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### Are the Pueblo Indians Too "Civilized" for Federal Indian Law?

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## *Are the Pueblo Indians Too "Civilized" for Federal Indian Law?*

by Richard B. Collins

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**Mountain States Telephone and Telegraph Co.**

v.

**Pueblo of Santa Ana**

(Docket No. 84-262)

*Argued February 20, 1985*

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### ISSUES

In 1928, the Pueblo of Santa Ana, a New Mexico Indian tribe, consented to an easement across Pueblo land for a telephone line, and the Secretary of the Interior approved. In this case, the Pueblo claims that the easement was not lawfully granted. The easement's record owner, Mountain States, contends that a 1924 federal statute authorized the easement grant. In the alternative, Mountain States claims that a 1928 lawsuit resolved the question in its favor and cannot be reopened.

### FACTS

A predecessor company to Mountain States built the disputed telephone line in 1905. There is no evidence in the record that the company had an easement, and the Pueblo says it was a trespasser. Mountain States' here claims its predecessor had a "right-of-way," but it cites no evidence to sustain the claim.

In 1924, Congress passed the Pueblo Lands Act, intended to settle the claims of those occupying lands of the New Mexico Pueblo tribes without lawful title. Under the Act, the United States sued to quiet title to Santa Ana Pueblo land and named Mountain States as a defendant with respect to the 1905 telephone line.

Rather than defend the lawsuit, Mountain States asked the Pueblo to consent to a new easement for the line. In 1928, Pueblo officials consented in return for payment of \$101.60—about eighty cents per pole. The agreement was then forwarded to Washington and approved by the Secretary of the Interior. Shortly thereafter, Mountain States was dismissed from the quiet title case.

Indian tribal land cannot be sold except as allowed by Congress. In approving the 1928 easement, the Secretary of the Interior relied on section 17 of the 1924

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Pueblo Lands Act. The Pueblo filed this case in 1980, claiming that section 17 does not authorize sales of Pueblo land. The relevant words of the section are:

No right, title, or interest in or to the lands of the Pueblo Indians of New Mexico ... shall hereafter be acquired or initiated ... except as may hereafter be provided by Congress, and 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 Pueblo Indian living in a community of Pueblo Indians, in the state of New Mexico, shall be of any validity in law or in equity unless the same be first approved by the Secretary of the Interior.

Mountain States claims that the latter part of section 17 is authority for the Secretary to approve any conveyance of land by a Pueblo tribe. The Pueblo of Santa Ana argues that this part of the statute requires authority to convey under some other statute, and that section 17 alone does not authorize conveyances of Pueblo land. The Pueblo relies on the fact that there is no similar land conveyance authority for other Indian tribes, so section 17 construed as Mountain States argues would be a unique departure from general principles of federal Indian law.

Mountain States argues that the Secretary of the Interior has interpreted section 17 to allow its easement and several dozen others, and the courts ought to interpret the statute based on this longstanding administrative construction. It also claims that its 1928 dismissal from the government's quiet title lawsuit was a decision in its favor on the validity of the easement, and the issue cannot be reopened because of the legal doctrine of *res judicata*, which precludes retrying a legal dispute once it has been fully resolved in court.

By the time this case was filed in 1980, Mountain States had removed its poles and indicated that it would abandon the easement. Therefore, only damages for past use seem to be at issue. The federal district court in Albuquerque and the federal court of appeals in Denver ruled in favor of the Pueblo. Mountain States obtained Supreme Court review and a valuable ally. The Supreme Court asked the United States government for its views, and it filed a brief supporting Mountain States on the meaning of section 17.

### BACKGROUND AND SIGNIFICANCE

This case is of minor significance. It is surprising that the Supreme Court, claiming to be overburdened, granted review. As the facts show, the easement in ques-

tion is no longer in use, so only damages for past use are at issue, and these are likely to be modest. Furthermore, the case was appealed before trial, and Mountain States has another way to win, even if it loses in the Supreme Court. Another statute authorizes the Secretary of the Interior to grant telephone line easements across Indian reservations, and Mountain States invoked it in its pleadings as an alternative defense to the Pueblo's action. If the Pueblo wins on section 17, the other statute may defeat its claim.

Other parties received grants under section 17, and the result of the case will affect them, too. Two of them filed briefs as *amici curiae* in support of Mountain States. They have active land uses at stake, not merely damages; the most significant use is that of the Santa Fe Railroad. But these grantees have, like Mountain States, alternative statutes that may validate their grants regardless of section 17. Most other section 17 grants are no longer active, having been abandoned or settled, and the case affects only the Pueblo Indian reservations in New Mexico.

Despite its unimportance, the case has an interesting background. For centuries, the Pueblo Indian tribes have practiced irrigated agriculture on their lands. Their ownership was confirmed under Spanish rule by land grants from the crown. The United States acquired sovereignty over New Mexico in 1848, and in 1851, Congress specifically extended the protection of federal Indian law over New Mexico tribes.

A basic principle of federal Indian law is that Indian tribal land may not be acquired by non-Indians except as federal law expressly allows. Attempts to evade this law have been many, and one of the most ingenious ploys was used against the Pueblo tribes. Non-Indians who wished to claim Pueblo land persuaded the New Mexico territorial courts that the Pueblo Indians were not really Indians as the term is used in federal law, because they were too "civilized." Therefore, their lands could be acquired under local law. In an 1876 case, the Supreme Court itself was persuaded to endorse this rogue doctrine.

Over the years, some Interior Department officials made reports protesting the exploitation of the Pueblo people caused by lack of federal protection. Congress finally took note, and the 1910 statute authorizing New Mexico's admission to the Union specified that the Pueblo people and their lands were entitled to the same federal protection as other Indian tribes. In 1913, the Supreme Court sustained this law and repudiated its 1876 decision.

These events cast into doubt the titles of hundreds of non-Indians who had acquired Pueblo Indian land under the pre-1910 New Mexico territorial doctrine. Congress passed the Pueblo Lands Act of 1924 to settle these titles in an orderly and fair way. Claimants with continuous possession prior to 1902 could acquire good title by adverse possession. All other land was to be restored to the Pueblos. The United States was required to bring a quiet title action to settle land disputes on each Pueblo reservation.

Section 17 of the Pueblo Lands Act was intended to be the equivalent for Pueblo reservations of the general federal statute prohibiting acquiring Indian tribal land without federal approval. But the latter part of section 17 has no counterpart in the law governing other reservations, setting the stage for this lawsuit.

#### ARGUMENTS

*For Mountain States Telephone and Telegraph Co. (Counsel of Record, Kathryn Marie Krause, 931 14th Street, Room 1300, Denver, CO 80202; telephone (303) 624-2200)*

1. Section 17 of the Pueblo Lands Act of 1924 authorized Mountain States' 1928 acquisition of its telephone easement across the Pueblo of Santa Ana.
2. This action is barred by Mountain States' 1928 dismissal from the quiet title suit filed by the United States.

*For the Pueblo of Santa Ana (Counsel of Record, Richard W. Hughes, 201 Broadway, SE, Albuquerque, NM 87102; telephone (505) 842-6123)*

1. Section 17 of the Pueblo Lands Act of 1924 does not authorize conveyances of Pueblo lands.
2. Mountain States' 1928 dismissal from the United States' quiet title suit does not bar this action.

#### AMICUS ARGUMENTS

*In Support of Mountain States Telephone and Telegraph Co.*

The Atchison, Topeka and Santa Fe Railway Company and the Public Service Company of New Mexico filed briefs supporting both issues raised above. The state of New Mexico filed a brief supporting Mountain States on the issue numbered one above. The United States filed a brief supporting Mountain States on the issue numbered one and supporting the Pueblo on the issue numbered two.

*In Support of Pueblo of Santa Ana*

The Pueblo de Acoma and the All Indian Pueblo Council and six other Pueblos.