguing that the second clause of Section 17 did not authorize it to grant a conveyance to Mountain Bell, and that, in fact, that statute prohibited any such conduct on their part.

They renounced the actions of their legal representatives in the Brown lawsuit on the grounds that the order of dismissal was intended to be a procedural order only and not to be a final judgment on the merits and that the order by the trial court judge did not rise to the dignity

of the type of order that should be accorded res judicata effect.

The Tenth Circuit agreed with the Pueblo on both issues. It held that Section 17 of the Pueblo Lands Act did not authorize the Pueblo to convey their property and that the Pueblo would not be authorized to have granted the right-of-way until some Congress other than the 68th Congress took some action to authorize the Pueblo to convey their property.

The Court also held the Pueblo was not barred from the order of dismissal, from relitigating something it had a full and fair opportunity to litigate in 1928, the status of Mountain Bell as a trespasser across their lands.

The Tenth Circuit opinion is clearly erroneous for three reasons: First, that opinion failed to defer to a reasonable administrative interpretation of Section 17 that is almost compelled by the statutory language found in that section.

QUESTION: Judge Breitenstein thought the statute was clear as a bell, clear as Mountain Bell.

MS. KRAUSE: Clear as Mountain Bell.

The Tenth Circuit held that Section 17 means exactly what is says. The United States amicus brief, I think, does a very nice job of explaining the particular

problems with that theory. The Tenth Circuit stated that no conveyance of Pueblo lands would be valid until Congress hereinafter provided and the problem with that analysis is that the first clause of Section 17 does not make any reference to conveyances of Pueblo lands, only the second clause of Section 17 does.

And, along the lines Justice White has just suggested, the Tenth Circuit reading of the language of Section 17 seems superficial at best. It does not take into account the distinctly different types of language used in the first and second clauses. It results in imputing to Congress a most bizzare intention, the intention of enacting a statute of which the second clause was totally inoperative at the time it was passed.

QUESTION: Ms. Krause, I guess your interpretation really makes Section 16 of the Act superfluous, doen't it?

MS. KRAUSE: Not at all, Your Honor. Section 16 of the Act is an integral part of the procedure involving the Pueblo Lands Act and how that procedure was going to be administered and carried out through the fruition of the process.

That section --

QUESTION: Well, suppose if 17 means what you say it means, then Section 16 was not needed --

MS. KRAUSE: Well --

QUESTION: -- because the Pueblo, with the consent of the Secretary, could have disposed of lands that otherwise would have been disposed of under Section 16 possibly.

MS. KRAUSE: That is possible, but Section 16 has responsibilities that are imposed on the Secretary of the Interior that are not imposed on him under Section 17. Under Section 16, as originally drafted, and I will also explain the amendment, if a claimant before the Lands Board was not successful and lost his property so that this piece of property here was now Pueblo property, the title to which had not been extinguished, and all the land surrounding that property were in non-Indians, then the Secretary was supposed to put that piece of property up for bid to the highest bidder for cash. After he received that cash, he was to --

QUESTION: Well, wait. I think we understand, but if 17 means what you say it means, that wouldn't have to be done at all. They could have used Section 17 and, indeed, I guess there are some indications that 17 was used instead of 16.

MS. KRAUSE: Well, they couldn't have used Section 17 if they wanted the Secretary to make distinctions between the claimant who bought the property and the claimant who lost the property and they couldn't have used Section 17 if they wanted the Secretary to credit when it was the

claimant who bought the property and to disburse funds for improvements when it was the claimant who didn't purchase it.

QUESTION: Do you know whether Section 16 was ever used?

MS. KRAUSE: I do not know if it was used. I know it was amended in 1933 so that the Secretary could put lands out for bid, still within the confines of the Pueblo Lands Act legislation and still within the confines of the adjudications that were going on in that Act, so that the land no longer had to be surrounded by non-Indian land. And, because of the fact that it was specifically amended, I guess I would make the assumption that it was probably used.

The Tenth Circuit's interpretation, as I mentioned, ignored a reasonable administrative interpretation of Section 17 that was almost compelled by the language of the statute and it gave no weight to the administrative practice that grew up around that interpretation, a practice that was concurred in by the Pueblos themselves and by their legal representatives.

In so doing the Tenth Circuit failed to follow this Court's admonition in a long line of cases which culminated only last term in the Chevron decision delivered by Justice Stevens that if a statute is ambiguous or is

silent, that a court should not substitute its interpretation of what a statute means over and above that of an administrative agency who has provided that statute with a reasonable administrative interpretation.

QUESTION: The agency changed its mind, didn't it?

MS. KRAUSE: Well, it depends on if you are talking about in-court documents or out-of-the record documents. The agency stopped using Section 17 which is not at all surprising because in 1926 Congress enacted legislation that would have allowed utilities to go ahead and condemn Pueblo property without any participation or consent by the Pueblo and without any participation by the United States and, indeed, because of that reason a District Court in New Mexico ruled that it was unconstitutional. Therefore, in 1908 and 1928 Congress adopted legislation that the general right-of-way statutes that applied to the other Indian tribes in the United States would also be applicable to the Pueblo. At that point in time, there really is no necessity to use Section 17, although it does seem to appear from the record that the Secretary used Section 17 whenever a Pueblo was willing to consent to give the right-of-way and only use the 1928 Act initially when a Pueblo refused to consent to give a right-of-way.

The reason I said that about inside or outside

of the record is I understand there is a filing by the Pueblo of Taos which attaches the Department of Interior letter to the Solicitor General where they take the position that Section 17 should not have been used. And, in response to that, I would only say that the amicus brief filed before this Court is filed on behalf of the United States and I would assume the decision has been made that that was an appropriate administrative practice.

QUESTION: Do you see eye to eye with the United States amicus brief?

MS. KRAUSE: Not on the res judicata issue we don't see eye to eye. We generally see eye to eye, I think --

QUESTION: The construction of the statute?

MS. KRAUSE: The construction of Section 17. I think --

QUESTION: So, you think Section 17 is limited to just conveyances of right-of-way?

MS. KRAUSE: I think the United States indicates that this Court could limit its decision if it so chose.

QUESTION: Was that your position?

MS. KRAUSE: This Court -- Mountain Bell's position would be that it could. If you are asking me what the logical extention is of Mountain Bell's argument, I will readily admit that the logical extension of that argument is that the Pueblo is authorized to sell, grant, lease, or convey

their lands.

QUESTION: That is my difficulty as to where one draws the line. Why does the S.G. just go so far and not any further? What is the justification for his stopping short of going all the way?

MS. KRAUSE: Well, I think the justification is we reached the Tenth Circuit and, indeed, reached this Court was because that is what the record was based on and that is what the administrative practice basically involved.

At the time this interpretation was developed, it seems quite clear from reading the legislative hearings that Congress simply did not address one way or another the question of rights-of-way when it was discussing the Pueblo Lands Act.

It did discuss, however, the fact that the Pueblos had, since this Court's decision in Joseph, been conveying -- making conveyances of their property without any United States participation or approval.

It was also informed that after this Court's decision in Joseph the territorial courts of New Mexico had held that the Pueblos were subject to the New Mexico state statutes of limitations. So, there were two evils that Congress was informed of. They were informed that one of those evils was being remedied at the time the hearings on this Act were held. Congress was informed that since the New Mexico

Enabling Act and since this Court's decision in United States v. Sandoval that Pueblo alienations, conveyances, and leases were being approved by the Department and that is how the exercise of guardianship had been put into practice in New Mexico regarding Pueblo conveyancing.

The Pueblos historically had the power to convey their property under the Spanish Sovereignty provided that it was approved by the Sovereign and there is support for that proposition into the Mexico jurisdiction in cases of this Court. There is nothing in the legislative history that would indicate that Congress meant to deprive the Pueblos of their historical power to convey property. The only thing in the legislative history is that the Sovereign's approval was being exercised since this Court indicated in Sandoval that some kind of guardianship responsibility or relationship was involved with the Pueblo Indians and the United States.

QUESTION: Ms. Krause, can I go back for a second before I lose the thought to the question of limiting the case to rights-of-way. Your argument, I gather, is that because that is where the main administrative practice was, why, maybe that is all you have to do. But, isn't it true, I think, there were 64 conveyances of right-of-ways and one conveyance of land, all of which were approved by the Secretary?

MS. KRAUSE: The deposition that was before the Tenth Circuit makes reference to the fact that there was one out-right conveyance but it goes into no detail and I have no knowledge about the surrounding circumstances from the record.

QUESTION: I see. I was thinking if it were true, even if it was only one, and the Secretary followed the same practice there, I don't know why the argument wouldn't -- How you can chop it off.

MS. KRAUSE: I think the United States would like the administrative practice and the decision of this Court to be limited. I think this Court can limit its decision if it wants, but I don't think Mountain Bell feels awkward or embarrassed by the concept that the logical extension of its argument is that the Pueblos could convey their property under the second clause of Section 17. And, if this Court would want to so hold, it would certainly go far to articulate, at least for the Pueblos, what the extent of their power is under that statute.

QUESTION: It isn't really what we want to hold. We are construing a statute and it seems hard for me to believe it means one thing with one kind of a conveyance and another thing with another kind.

MS. KRAUSE: I would agree. I think it is just a matter of if this Court wants to say we reserve that issue

for another day, then it could probably do that. But, I think you are right. If you are construing the language of the statute, as long as you don't say it says exactly what it means, Mountain Bell will probably be comfortable.

I would like to read the second clause of Section 17. It is that section on which Mountain Bell relies to support the validity of its right-of-way.

It states that "no sale, grant, lease of any character or other conveyance of lands, or any title or claim thereto, made by any Pueblo as a community, or any individual Indian living in a Pueblo community in the State of New Mexico, shall be of any validity in law or in equity unless the approved by the Secretary of the Interior."

There are two things that are fairly obvious about that language. The first is that it is directed to conduct that originates with the Pueblo. The Pueblo is the acting body. They make a conveyance or the individual Indian is an active conveyor, the body that does the action.

The section then is clearly talking about consentual and voluntary activity.

The second thing that is fairly obvious about the language is that it is language substantially similar to the Non-Intercourse Act of 1834 that was on the books at the time the Pueblo Lands Act was passed in 1924.

That statute as written was by 1924 an anachronism.

It still read that a treaty or a convention was required, but in 1871 Congress had stated that no more treatying should be done with the Indians.

Therefore, the second clause of Section 17 substitutes for something that was already anachronistic, a requirement of Secretarial approval to validate the Indian conveyance. And, as I have explained, the approval of the Department of Interior was the way that the United States had been exerting its guardianship at the time the Pueblo Lands Act hearings were taking place.

The Secretarial approval requirement, as I said, took the place of the treaty or convention requirement and to the extent that the people involved in the transaction complied with the restriction, the conveyance that was attendant to that statute was valid in the same way that a conveyance made within the confines of a treaty or a convention was clearly valid under the Non-Intercourse Act of 1834.

The first clause of Section 17, on the other hand, is written in language distinctly different from the second clause. It states that "no right, title, or interest in or to the lands of the Pueblos to which their title has not been extinguished as hereinbefore determined shall hereafter be acquired or initiated by virtue of the laws of the State of New Mexico or in any other manner except as may hereafter may be provided by Congress."

That language uses language characteristic of an involuntary transaction, something that is done against the Pueblo as opposed to done with their concurrence on their origination.

QUESTION: Yes, but the section does speak of transfers in any other manner, doesn't it?

MS. KRAUSE: It doesn't speak of transfers in any other manner, it says or in any other manner, no right, title, or interest or in any other manner.

What the Department of Interior did --

QUESTION: Doesn't that suggest something other than just involuntary transfer?

MS. KRAUSE: It suggests something broader than involuntary alienations under laws of the State of New Mexico. And, if you applied the general ejusdem generis principles you have got a broader clause that is followed by limited involuntary types of language and the most that "or in any other manner" would then refer to would be to some other types of involuntary losses that arose other than by the State of New Mexico and, indeed, the Department of Interior --

QUESTION: And where do you get the source of that interpretation?

MS. KRAUSE: Well, it is the interpretation of the Department and it is also an interpretation that arises out of a generally well-recognized statutory construction

canon and that is that a general phrase is limited --

QUESTION: Used in generous.

MS. KRAUSE: Right. Along those lines I might just say that the Department of the Interior did find a meaning for that language. Indeed, it prohibited the railroad from acquiring a right-of-way under an 1899 statute or Mountain Bell from acquiring a right-of-way from the Secretary under the 1901 statute.

QUESTION: While I have you interpreted, I think you may have already answered this in response to Justice O'Connor, but giving 17 the interpretation that permits voluntary sale on the Secretary's approval, what point is under Section 16?

MS. KRAUSE: Under Section 16, Justice Brennan, the Secretary of the Interior has some very clearly stated administrative responsibilities with money. He is to sell the property with the consent of the Pueblo. If they claimant who had made the claim before the Board is the loser, meaning he doesn't buy the property, then the Secretary is required to take the money, give some of it to the Indian tribe and give the rest of it to the claimant who had made improvements on the property. If the claimant is the purchaser under Section 16, the Secretary is to credit what he gives to the Pueblos the benefit and value of the improvements that were made by the non-winning claimant.

So, he has some clearly defined administrative responsibilites that are integral to the entire Pueblo Lands Act resolution that are not addressed in Section 17.

Section 17 --

QUESTION: Is that to say that 16 has nothing to do with the form that the conveyances should take?

MS. KRAUSE: It does not address what type of form they should and the Secretary is the seller under Section 16, not the Pueblo. The Pueblo is a consenting body to the sale under Section 16.

I think the briefs also make clear, I am sure this Court is aware, they were put into the statute at different times. Section 16, however, is integral to that statute, whereas 17 is prospectively addressed to deal with transactions that occur outside of the Pueblo Lands Act.

I would like to reserve the remainder of my time if there are no further questions.

CHIEF JUSTICE BURGER: Mr. Borg?

ORAL ARGUMENT OF SCOTT E. BORG, ESQ.

ON BEHALF OF THE RESPONDENT

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

In the entire history of Indian affairs in this country, Congress has never given the Secretary of the Interior unbridled discretion to approve conveyances of unallotted,

unseeded tribal lands and yet Petitioner would have this Court enshrine an interpretation of Section 17 of the Pueblo Lands Act as a wholesale transfer of Congress' own power over conveyances of Pueblo tribal land transactions.

Section 17 is one of the last sections of a statute passed in 1924 of quiet Pueblo titles and validate the titles of a very carefully limited group of non-Indian settlers that Congress decided deserved to have their titles validated under the procedures of this Act.

QUESTION: But ever since 1924 have most or all of these been transfers only with the consent of the Secretary?

MR. BORG: Yes. Each of these transfers or so-called transfers has been with the consent of the Secretary.

QUESTION: That is all?

MR. BORG: Yes, but not with the consent of Congress.

QUESTION: Any suggestion that there be consent of Congress before this date?

MR. BORG: Congress -- The idea is that Congress under the Non-Intercourse Act must authorize conveyances of Indian land. It has never given carte blanche power to the Secretary of the Interior to a group. In fact, the continuous and consistent practice of Congress has been to allow only conveyances of very limited interest in Indian land and Congress itself has imposed statutory conditions

on such conveyances and has required regulations.

Section 17, on the other hand, does not limit in any manner the kinds of conveyances of Pueblo Indian land that can be made. It imposes no conditions whatever on the Secretary of the Interior or the tribes and it does not even require the issuance of regulations. Moreover, it does not require that the Indians receive just compensation and, in fact, one of the problems that developed in the use of Section 17 was improvident conveyances. The Secretary of the Interior did not give adquate authority and that has been recognized by Congress in carefully retaining unto itself that kind of authority over the disposal and conveyance Indian lands and not giving the Secretary such a massive transfer of its own authority.

QUESTION: Mr. Borg, you say the Secretary has never been given this authority. Didn't he get this authority in Section 16? There is no requirement of congressional approvement in Section 16.

MR. BORG: Section 16 does give congressional approval for a carefully limited kind of transaction.

QUESTION: I mean that is a carte blanche congressional approval, not as to each particular Act or anything like that.

MR. BORG: No. The point is that Section 16 gives congressional authority for a very limited type of transaction.

It involves lands situated away from the main body of Pueblo lands, little splinters that are isolated and are no longer of much value to the Indians. Congress gave its consent for those lands to be sold in order for Pueblo lands to be consolidated and to bring their own land holdings into better shape.

QUESTION: If it is consent conditioned on the approval of the leaders of the tribe and also --

MR. BORG: Right.

QUESTION: -- the Secretary are the same conditions in Section 17.

MR. BORG: No, those are not the same conditions because -- not precisely the same conditions because Section 17 does not impose any requirement that the transaction be judged in the best interest of the Indians as does Section 16. It does not require the issuance of regulations as does Section 16 and it does not require that it be by option to the highest bidder as does Section 16.

Section 16 is a very carefully limited provision.

QUESTION: The difference is, I suppose, that in Section 16 you are dealing with conveyances conceivably of an individual member of the Pueblo who might not want himself to dispose of his land.

MR. BORG: No. The Pueblo lands are not allotted lands. They are held in communal title the same as any

other Indian lands except the Pueblo has fee simple title to it.

Neither of those --

QUESTION: Why does the statute then refer to any Pueblo Indian living in a community? It seems to contemplate individual ownership of some of the land. That is what --

MR. BORG: It seems to contemplate such ownership in the future and I would bring to the Court's attention that Mountain Bell does not do anything to explain that particular clause, the second clause of Section 17.

We believe that that clause has a rational meaning. Pueblo lands were not allotted at the time of the passage of the Pueblo Lands Act. Congress at that time was still adhering to the policy of allotment, but until Congress went ahead and issued allotments and removed the restrictions on alienation that are commonly given to allotments, individuals couldn't sell.

The United States does not believe that individual Pueblo Indians could sell. Mountain Bell says they could, but the language of that statute, the second clause, indicates that Congress must act in the future to allot Pueblo lands before individuals can sell.

In a parallel fashion, Congress must act to authorize the Secretary and the Pueblos to convey lands

in any other matter.

QUESTION: But those two kinds of authorizations are quite different. The first would be that an individual Pueblo isn't authorized to convey land to which he has no title and if Congress ultimately allots lands, then the individual Pueblo would have the sort of title he could convey. But, that is quite a different kind of authorization from the second kind of authorization you spoke of.

MR. BORG: Indeed. The authorization that Congress was referring to for sales by individuals was somethiong it contemplated doing in the future. Likewise, it contemplated in the future allowing tribal lands to be conveyed under various statutes that Congress would pass allowing the very limited kinds of conveyances for rights-of-way, for leases, for other purposes that Congress has done both before and since the Act.

The second clause of Section 17 merely references the existing statutes by which Congress had already authorized very limited transactions in Indian land and it refers to the future, both in allotment and for tribal lands to acts of Congress that would allow future conveyances.

The significant thing about Section 17 is that the first clause addresses the evil that Congress sought to remedy in the Pueblo Lands Act, namely, conveyances and losses of Pueblo land through adverse possession.

The first clause completely wipes out any kind of loss of Pueblo land without congressional authority. The second clause simply references that the Secretary of the Interior who did have broad supervision over administration of Pueblo lands must approve transactions when those transactions must be approved under the congressional statute.

It is highly unlikely that Congress would in the future pass any kind of a statute that would not require Secretarial approval. As noted by Mountain Bell, the second clause addresses conveyances. Congress has generally required Secretarial supervision for conveyances of allotted Indian lands and further kinds of transactions. Congress was not going to pass a law in the future saying that the Pueblos could convey independently of the Secretary. That has been a fundamental part of the Secretary's role in supervising and managing Indian lands throughout the last 90 to 100 years.

Section 17 must be viewed in a common-sense way. It must be viewed as simply declaratory statement by Congress that the Pueblos were subject to the full benefits and protections of the Indian Non-Intercourse Act.

The Pueblo Lands Act sought to give effect to this Court's decision in United States v. Sandoval which held that the Pueblos were tribal Indians subject to the same protections and having the same status as other tribal

Indians in this country. That reversed a prior decision and finally gave effect to the intent of Congress in 1851 when it extended the Non-Intercourse Act to New Mexico specifically to protect the Pueblos.

So, the evil that Congress sought to remedy in 1924 was that long history of maybe 30 or 40 years from the Joseph decision where the Pueblos were placed in a unique status, stripped of the protections of congressional control of their lands.

Congress had no reason to turn around in the same Act by which it had accomplished that goal and simply cast the Indians adrift, subject only to the unbridled discretion of the Secretary or his lesser subordinate.

The interpretation that Mountain Bell is advancing here would authorize conveyances going all the way down the line through the bureaucracy of the Bureau of Indian Affairs. Transactions and approvals for leases and rights-of-way even today are commonly done at the agency level and it would just simply be absurd to presume that Congress intended to give that kind of authority to low-level bureaucrats within the Bureau of Indian Affairs. That is not the kind of protection that Congress has historically sought to give Indian lands. Congress has very jealously retained its own power and its own authority over unseeded, unallotted Indian lands, the lands on which Indians are living.

When lands have been seeded or when lands have been allotted, Congress has generally allowed some kinds of broader control to the Secretary, but that is part of the emancipation process that allotment sought to promote. Earlier that has been disavowed.

QUESTION: If you have mentioned the deference that the Court sought to give to the Secretary of the Interior, I have missed that. How much reliance do you place on that?

MR. BORG: We believe that reliance is not called for at all to the administrative interpretation. We think the language of the statute, like the Court of Appeals, is clear; that the legislative intent of Section 17 can be discerned by looking at the language of the statute and looking --

QUESTION: What I am addressing or referring to is the Secretary's attitude toward that language for many, many years.

MR. BORG: The Secretary's attitude toward that language was not the kind of attitude that this Court traditionally gives deference. The interpretation that is advanced by Mountain Bell was arrived at by private attorneys two years after the Pueblo Lands Act as a means of evading the Pueblo Lands Act. That interpretation was never communicated to Congress and, in fact, is inconsistent with other congressional enactments passed subsequent to that

time.

QUESTION: But the Secretary did give approval to the --

MR. BORG: The Secretary did give approval but I would remind you that the approvals were given to very irregular conveyances. First, they were used to --

QUESTION: Nevertheless, the Secretary apparently thought he was acting in accordance with the law.

MR. BORG: It is not clear. None of the approvals were given by the Secretary himself.

QUESTION: Do you think it is clear that the Secretary acted contrary to what he thought the law was?

MR. BORG: No, I would not say that the Secretary knew how he was acting. The Secretary never approved a single conveyance. They were all approved by assistant secretaries below him.

This interpretation --

QUESTION: That is the action of the Secretary, isn't it?

MR. BORG: Well, this interpretation -- I suppose it is. This interpretation did not originate in any kind of judicious process by the intent of Congress was to be discerned. It came from private attorneys. It was acquiesced in doubtfully by local federal officials in New Mexico who then --

QUESTION: You don't think any congressional committees knew how the Secretary was applying this statute?

MR. BORG: We do not believe that it was brought to the attention of a single congressional committee in any kind of direct fashion. It may have been brought to the attention of maybe an isolated congressman, but there is nothing that we have been able to determine that it was brought to the attention of Congress at all.

And, in fact, Congress legislated in a manner that is inconsistent with that interpretation.

QUESTION: Mr. Borg, really, how important is this case?

MR. BORG: This case is very important, Your Honor.

QUESTION: What hangs on our decision here?

MR. BORG: What hangs on your decision here is whether the Pueblo Indians are going to be found by this Court to have been placed in a completely different status than any other Indian tribe in this country.

QUESTION: That philosophically sounds very broad, but how much is involved really, just a few easements?

MR. BORG: In practical terms, not very much, just a few easements. Mountain Bell itself acquired 26 rights-of-way under Section 17. It has only one standing line that has not been renegotiated. There are very few of these cases left to be adjudicated. What is really at

stake here is the possibility -- probably nominal damages as shown by the letter from Judge Campos that is appended to our brief.

QUESTION: Well, I am just wondering, what justifies what must be substantial expense in getting this case up here if all we are talking about are nominal damages and a few rights-of-way to provide as easements, go back in the 30's really.

MR. BORG: Right. When this case was brought, we anticipated --

QUESTION: Is this a lawyer's lawsuit?

MR. BORG: No, this lawsuit was brought to us by our clients. In fact, it was identified by the United States as a potential trespass suit under 28 U.S.C., Sec. 2815.

QUESTION: Is there anything else behind this, anything by way of water rights or other things that are more substantial?

MR. BORG: Yes, there are considerations --

QUESTION: That is what I am trying to get out and I don't get it from you.

MR. BORG: Well, the effect on water rights is an indirect one. Only since this Court took cert in this case in the lead water rights adjudication in New Mexico for Pueblo Indian water rights, the state is now arguing

that the Pueblo Indians have never been subject to the Non-Intercourse Act and they are saying -- in arguing in that court that the Pueblos are somehow to be treated differently because Congress treated them differently in the Pueblo Lands Act and that they have never been subject to the Non-Intercourse Act, despite this Court's decision in U.S. v. Candelaria. And that has the potential for having great impact on Pueblo Indian water rights. It would put the Pueblos in a unique position where they would not be entitled to the same kinds of protections and the same kinds of rights that have been accorded other Indian tribes.

That is why some of the amicus briefs filed against us were filed.

QUESTION: Of course, sometimes people don't want federal protection.

MR. BORG: Indians, Your Honor, do want federal protection. It is those people who want to strip the Indian tribes of their special rights and their special protections that are the ones who are advocating removing those restrictions.

What is really at stake for the companies in this case is nominal. PNM, one of the amicus curiae in this case, has negotiated seven of eight of its rights-of-way and the remaining one expires next year.

Mountain Bell, like I say, has only one standing

right-of-way that has not been renegotiated.

For the Pueblos, on the other hand, what is at stake is their very status, whether they are to be treated as Indian tribes like other Indian tribes or whether they are somehow to be cast in a unique status, stripped of some of the protections that have been given to those other tribes.

I would like to --

QUESTION: Let me ask one factual question before you move on. These 64 conveyances that took place, what period of time do they cover? Is that in the --

MR. BORG: Yes. Well, it is in the documents that we lodged with the Court. There were actually more than 64. There were 79 conveyances.

QUESTION: Oh, were there?

MR. BORG: And, 55 of those were within a six-year period from 1926 to about 1932. There were a couple of other conveyances around 1940 and then a group of them in the 1950's that were only intended as a means of circumventing the existing Secretarial regulations that limited rights-of-way to 50 years.

The administrative interpretation has not been a consistent interpretation. It has been erratic, it has been irregular, it has even been abandoned. There has been no Section 17 conveyance since 1959 and for the last eight years the Department of Interior supported our position.

And, in fact, the United States has brought suits based on this same statute that -- the same kind of suit that is before you here. It is only since November that the United States has decided to take a different position. This kind of waffling may not reflect what the government's position is today but it shows that there has been a relative lack of consistency in the interpretation of Section 17.

One other thing is that in 1943 the Solicitor for the Department of the Interior advised that rights-of-way were to be governed solely by the general right-of-way statutes and not by Section 17. Thereafter, transactions under Section 17 were made only to evade the existing statutes, made to evade the time limits, made to evade the limits on just compensation to the Pueblos, made to evade limits on who the parties could be to get those transactions.

Section 17 was a giant loophole opened up by private interests and acquiesced in reluctantly by local federal officials in order to evade the law and all we are doing in this suit is trying to compel --

QUESTION: I thought it was drafted by the lawyer for the Pueblo. Wasn't it Mr. Wilson that wrote this section?

MR. BORG: Section 17 was drafted by Francis Wilson. Francis Wilson was not the lawyer for the Pueblo. He was the lawyer for one of the Indian rights organizations that was active in lobbying for the bill.

The lawyer for the Pueblo was one of those who was compromised by the whole thing. He represented two of the companies that wanted to get rights-of-way and he was one of the people who was originally involved in concocting Section 17 as an artifice for evading the Act.

QUESTION: Maybe I misspoke. Wasn't it correct though that Mr. Wilson was basically kind of representing the interests of the people you now represent?

MR. BORG: Francis Wilson was trying to represent the interest of a lobbying group on behalf of the Indians, generally a fairly wealthy group of persons in the early 1920's in New Mexico and in New York who wanted to preserve Pueblo culture and Pueblo arts and crafts. And, his interest was one as an advocate for the Pueblos, but not as their representative.

And, Francis Wilson's statement, which everybody has been citing, that Section 17 was intended to cover the same ground as the Non-Intercourse Act is clear. Section 17 does cover the same ground as the Non-Intercourse Act. It was intended to preserve Congress' power.

QUESTION: You know, one thing that I guess that has run through my mind a couple of times when you mentioned the importance of the case to the Pueblo, because it treats them differently than other Indian tribes, in a way it treats them with a higher degree of respect if it gives them greater

autonomy in their right to dispose of their land.

MR. BORG: On the surface that might be true, but in actuality the Pueblos and Indian tribes generally do not exercise very much independent judgment in these kind of affairs. Whether it is voluntary or involuntary doesn't really matter because they generally rely on the judgment of the Bureau of Indian Affairs and the officials who are designated to fulfill this country's guardianship responsibilities.

They are not treated any better under Section 17 by requiring their consent because the conditions that Congress uniformly imposes on these kinds of statutes for conveyances are not available to them.

For instance, the railroad statute governing rights-of-way requires that a commission determine the compensation. It requires that if the Pueblo objects they be given a full hearing before it be granted. It requires certain types of widths for rights-of-way and it requires stations.

QUESTION: In the Kerr-McGee case that is going to be argued to us next week, the government -- the Indian tribes take the position that the last thing the tribes should want is Secretarial approval. They ought to be able to do things on their own. Now, each tribe is presumably entitled to its own view on that thing, but certainly a

lot of people, I think, would agree with the suggestion of Justice Stevens.

MR. BORG: Some people might agree. On the surface it sounds fine, you know, requiring Pueblo approval, and that is what is done in the present statutes by regulation and in some cases by statute consent is required of Indian tribes for these limited type conveyances.

In the Kerr-McGee case, the question, as I understand it, involves whether if the tribe imposes a tax on mineral extract it must have the Secretary's approval. That is a different thing from here. In this case we are talking about alienation of Pueblo Indian lands. There the Pueblos wants as much protection as they can have. They do not want to have -- Say, if a new leadership comes into power, if there is some kind of upheaval within the tribal government. They do not want to have the kind of -- be stripped of the protections that other tribes are given.

QUESTION: The Indians don't want their own governing bodies to be able to convey land without the approval of the Secretary of the Interior?

MR. BORG: Or without the authorization of Congress. That is definitely true. The Indian tribes are very protective of their special land status.

QUESTION: Mr. Borg, have the Indians, the Pueblos ever asked Congress to amend Section 17 to clarify the

section in all these years where the Secretary of Interior had a different interpretation?

MR. BORG: No. The Pueblos were not really accorded private counsel or really the kind of assistance that they have had in only the last ten or fifteen years.

QUESTION: So, no suggestion has ever been made to Congress on that?

MR. BORG: No. There have been other procedures that have been followed by the Pueblos in trying to get the Department of the Interior to reject that interpretation, and, in fact, the Department of the Interior itself identified these trespass cases.

QUESTION: Has Section 16 ever been utilized to your knowledge?

MR. BORG: Section 16 was utilized, but Section 17, as you --

QUESTION: How often?

MR. BORG: I have no idea of just how frequently. I don't think the issue came up all that often, but Section 17 was, in fact, used to override Section 16. The documents that we lodged with the Court show that in some instances the lands that were -- the precise same lands that should have been covered by Section 16 were conveyed under Section 17. Presumably -- It is not clear, but presumably to avoid the requirement that they be put up for bid to the highest

bidder. It was used in order to make sure that the persons who wanted them got them.

I might add that the consideration for those conveyances was woefully inadequate. Some of them were on the edge of the town of Bernalillo in New Mexico and they were sold for seven or eight dollars an acre, whereas the appraised value at the time was probably a couple of hundred dollars an acre.

Section 17 was also used to validate some invalid, concededly void deeds that were issued in 1880 for the consideration of a dollar to the Atchison, Topeka and Santa Fe Railroad.

Section 17 had a highly irregular use. It was not a consistent kind of administrative practice and it was simply used when no other statutory authority seemed to be available. But, when it had the instrumental value, say, of getting a good deal and it is just something that was developed as an artifice. It was used as a mean of evading the Pueblo Lands Act and it is certainly not worthy of this Court's deference.

QUESTION: It is something the Indians wanted.

MR. BORG: The transaction?

QUESTION: You say that is what the Indians wanted, Section 17.

MR. BORG: The Indians wanted Section 17 because --

QUESTION: Was it the Indians or the Indians' lawyers?

MR. BORG: That wanted Section 17?

QUESTION: Yes.

MR. BORG: Section 17 was drafted by a representative for a pro Indian organization.

QUESTION: Representative of the Indians, not the Indians.

MR. BORG: No. Statutes have hardly ever been drafted by the Indians themselves.

But, the section is one that the Pueblos --

QUESTION: Do you mean the Indians don't want to operate their own property.

MR. BORG: No, the Indians do not want to operate their own property. They want to have some say in it, but they want it to be protective.

QUESTION: They just want a little bit of say.

MR. BORG: That is right. And, that is why government regulations and government policy requires their consent generally.

QUESTION: Will you name me the Indian tribe that said that, the tribe that said that?

MR. BORG: Sure. I can name you our clients, Santa Ana Pueblo.

QUESTION: You are speaking for your tribe now.

MR. BORG: No, I am not a member of the tribe.

QUESTION: I know you are not. But, you speak for the tribe.

MR. BORG: That is right.

QUESTION: And, you, speaking for the tribe, say the tribe -- It is ashame we don't know what the tribe says.

MR. BORG: Well, we have a couple of tribal members here today.

It has been -- I don't think you will find in recent legislative history any effort by an Indian tribe that is subject to the Non-Intercourse Act asking to be relieved of the Non-Intercourse Act. Indian tribes -- It is just inconceivable because the history of allotment which did result in the removal of restrictions on alienation resulted in a massive, massive loss of Indian land and that was rejected and reversed in 1934 under the Indian Reorganization Act. And, Congress has expressly repudiated that entire policy of giving Indian tribes the power to alienate their lands.

Congress, moreover, had no reason to enact Section 17 as interpreted by Petitioner. Congress was informed, as Mountain Bell admits, that the general procedures for administering and governing Indian lands were being followed in 1924 when it enacted the Pueblo Lands Act. Congress had no reason to provide an additional means for providing

conveyances. It certainly had no reason to cut off any access to existing means for acquiring rights-of-way.

And, as I say, subsequent legislation refutes Mountain Bell's interpretation. In 1928, Congress passed a comprehensive statute that applied the existing statutes governing rights-of-way to the Pueblos. That statute has been found by the Court of Appeals to be a comprehensive statute that covers the field. It is certainly inconsistent to say that the conditions and the limits imposed by that statute, the 1982 statute, could be conveniently circumvented simply by citing Section 17 of the Pueblo Lands Act.

In 1933, Congress broadened Section 16 of the Pueblo Lands Act. There is not an iota of an indication that Congress was aware that Section 17 had been interpreted to have the operative effect that it was being used for. Congress instead broadened the scope of conveyances under Section 16 but still left in all of the carefully defined protections that it had imposed in the first place.

In 1948, Congress passed a general Right-of-Way Act, specifically mentioning the Pueblos and requiring the consent of the tribes. If Congress was aware that Section 17, using tribal consent, could grant rights-of-way for all purposes, it certainly would not have referred to them in the 1948 Act.

Finally, in 1968, Congress allowed four specific

Pueblos to lease their lands for 99 years. Petitioner's interpretation of Section 17 would allow those Pueblos to do that without the benefit -- without the need for that statute. Any of the Pueblos could have leased their lands for 99 years or even have sold their lands. There was absolutely no need in 1968 for that kind of statute if Section 17 had the operative effect attributed to it.

In conclusion I would like to say that in three unanimous decisions of this court, U.S. v. Sandavol, U.S. v. Candelaria, and U.S. v. Chavez, the Pueblo Indians were found to be entitled to the exact same status and the exact same protections given other Indian lands.

Section 17 was turned on its head and used to undermine the Non-Intercourse Act and to usurp the authority of Congress over Indian affairs.

Petitioner's argument would have this Court place the Pueblo Indians in a unique status, stripped of some of the same protections as other Indian lands and could have implications beyond this decision and we ask the Court to affirm the judgment of the Court of Appeals and to continue those protections for the Pueblo Indians.

Thank you.

CHIEF JUSTICE BURGER: Do you have anything further, Ms. Krause? You have three minutes remaining.

MS. KRAUSE: Thank you.

ORAL ARGUMENT OF KATHRYN MARIE KRAUSE, ESQ.

ON BEHALF OF THE PETITIONER -- REBUTTAL

MS. KRAUSE: The Non-Intercourse Act or the Section 17 is basically an adoption of the Non-Intercourse Act and shows that the second clause of Section 17 uses the language of the Non-Intercourse Act that was on the books.

The first clause of Section 17 in essence is the first legislative statement of what had been held to be judicially the necessary implications of the Non-Intercourse Act. If a conveyance was made within the confines of a treaty or a convention, it was valid, and if a transfer of land occurred in any other way voluntarily or involuntarily, it was invalid. The courts have held you couldn't involuntarily transfer the land through statutes of limitations, through deeds that didn't comport with the requirements of a treaty or a convention or any other theory and that is basically what the first clause of Section 17 does.

The argument that the Pueblos are in a status all by themselves is refuted at page 20 of Mountain Bell's opening brief and page six of its reply brief. The Chickasaw and the Cherokee Tribes have been authorized to convey their property with the participation of their tribal agents or their counsels and with the approval of either the President of the Secretary of the Interior.

This is not an unparalleled kind of power. It is not an usual power for Congress to grant, but the legislative hearings make quite clear that the Pueblo Indians, even in 1924, were not considered to be usual Indians. They were respected in their Mexican community. There is considerable debate in those hearings as to whether they are indeed citizens of New Mexico even though the Sandoval court did not decide. There is considerable discussion in those legislative histories about conveyances that were made by individual Pueblo Indians, discussions about how the Pueblo Tribe had conveyed to an individual Indian who had turned around and conveyed to a non-Indian.

Therefore, the language of Section 17 in almost every phrase and every clause has a distinct reference in the history as Congress knew it and we would ask this Court to reverse the Tenth Circuit's opinion on the grounds that Section 17 does not mean exactly what the Tenth Circuit said it meant.

Thank you for your kind attention.

CHIEF JUSTICE BURGER: Thank you, counsel, the case is submitted.

(Whereupon, at 2:50 p.m., the case in the above-entitled matter was submitted.)

* * * *

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

#84-262 - MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY, Petitioner

V. PUEBLO OF SANTA ANA

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Paul A. Richardson

(REPORTER)