

Supreme Court of the United States

OCTOBER TERM, 1969

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Supreme Court, U. S.
APR 8 1970

In the Matter of:

Docket No. 41

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 THE CHOCTAW NATION AND THE :
 CHICKASAW NATION, :
 :
 Petitioner, :
 :
 vs. :
 STATE OF OKLAHOMA, et al. :
 :
 Respondents. :
 :
 -----X
 THE CHEROKEE NATION OR TRIBE OF :
 INDIANS IN OKLAHOMA, :
 :
 Petitioner, :
 :
 vs. :
 STATE OF OKLAHOMA, et al. :
 :
 Respondent. :
 :
 -----X

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(See also:
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Date March 5, 1970

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

THE CHOCTAW NATION AND THE
CHICKASAW NATION,

Petitioner

vs

STATE OF OKLAHOMA, ET AL.,

Respondents

THE CHEROKEE NATION OR TRIBE OF
INDIANS IN OKLAHOMA,

Petitioner

vs

STATE OF OKLAHOMA, ET AL.,

Respondents

The above-entitled matter came on for argument at
11:30 o'clock a.m., on Thursday, March 5, 1970.

BEFORE:

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

1 APPEARANCES:

2 LON KILE, ESQ.
3 Box 726
4 Hugo, Oklahoma
5 Counsel for Petitioner
6 Choctaw Nation and
7 Chickasaw Nation

8 PEYTON FORD, ESQ.
9 1000 Connecticut Avenue, N.W.
10 Washington, D. C. 20036
11 Counsel for Petitioner
12 Cherokee Nation, et al.

13 LOUIS F. CLAIBORNE, Office
14 of the Solicitor General
15 Department of Justice
16 Washington, D. C. 20530
17 Counsel for United States
18 as amicus curiae

19 M. DARWIN KIRK, Assistant
20 Attorney General of Oklahoma
21 P. O. Box 1439
22 Tulsa, Oklahoma 74101
23 Counsel for Respondents
24
25

1 application as to the facts in the case at bar.

2 In United States against Holt State Bank, the
3 Chippewas ceded to the United States their right of occupancy
4 to a certain land then Minnesota. In return, the United
5 States agreed to put the land up for sale and when it was
6 sold, to put the money in a trust fund to be used for the
7 benefit of the Chippewas.

8 Within the land that the Chippewas ceded to the
9 United States, was a lake, called "Mud Lake." Following the
10 treaty with the Chippewas, Minnesota became a state and later
11 Mud Lake was drained and its bed became valuable for agricul-
12 tural purposes.

13 After Mud Lake was drained, the Government claimed
14 that it was obligated to sell the bed of Mud Lake for the
15 benefit of the Chippewas. The defendants claimed that upon its
16 admittance to the Union, Minnesota became the owner of the bed
17 under the equal footing doctrine and that they had succeeded to
18 the rights of the state.

19 The case presented two issues: First was the lake
20 navigable? And second: were the lands underlying the lake dis-
21 posed of by the United States before Minnesota became a state?

22 When the court first found that the lake was
23 navigable, and then it addressed itself to the question of
24 whether the United States had disposed of those lands before
25 Minnesota became a state.

1 And it was not claimed in Holt State Bank that
2 United States had made an affirmative disposition of the bed
3 of the lake, but only -- this was the only claim that was
4 made -- that the lake was in the limits of a reservation when
5 Minnesota was admitted to the Union.

6 Now, in its analysis of the facts in that case, this
7 Court said: "The reservation came into being through a succes-
8 sion of treaties with the Chippewas, whereby they ceded to the
9 United States their aboriginal right of occupancy to the
10 surrounding land."

11 There was no formal setting apart of what was
12 ceded. The effect of what was done was to reserve in a general
13 way for continued occupation of the Indians what remained of
14 their aboriginal territory, and thus it came to be known and
15 recognized as a reservation.

16 This Court in its decision in U. S. versus Holt State
17 Bank, referred to the Equal Footing Doctrine and said: "First,
18 that disposals by the United States during territorial days is
19 not likely to be inferred, and should not be regarded as in-
20 tended unless the intention was definitely declared or other-
21 wise made very plain.

22 This Court found nothing in the cession of a right of
23 occupancy in exchange for a promise that the land would be sold
24 and the money used for the benefit of the Chippewas, right-
25 fully so, I think, is even approaching a grant by the Government

1 to the Indians of the underlying navigable waters.

2 And this Court did not find anything in this cession
3 of a right of occupancy in exchange for the creation of a trust
4 fund that would evince a purpose to depart from the established
5 policy of treating such land as held for the benefit of a
6 future state.

7 And we take no issue with this Court's decision in Holt
8 State Bank case. We believe that it's a good decision and a
9 sound decision and one that should be allowed to stand, but it
10 must be remembered that in Holt State Bank the Chippewas
11 were the grantors and the United States was the grantee. The
12 Court said there was no formal setting apart of that which is
13 not ceded.

14 What the Court is there saying is this: the
15 Chippewas were the grantors; had they wanted to keep the soil
16 and the minerals underlying Mud Lake, they should have set them
17 apart from their cession.

18 But in the case at bar, the shoe fits on the other
19 foot. In the case now at bar the United States was the grantor
20 in the patents to the Cherokees of 1838 and it was the grantor
21 in the patent to the Chocktaws in 1842.

22 Applying the rule enunciated in Holt State Bank it
23 must be said that had the United States, in its patent to the
24 Cherokees in 1838 and the patent to the Chocktaws in 1842,
25 wanted to have reserved the soil and minerals underlying any

1 portion of the Arkansas River, it should have done so.

2 Now, if you said in Holt State Bank, and we think
3 that it is a sound rule, that before the disposal of a bed of
4 navigable waters by the United States can be inferred it's
5 intent to do so should be made very plain.

6 If it appears then in this case that when the Indians
7 moved from their ancestral homes in the south to the wild lands
8 in the west, it was both their intention and the intention of
9 the United States that the lands to which they were being moved
10 would never be embraced in the state or territory.

11 If it appears, from the negotiations leading up to
12 the treaty, the language of the treaties themselves, that it
13 was the intention of the Indian tribes and the intention of
14 the United States that the lands to which the Indians were
15 being moved would never be embraced in a state or a territory.

16 Then it is very plain and the test established in
17 Holt State Bank has been met, that the United States would
18 have no reason to have retained the bed of navigable streams
19 in these lands. The absence of the necessity for retaining
20 such a bed, coupled with the urgency associated with moving the
21 Indians out of the Southern States makes the intent of the
22 United States to dispose of the beds of the navigable streams
23 within those lands to which the Indians were then being moved,
24 very frightening.

25 Q Was the treaty with the Cherokees such that they

1 wouldn't create a state without the Cherokees' consent?

2 A That is, indeed, so. The treaty with the
3 Choctaws said it should be theirs as long as they remain a
4 nation.

5 Q When was that?

6 A If it please, Mr. Justice, the treaties were
7 made with the Choctaws in 1820; with the Cherokees in 1828;
8 another treaty with the Choctaws in 1832; a final treaty with
9 the Cherokees in 1835. The result of these treaties were the
10 issuance of a patent, the first patent that the United States
11 Government ever gave to a tribe of Indians where it conveyed
12 this land in fee simple to the Cherokees in 1838, and then
13 another patent -- the second patent in which the United States
14 Government had ever conveyed a fee simple title to an Indian
15 tribe to the Choctaws in 1842.

16 Q Does the case depend on written documents?

17 A Yes; I think so. I think it depends -- I think
18 that it depends upon the negotiations leading up to the
19 treaties and the treaties themselves.

20 Q They would have to be in writing, I assume.

21 A Yes, sir; handwritten writing and they are set
22 out in our brief.

23 Q And the patents, I suppose.

24 A And the patents. The patents each convey a
25 fee simple title.

1 My time has expired, if I may be excused.

2 MR. JUSTICE BLACK: All right.

3 ORAL ARGUMENT BY PEYTON FORD, ESQ. ON BEHALF
4 OF PETITIONERS CHEROKEE NATION, ET AL

5 MR. FORD: If the Court please: I think the back-
6 ground of this case has been fully covered, except I would
7 like briefly to refer to the so-called Louisiana Purchase,
8 of 1883. There has been great weight placed upon that by the
9 Respondents in that their interpretation of that purchase is
10 that it was purchased for the purpose of the formation of
11 future states and covered by the Louisiana Purchase.

12 Article 3 of that purchase, and it's the only
13 reference that provides that the inhabitants of this are that
14 have ceded to the United States, by grant, shall be -- that
15 they shall enjoy their freedom, their religion, the constitu-
16 tional rights that the Federal Government would afford them
17 and that the inhabitants, perhaps, at some future date, might
18 become citizens of the United States.

19 There was no reference to the creation of specific
20 states --

21 MR. JUSTICE BLACK: Mr. Ford, do you have a separate
22 brief?

23 A Yes, sir. It's red; does that help any?

24 And I have a short reply brief --

25 MR. JUSTICE BLACK: I'll get them.

1 A -- that I would recommend to Your Honors, merely
2 because of its brevity.

3 Q According to its brevity? Well, that's
4 interesting.

5 A Now, the only thing, having disposed of the
6 Louisiana Purchase, briefly, rather than to recite schoolboy
7 history, that Jefferson was severely attacked by purchasing
8 Louisiana as an executive. He had doubts in his own mind and
9 through correspondence he indicated he thought a constitutional
10 amendment was necessary to annex this territory.

11 He was apparently dissuaded in that position for the
12 treaty was affirmed 24 to 7, I think on Christmas Eve, 1803.

13 Q Eighteen?

14 A I mean 1803 if I dropped a century.

15 But, the interesting part of that is in 1802,
16 Georgia made a cession pact, ceding part of their land, and
17 following that to the Osages, in return for certain lands.

18 Then, in 1808 the Osages began negotiations for a
19 treaty that was ratified in 1810. But in 1809 the Cherokees
20 called upon Jefferson, or they petitioned him in regard to the
21 way they were being treated and so forth, and that possible
22 removal to the west. And this also was in between the nego-
23 tiations for the Osage treaty and their application.

24 And, in 1809 Jefferson said, gave his blessings and
25 said to "My children, go forth, and seek this land" and directed

1 them to the Arkansas and the White Rivers and said, "the
2 higher the better," which incorporated part of the land that
3 is in contention today.

4 With reference to the treaties, the 1835 treaty,
5 in effect, incorporates, and I'm speaking of the Cherokees,
6 the treaty of 1817 and 1833 and 1835. In Brewer V. Elliot,
7 this Court clearly spoke that the Louisiana Purchase could not
8 enter where a tribe was granted fee simple title.

9 Of course, in Cherokee Tobacco it was held that a
10 treaty may suspend the prior Act of Congress and an Act of
11 Congress may suspend a treaty.

12 And by later treaties, if the Louisiana Purchase had
13 any validity, it certainly was -- I would not abrogate it,
14 but it was modified by the subsequent treaty.

15 But the thing that shines through this case, to my
16 mind, is the core language of the treaty described in the 1833
17 treaty, adopted in the 1835 treaty, in the patent that was
18 adopted in 1838, and the language in the treaty, so far as the
19 land covered, was consistent with the facts of that position.

20 And, in case after case, the Cree case, and I think
21 Holden v. George and several other cases of this Court that
22 holds that we did get title in fee simple; or at least these
23 five civilized tribes did; the Choctaws, the Cherokees, the
24 Crees, Seminoles and Chickasaws.

25 Now, as to the conveyance, it was a simple conveyance

1 and Holmes pointed out in the Fleming case, 215 U.S., that the
2 United States could choose to use any language they wanted but
3 it chose the simple language of conveyance that the average
4 citizen would understand.

5 Q Where is that quoted in your brief?

6 A In my brief?

7 Q Yes.

8 A Fleming is not cited, but it's 215 --

9 Q I meant the language to which you referred.

10 A By Holmes? It's Fleming v. Curtain; it's not
11 cited in the brief, but it's 295 U.S. -- I've forgotten.

12 He also in that case, spoke to the cessation of these
13 tribes and said the Congress had spoken and that's a simple
14 answer to it. And we're in existence where any Act of
15 Congress, including the Act of 1894, of 1902, 1906, 1952 and
16 of 1962. And as to the Equal Footing Doctrine

17 And as to the Equal Footing Doctrine, Shively v.
18 Bowlby, cited in 1845, there was a trust expressly created
19 between Virginia and Georgia prior to that time to form the
20 State of Alabama and the United States attempted to grant land
21 to a private party after statehood, in Shively v. Bowlby.

22 And, of course, that endrafted the so-called "public
23 purpose exception." But, before the Court need reach that, it
24 is pointed out in our reply brief; in every case from Shively
25 v. Bowlby to Holt, the case is decided upon the facts that the

1 territorial status existed; that there was a Government in
2 existence prior to states. Indian territory was never a
3 territory as such, other than as you speak of a territory
4 covering certain land.

5 Oklahoma territory did enjoin territorial status.
6 Indian territory never became a territory of the United States.

7 And, I think the public purpose in this is so obvious
8 that it hardly needs reference. It seeks to remove the Indians,
9 which is an absolute necessity, there is a compact of 1802
10 with Georgia which indicates the public purpose and the power
11 of Congress to convey this land is clear and simple and the
12 so-called argument that the tribe might, at sometime, cease,
13 then as was pointed out in the early days in a letter from one
14 of the Indian Commissioners in Holden v. Joy, I think, and
15 it's simply an escheat provision: "if we cease, the land goes
16 back."

17 Q What has made that land so valuable under the
18 river?

19 A Well, there is, as any river, it has certain
20 agricultural --

21 Q I wouldn't suppose they would just be litigating
22 over the surface of the river. What is it; is it oil?

23 A Well, it's -- I think Mr. Kirk in a previous
24 argument, said it's oil and it's gas.

25 Q It's gas. I think in his previous argument we

1 heard that it wasn't oil, and it wasn't as valuable as people
2 had thought.

3 A No; I don't think that's for the Court to
4 decide, anyway. The principal production, I think, is gas
5 instead of oil. And Mr. Kirk would be far better informed
6 on that subject than I.

7 Q Well, for what purpose can the Indians use it
8 except for the gas?

9 A Sir?

10 Q For what purpose can the Indians use it except
11 for the gas? Or oil?

12 A Well, they could use the revenue.

13 Q Of the streams?

14 A They could use the revenue derived from the bed
15 of the stream if a particular bed was productive of oil, gas --

16 Q Well, that's what it's about, mainly; isn't it?

17 A It happens to be gas.

18 Do I have any time left?

19 Mr. Justice Black. The Clerk says you have three
20 minutes.

21 A I will reserve it for rebuttal.

22 MR. JUSTICE BLACK: Mr. Claiborne.

23 ORAL ARGUMENT BY LOUIS F. CLAIBORNE, OFFICE
24 OF THE SOLICITOR GENERAL, AS AMICUS CURIAE

25 FOR THE UNITED STATES

1 MR. CLAIBORNE: Mr. Justice Black, and may it please
2 the Court: There are really two arguments made by the State
3 of Oklahoma in order to claim the bed of the navigable portion
4 of the Arkansas River, which is in dispute here.

5 The first is that these Indian tribes never obtained
6 title to the beds. The second is that if they did they lost
7 it, at some subsequent time.

8 As to the first proposition --

9 Q Lost it how?

10 A Well, they would say -- while they don't press
11 these arguments, they are suggested here and there. I take it
12 that they are not pressed as their main arguments. Lost by
13 voluntary relinquishment in the 1890s, just prior to state-
14 hood, that is just prior to Oklahoma's statehood. It was
15 either taken from them or that they gave it away when they
16 agreed to an allotment of their land or were forced to give up
17 their lands.

18 The second of these arguments would be that they
19 ceased to exist as a nation and, therefore, under the terms of
20 the grants, these communal tribal lands reverted to the United
21 States and in turn, inured to the State of Oklahoma.

22 That is an argument which is barely suggested by
23 Oklahoma and I hope not seriously pressed.

24 More seriously, I think they suggest that neither
25 tribe, the Choctaws and Chickasaws together, nor the Cherokees,

1 ever obtained title to the bed of the river. There are only
2 two arguments in that respect: the first is that as a technical
3 matter of conveyancing, these treaties and patents did not
4 embrace the bed of the river.

5 The second is that even if the patents broadly em-
6 brace the bed, there was an implied reservation by the United
7 States in these grants for the benefit of some future state.

8 As to the first proposition: I think what is most
9 noteworthy when one faces down the various descriptions, the
10 various treaties and the various patents is that the grant to
11 the Cherokees and the grants to the Choctaws always define one
12 with relation to the other. The boundary between them is
13 spoken of as a common corner, "the Cherokee corner," or the
14 "Choctaw corner," at the extreme downward point of the Arkansas
15 River.

16 There are references to the river which talk about
17 "down the main channel," which doesn't sound like "along the
18 north bank."

19 Finally, and I think most persuasive, is the almost
20 unthinkable proposition that in grants of this size and as for
21 the little map I had prepared for the Court indicates, the
22 whole of the State of Oklahoma, except the panhandle, was
23 granted to three Indian tribes: the Cherokees at the north;
24 the Creeks and Seminoles in the center; the Choctaws and the
25 Chickasaws at the bottom. Each of these grants is of a huge

1 tract of land.

2 In the case of the Cherokees, it's approximately 14
3 million acres; roughly three times the size of Maryland. The
4 Choctaw and Chickasaw grant is considerably larger.

5 All of this territory west of the Arkansas boundary
6 was intended to be and to remain Indian territory. These
7 enormous grants to what were then described as "nations,"
8 meant to remain forever as quasi-independent, quasi-sovereign
9 states.

10 It is unthinkable, I think, that the river beds
11 were meant to be left out when all of this territory west of
12 the line was confined to the tribes as a contiguous grant.

13 Much the same considerations weigh against the
14 second argument advanced by Oklahoma, which is that the
15 United States impliedly reserved the beds, even though they
16 are caught within the description.

17 I should emphasize that in one instance it's quite
18 clear that the bed of the river is caught within the descrip-
19 tion of that portion of the Arkansas River that is entirely
20 embraced by Cherokee lands on both sides, which runs from
21 Fort Gibson to the confluence of the Arkansas with the Canadian
22 River.

23 Now, the notion that the United States would have,
24 in this instance, reserved to itself for the benefit of a
25 future state, the bed of the Arkansas River insofar as it

1 was navigable, is at odds both with the understanding of the
2 times. First of all, that doctrine had not yet been articula-
3 ted. It was only several years later that this Court, for the
4 first time, developed that proposition.

5 But, leaving that aside --

6 Q What about the other language, "Over to the
7 Arkansas River and thence up the river so many miles." Is it
8 your position that that means the whole bed of the river, or
9 half of it?

10 A Mr. Justice, we do not take position with res-
11 pect to the intermural debate as between the two tribes. It
12 would seem to us that that description is ambiguous; it cer-
13 tainly does not show any intent to exclude the bed of the
14 river. As to which of the two tribes has the better claim, is
15 a matter which I should think this Court would leave to the
16 lower courts which have not ruled on it --

17 Q Well, isn't there a part of the river that was on
18 the boundary not between the two, but is there a part of the
19 river that's on the boundary?

20 A There is, Mr. Justice.

21 Q Well, do you claim that whole riverbed there or
22 half of it?

23 A The Chocctaws claim the whole of it; the
24 Cherokees claim the north half of it. Obviously there is an
25 overlapping claim here, which I don't think has to be disposed

1 of by this Court.

2 (Whereupon, at 12:00 o'clock p.m. the argument in the
3 above-entitled matter was recessed to reconvene at 12:30 p.m.
4 this day).

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1 12:30 o'clock p.m.

2 (After the recess the argument was resumed)

3 MR. JUSTICE BLACK: Mr. Claiborne.

4 MR. CLAIBORNE: Mr. Justice Black, we have one
5 admission to the --

6 MR. JUSTICE BLACK. Oh, that's all right.

7 Admissions to the Bar.

8 Mr. Claiborne, you may proceed.

9 MR. CLAIBORNE: Mr. Justice Black and may it please
10 the Court: Picking up from Mr. Justice Marshall's question,
11 let me say broadly that the realistic situation here is that
12 the Government of the United States determined that all lands
13 west of a certain boundary, which ultimately was the boundary
14 of the State of Arkansas, should be Indian lands, a whole
15 north territory which includes present Oklahoma and some other
16 lands.

17 Subsequently it was determined to divide that
18 acreage between these several tribes. The exact descriptions
19 of that division should not be dispositive as to whether all
20 of that Indian country was then meant to be and to remain an
21 Indian territory.

22 From that point on, from the 1820s on, and later
23 when this territory was called the "Indian Territozy," nobody
24 ever thought any portion of it had been kept back. The exact
25 boundaries between the several grants were matters of some

1 dispute. Some of the grants originally were overlapping, were
2 found to be overlapping and have been corrected.

3 But, the general picture, and I think this is a fair
4 statement is that all that land was meant to be Indian land
5 in which white settlers were excluded and it ought not be
6 dispositive, whether the calls in certain surveys exactly
7 matched or did not. As a matter of fact, we think here that
8 the descriptions do show a continuous boundary between the
9 Cherokee and the Choctaw grant, where the Arkansas River is the
10 boundary between them.

11 Q When did this dispute arise first?

12 A This dispute as between the tribes in the State
13 of Oklahoma, Mr. Justice?

14 Q Yes.

15 A I suppose it was always there from the point
16 when Oklahoma became a state.

17 Q When did it arise over the bottom of the river?

18 A Well, the letter from the Interior Department,
19 which is printed at the back of our brief, in 1908, indicates
20 at that time there was already some question as to whether the
21 state or the tribes owned the bed. At that time it was simply
22 sand and gravel removal; it was not oil or gas.

23 The avalue of the bed at that time, I suppose, was
24 minimal. And they say also that to the extent that these
25 tribes are taxed with not having brought this suit earlier, it

1 is not at all clear -- in fact it is assumed
2 Nation versus Georgia that these tribes had no standing of
3 their own to bring a suit in a Federal Court, and of course,
4 they couldn't bring on in the state court without the consent
5 of the state.

6 It was only in your opinion, Mr. Justice Black, in
7 the Creek case in 318 U.S., decided in 1944, that for the very
8 first time it was said -- it wasn't a holding it was a dictum,
9 but it was a clear dictum, that these nations, so-called, these
10 civilized tribes did have standing to file a suit without a
11 special Act of Congress authorizing it.

12 There were, of course, dozens of cases entitled
13 "Cherokee Nation versus the United States" --

14 Q have there been any efforts to get a special
15 Act of Congress passed to --

16 A I don't think up until that time. The Act of
17 1944, that still leaves some time between then and the time
18 the suit was filed 20 years later.

19 However, it's first the fact that the value of this
20 property was not apparent until the discovery of gas in very
21 recent years --

22 Q You started to say, Mr. Claiborne, before, in
23 that opinion to which you referred in 318 U.S., that many
24 cases, captions "such and such a nation" against the United
25 States but --

1 MR. CLAIBORNE: But all of them, except perhaps one,
2 and the one is entitled: "Cherokee Nation versus Hitchcock,"
3 who was then Secretary of the Interior, which is cited by
4 Mr. Justice Black in that opinion in the Creek case, as
5 authority, there is another cited which is really not a good
6 test, because it was filed pursuant to a special Act of
7 Congress.

8 What I meant to say was that all of these suits,
9 with that possible exception, were filed pursuant to specific
10 authorizations from the Congress.

11 Q Special bills were passed.

12 A Special bills were passed, usually ever since
13 the Court of Claims.

14 I might say that even this suit could not have been
15 brought under the decisions of this Court, but for the consent
16 granted by Oklahoma, a waiver of its sovereign immunity.

17 We don't know whether Oklahoma was at all times
18 willing to consent to the suit by these tribes.

19 Finally, I should say in fairness, that the tribes
20 approached the Department of the Interior some years ago,
21 seeking to have the United States file this suit on behalf of
22 the tribes, which has been an established practice. The
23 Department of the Interior did not refuse to do so, but it
24 took its time in processing the request and ultimately the
25 tribes brought their own suits.

1 I don't mean to imply for a moment that the Depart-
2 ment of Interior and the Department of Justice are not fully
3 in support with the Petitioners here as, indeed, my presence
4 indicates, and the Government appeared likewise in the courts
5 below. This is not its first appearance.

6 Now, going back, these grants were in no sense, as
7 though they were grants to private owners of even large
8 estates. These were cessions made by treaty with what were
9 considered independent nations or at least quasi-independent
10 nations. They were recognitions and grants, not only of
11 property in the real estate sense, but a political power.

12 The treaties themselves, and the opinions of this
13 Court rendered just two and three years before in the Cherokee
14 Nation versus Georgia and in Worcester versus Georgia by Mr.
15 Chief Justice Marshall, indicated to what extraordinary extent
16 these tribes, these civilized tribes were independent nations.
17 They were held not to be foreign states, but they were held in
18 every other respect to be independent political sovereignties.

19 Under those circumstances, and considering also the
20 terminology of the grants, which I remind the Court were in
21 terms of a fee simple title; in terms of a permanent home for
22 these tribes of Indians. And with a special assurance that at
23 no future time would a state be carved out or surround them.

24 It seems to us that one cannot realistically suppose
25 that there was any intention to retain for the benefit of the

1 future state, the beds of the navigable rivers that might
2 exist within that enormous territory now ceded for the benefit
3 of the tribes.

4 It does not appear that the United States would have
5 wished, for its own purposes to retain the bed of the river.
6 It did retain, as it always does, its navigational servitude;
7 its right to use the river as an artery of commerce. It had
8 an interest in maintaining Fort Gibson at the head of naviga-
9 tion on the Arkansas River, and access to that Fort was, of
10 course, a matter of importance.

11 Q Does this issue exist with respect to the
12 Creeks?

13 A No, Mr. Justice, because the Creeks do not have
14 land bordering on any navigable portion of the river.

15 Q The Arkansas is considered navigable above
16 Fort Gibson?

17 A In this Court's opinion in Brewer-Elliott, in
18 260 U.S., the Court there accepted the findings of the two
19 courts below, that the head of navigation on the Arkansas River
20 was just above Fort Gibson, at the confluence of the Grand
21 River and the Arkansas River, which is the point from which
22 this dispute arises.

23 That case, incidentally, the Brewer-Elliott decision
24 says in so many words that the reserved doctrine under which
25 the beds of all navigable rivers are all reserved, may not be

1 applicable with respect to these grants, that being granted the
2 Cherokees and by the Cherokees to the Osages

3 Q Is there a conflict between the Choctaws and the
4 Chickasaws and the Cherokees over the bed of the Canadian?

5 A I think not, Mr. Justice.

6 Q You know how that was -- you say each owns a
7 half of it; is that it?

8 A I think not, but I'm not -- I'm really not
9 clear. Of course, non-navigable, there wouldn't be any claim
10 by the state; it simply would be a claim as between the two
11 tribes, and I frankly don't know which way it was resolved.

12 I think there the patent is clear, however, that it's
13 the north bank of the Canadian --

14 Q What?

15 A I think it's the north bank of the Canadian --

16 Q It's on the north bank of the Canadian.

17 A I think the Cherokee grant recites the north
18 bank, but --

19 Q Well, what about the Choctaws?

20 A The Choctaw grant is not that specific. It
21 simply says "a territory between the Canadian and the Red
22 Rivers."

23 Q You mean if the Cherokees have any part of the
24 Canadian, by reason of the interest a riparian owner normally
25 has for a non-navigable stream, rather than it's having been

1 disobeyed by the --

2 A In terms; yes, I think that's correct.

3 But I really don't -- I'm not sufficiently informed
4 on that question to be sure in my answer.

5 Q How about the Red River?

6 A The Red River in this Court's decision in
7 Oklahoma versus Texas, was adjudicated to belong -- well, to
8 be outside of Texas and to be within Oklahoma. It was held to
9 be nonnavigable and the Indian allottees were held to own the
10 bed.

11 Q The entire bed?

12 A The entire bed, where their allotment fell.
13 So, that dispute was only about a small portion of the Red
14 River, which was in what was called the "leased district" of
15 the Choctaw grant.

16 Even if the Equal Footing Doctrine is applicable, it
17 is recognized that there is an exception where the United
18 States, for a public purpose grants the bed of the river; does
19 not reserve it.

20 Here, the public purpose is to satisfy the claims of
21 the Eastern Seaboard States as to whom the United States had
22 promised to extinguish Indian title and it's resulting obliga-
23 tion to the Indian tribes to find a new home for them and to
24 maintain the peace in avoiding new laws.

25 All of those important public services

1 were determinative in helping the Government settle the tribes
2 west of this Arkansas line and in a way that gives them an
3 absolutely protected boundary into which no white man was
4 permitted, except by leave of the governments of these tribes.

5 Q Wouldn't it be true that if the United States
6 granted the lands to the Cherokees or the Choctaws, say, just
7 take one of the tribes and the patented treaty and the patent
8 both said "the north bank," for example, of the Arkansas River.

9 Now, without regard to any presumptions or Equal
10 Footing Doctrines or anything else, I suppose the grant to the
11 Cherokees would have been limited to the banks, because you
12 don't normally, I suppose, say that the riparian owner of a
13 navigable stream owns, is deemed to own any part of the river
14 bed.

15 A Well, I think even there, Mr. Justice, they
16 would be in argument that the terms of this entire area had
17 been carved out, not so much as a land grant, but as a political
18 grant that the -- just as the state would own the bed, so here,
19 the intents was that these tribes as nations would stand in the
20 shoes of a state with all attained rights. If there is any
21 Equal Footing argument here it's that the nations who received
22 these territories ought to stand on an equal footing with the
23 other territories created from the Louisiana Purchase.

24 And the suggestion that Oklahoma is being treated as
25 a second class state is rather out of place; it's the Indian

1 nations that are being treated as second class grantees if
2 they are deprived of the bed.

3 We would certainly strain to avoid a result which
4 would leave a strip of land in the middle of Indian country
5 reserved from those grants when one could imagine no purpose--

6 Q Well, I suppose you would concede that the
7 United States retained its sovereignty over the navigable
8 streams.

9 A It's a sovereign servitude, but not --

10 Q Well, I know; then you can't say that they in-
11 tended to convey the river to and convey away their navigational
12 servitude.

13 A No; no more than when a state is created out of
14 the Louisiana Territory, the United States retains its naviga-
15 tional servitude.

16 Q So that the United States did reserve a -- some
17 sovereignty over a strip of -- over the river going through
18 Indian country.

19 A Well, that is an aspect of sovereignty, I
20 suppose. Certainly, the United States retained roughly the
21 same sovereignty that it would with respect to the state
22 carved out of the Louisiana Territory or other territories of
23 the United States.

24 If I may trespass on the Court's time for a moment,
25 I would say that with respect to the suggestion that somehow

1 if they once got it, they subsequently lost the bed of the
2 river. I think Oklahoma is hesitant to suggest that they gave
3 it up because that would amount to an argument that they did
4 so only by delay.

5 It's perfectly clear that the Cherokees and the
6 Choctaws agreed to allotment only under pressures from the
7 Congress and after the passage of the Curtis Act.

8 As to the proposition that they can cease to be
9 nations and that therefore, under the terms of the grants there
10 was a reversion to the United States, this Court's decision
11 in the Menominee case, which holds that a tribe remains a tribe
12 even after a termination act has been passed by the Congress,
13 would seem dispositive there.

14 Though there was at one time an intention to abolish
15 the tribe and end their tribal community, they still retained
16 tribal property. They are still tribes; they do so with the
17 same rights of self-government and in all events, it would be
18 unworthy to have destroyed the nation in order to rob it of
19 its property.

20 We would suggest that the judgment below should be
21 reversed.

1 MR. JUSTICE BLACK: Mr. Blankenship.

2 ORAL ARGUMENT BY G. T. BLANKENSHIP, ATTORNEY
3 GENERAL OF OKLAHOMA, ON BEHALF OF RESPONDENTS

4 MR. BLANKENSHIP: Mr. Justice Black, and may it
5 please the Court:

6 Q Mr. Blankenship, could I just ask you at the
7 outset, how many Indians are there in these five civilized
8 tribes now in Oklahoma? Do you have some rough estimate?

9 A I do. It depends upon, of course, what degree
10 of blood you are referring to.

11 Q Well, let's talk about members of the tribe,
12 then, still enrolled --

13 A Well, estimated a total of a quarter or more
14 of Indian blood, 25,000 Cherokees, 3200 Chickasaws, 16,000
15 Choctaws, and I must say, Mr. Justice, the figures vary with--

16 Q I know. How about the Creeks and the
17 Seminoles?

18 A I don't have those figures, sir.

19 Q So that there is now, you say, about 40,000
20 Cherokees?

21 A 25,000 with a quarter blood or more; about
22 5,100 full-bloods.

23 Q And the Choctaws?

24 A The Choctaws, 16,000 a quarter or more; about
25 5,100 full-bloods.

1 Q And the Chickasaws?

2 A 3200, with about 1400 full-bloods.

3 Q And the population of Oklahoma? I should know.

4 A Two-and-a-half million, sir.

5 Q Where do these Indians live?

6 A All over, Mr. Justice.

7 Q All over what?

8 A All over the State of Oklahoma; primarily in
9 the eastern part.

10 Q Do they all live in the State of Oklahoma?

11 A Yes, sir; the figures that I have been referring
12 to are residents of the State of Oklahoma.

13 Q Well, I thought a large number of them had left
14 Oklahoma.

15 A Well, we hope not, sir, but the figures that I
16 am referring to are figures compiled from the --

17 Q Do they live on this particular land that was
18 deeded to them?

19 A Well, you see, most of the land has been
20 allotted to the individual members of the tribe. Most of it,
21 sometime ago -- there is still some land held in common; there
22 is some restricted land, but the vast majority of it was
23 allotted to the individual members of the tribe.

24 My part in this effort today is somewhat limited.
25 I come to you to, I hope, to make it a little clearer what this

1 controversy, at least from our view, is really all about and
2 will take but merely a few minutes of our time, at which time
3 I will defer to my colleague, Mr. Kirk, who carried the
4 argument on the occasion of the last appearance before this
5 Court.

6 But, before I do so, I have -- I would like to re-
7 quest permission of the Court to use a photograph which is
8 not part of the record, but is in the matter of being infor-
9 mative which I think will assist the Court in understanding
10 the controversy. And I'd like to use it in the same manner --

11 MR. JUSTICE BLACK: I don't suppose it would do us
12 any harm.

13 A Thank you, sir.

14 MR. JUSTICE BLACK: This is the map?

15 A Yes, sir. This is an aerial photograph taken
16 of the Arkansas river bed very near Forth Smith, as you can see.
17 This picture was taken in 1963. Its only purpose is to help
18 the Court in understanding that which the Court delved into on
19 the occasion^{the}/last appearance here, in which you, Mr. Justice
20 Black, asked about earlier today, and that is what is the con-
21 troversy all about.

22 And you may note that in this picture there an area
23 called "Old Channel;" that's a large ox bow that was created
24 by having the channel straightened through the efforts of the
25 Army Engineers, which is referred to as "new channel."

1 Now, this particular photograph is a picture of a
2 place called "Braden's Bend." It's near Fort Smith; it con-
3 tains about 5,000 acres of very, very valuable land.

4 We have engineered it and we estimate that the land
5 which has been uncovered as a result of straightening the river
6 bed for which rights-of-way were acquired, and not in contro-
7 versy here, the surface of this uncovered land is valued at
8 somewhere around \$7 million.

9 Q Is there any water now flowing in the old
10 channel?

11 A Sir?

12 Q Is there any water flowing in the old channel?

13 A Oh, yes, sir. Oh, you mean in the old channel?

14 Q Yes.

15 A Well, because of the fact that it was covered
16 for so many years there have been some drainage problems, but
17 a great majority of it is useful for farming. Now, it's
18 within the flood banks, you see, and on occasions of very high
19 water it may very well be inundated at some future time, at which
20 times it take a couple of years for it to aerate and be useful
21 again. But at the present time that that you see referred to
22 as Old Channel, can be farmed and is highly productive.

23 Q Well, is that an issue in this case?

24 A That is what the controversy is all about.

25 Q Why is that? I can see that the -- but no one

1 is claiming a boundary on the New Channel; are they?

2 A No, sir; the new channel was acquired by pur-
3 chase; it's not at issue here, but when they diverted the river
4 into the new channel, then this land was uncovered and is part
5 of the controversy here.

6 As you know, we are talking about from Fort Gibson
7 down to the Arkansas line, which is approximately 95 miles --

8 Q Mr. Attorney General, does that suggest that all
9 this within that ox bow is the bed of the river; is that what
10 it's called?

11 A Yes, sir.

12 Q I see.

13 A And that land is the is the primary object of
14 the controversy, or land similar to it. These are three of
15 those.

16 Q And as you look at this photograph, as I under-
17 stand it, to the right of the Old Channel is the Choctaws and
18 Chickasaws and to the left is the Cherokees?

19 A Yes, sir.

20 Q Is that right?

21 A Correct.

22 Q And it's the old channel which is the boundary;
23 not the new channel; is that correct?

24 A Yes, sir; that's correct.

25 Q And therefore, the land which has now been

1 uncovered because of the construction of the new channel, it's
2 that land that used to be under the old channel that is in
3 issue here.

4 A That is correct. In addition to that, the
5 mineral rights are also in controversy.

6 Q Well, the land and what's under the land.

7 A Yes, sir.

8 Now, with regard to that, that question was raised
9 at the last argument and we have since taken steps to deter-
10 mine what's at stake there and the mineral interests, which
11 are presently under lease by various oil companies have been
12 valued at a million dollars.

13 Q At what?

14 A At a million dollars. The surface area at
15 \$7 million.

16 The riverbed in this navigable portion is about 95
17 miles long and contains 41,000 acres, roughly, during the
18 length of that 95 miles and that which is primarily an issue
19 here is the lower 17 miles, for two reasons: First of all, it's
20 the only area of the riverbank that has any value for oil and
21 gas discovery purposes, and secondly, this is the area where
22 the land is flattened out and the riverbed strayed all over
23 the countryside.

24 Farther back up north it's contained within rather
25 narrow boundaries and there is nothing particularly at issue.

1 Q This is not one of the actions that was
2 authorized by Congress by special bill; is it?

3 A This case?

4 Q Yes.

5 A No, sir.

6 The State of Oklahoma has exercised dominion over the
7 river bed since Statehood, but sold oil and gas leases, start-
8 ing in 1910 and the latest having been in 1966. But, sand and
9 gravel leases were sold by the State starting in 1912 and for
10 practically every year through and including 1969.

11 This case was filed in December of 1966. Earlier in
12 that year the State sold oil and gas leases valued around four,
13 approximately \$500,000. Since Statehood the revenue from the
14 riverbed has been a total of about \$600,000. So you can see
15 that the largest amount, of course, is very recent.

16 Q That's a total since statehood; accumulated?

17 A Yes, sir; \$600,000. That money is in the School
18 Land Commission permanent fund, the revenue from which is dis-
19 tributed to all of the public schools in the State of Oklahoma.

20 The --

21 Q Suppose the Court were to decide this and
22 Oklahoma didn't own it?

23 A I suspect we would have to return that money to
24 the various entities. As a matter of fact, that's the very
25 reason why -- one of the reasons why we are here. We have made

1 a contractual arrangement with regard to the sale of these
2 leases. We have the largest economic interest, that being the
3 surface and that is the main purpose for which we appear, is
4 in defense of those interests.

5 The litigants, the Cherokees and the Choctaws and
6 the Chickasaws have no reservations in the State of Oklahoma.
7 They have no tribal system of schools; as a matter of fact,
8 what tribal schools they did have were transferred to the
9 Department of Interior in 1906, and the only tribal school to
10 my knowledge and that our research could reveal in existence at
11 the present time is a vocational school at Tahlequah, which is
12 of very recent origin.

13 The plaintiffs in this particular action have never
14 been in possession -- physical possession of the land, because
15 the land was only recently uncovered; therefore it's not a
16 case of having people, you know, ensconced on the land and we
17 are going to have to remove them physically, et cetera.

18 These are the facts which the Court inquired into
19 in our last oral argument and I thought it would be of assis-
20 tance to the Court to know, really, what the physical facts
21 were and the basis of the controversy.

22 Q How do you mean by saying the Indians have never
23 been in possession of any of the land?

24 A Physical possession of the river bed, because
25 it was the --

1 Q Oh, the river bed.

2 A They never had possession of the riverbed,
3 because it was the riverbed until they --

4 Q You are speaking only of the riverbed?

5 A Yes, sir.

6 That concluded my remarks. If there are any questions
7 I would be glad to answer.

8 MR. JUSTICE BLACK: Mr. Kirk.

9 ORAL ARGUMENT BY M. DARWIN KIRK, ASSISTANT
10 ATTORNEY GENERAL ON BEHALF OF RESPONDENTS

11 MR. KIRK: Mr. Justice Black and may it please the
12 Court: We have enlarged certain appendices from our brief and
13 would like to have them distributed to the Court. We think it
14 would be easier for you to read. After we had reduced them to
15 a point where we could print them in our brief, we found that
16 they were rather difficult to read and we think this will be
17 helpful to the Court if they will be considered.

18 The first one, the large map here, is attached to our
19 brief as Appendix 3. We have completed that and attached it
20 on --

21 Q Which page is that?

22 A What was that?

23 Q Which brief was that?

24 A In the brief of the State of Oklahoma.

25 Now, that is the map prepared by Isaac McCoy, from

1 which the Cherokee patent was prepared. This map is a map of
2 the survey under the direction of Isaac McCoy.

3 The other enlargement is the enlargement of our
4 Appendix 4 of our brief. This enlargement is an enlargement of
5 the copy of the field notes of the surveyor Donaldson, who did
6 this surveying under the direction of Isaac McCoy.

7 This -- these, we think, will be helpful to the Court
8 in locating the Cherokee and Choctaw boundary lines, particu-
9 larly the Cherokee, and locating the Cherokee and Choctaw
10 corners at or near Fort Smith.

11 Now, the trial court found and its finding was not
12 challenged, that this sketch of the Arkansas River was
13 navigable in fact, and in law at the time the western domain,
14 now a part of Oklahoma, was ceded to the Choctaw Nation and to
15 the Cherokee Nation and at the time treaties were made,
16 pursuant to which the lands were ceded. And also at the time
17 that Oklahoma was admitted to statehood on November 16, 1907.

18 We consider the fact of established navigability at
19 the time these treaties were made to be a very important fact.
20 That was so found at the trial court and has not been challenged
21 in this case.

22 Now, we, in substance, rest our case on the laws
23 governing navigable waters as laid down by this Court, par-
24 ticularly in the case of Pollard versus Hagan, Shively versus
25 Bowlby and U.S.A. versus Holt State Bank.

1 In the case of Pollard versus Hagan, Mr. Justice
2 McKinley in an opinion written in 1845, referring to an opinion
3 written in 1842 by Mr. Justice Taney, said, in the case of
4 Martin, et al, versus Waddell 16 Peters, 410. The present
5 Chief Justice Taney, in delivering the opinion of the Court,
6 said: "When the revolution took place, the people of each
7 state became themselves self-solving, and in that character
8 hold the absolute right to all their navigable waters and the
9 soils under them for their own common use, subject only to the
10 rights since surrendered by the Constitution."

11 In the case of Pollard versus Hagan the Court went
12 on and said: "We have arrived at these general conclusions:
13 first, the shores of navigable waters, the soils under them
14 were not granted by the Constitution to the United States, but
15 they are reserved to the states respectively. Secondly, the
16 new states have the same rights: sovereignty and jurisdiction
17 over this subject as the original states."

18 The State of Oklahoma was admitted on an equal
19 footing with the original states and we say that this law is
20 applicable as set forth in the case of Martin versus Waddell
21 and this case of Pollard versus Hagan is still applicable to-
22 day.

23 Now, the most complete, erudite opinion that has
24 been written on the subject of the rights of the states with
25 respect to navigable waters, was written by Mr. Justice Gray

1 in the case of Shively versus Bowlby in 1893. IN that case
2 Mr. Justice Gray comment that this was an occasion suitable
3 for a complete review of the law as had been developed. He
4 went back to the beginning to the common law of England as
5 applied to the American Colonies, to the common law as applied
6 after the Revolution. He reviewed the whole range of decisions
7 that had been handed down since then and wrote, what seems to
8 us to be a guiding opinion in this litigation.

9 Now, he did say that he, when the United States
10 acquires a territory it does have administrative jurisdiction
11 over it and it holds it in trust for the formation of future
12 states. Now, he says certain dispositions can be made when
13 necessary, by the United States during territorial periods.

14 He said, "We cannot doubt therefore that Congress has
15 the power to make grants of land, the low-high water mark of
16 navigable waters in any territory of the United States.
17 Whenever it becomes necessary to do so, first, in order to
18 perform international obligations; second, to effect the im-
19 provement of such lands for the promotion and convenience of
20 commerce, with foreign nations and among the several states;
21 or, third, to carry out other public purposes appropriate to the
22 objects for which the United States holds the territory."

23 Now, he goes further in that opinion and he defines
24 what the objects for which the United States holds the terri-
25 tory are. And with respect to that he said this: "And the

1 territories acquired by Congress, whether by deed of cession
2 from the original states or by treaty with a foreign country
3 are held with the object as soon as their population and con-
4 viction is justified, be admitted into the Union as states,
5 upon an equal footing with the original states in all respects.
6 The Congress of the United States, in disposing of the public
7 lands has constantly acted upon the theory that those lands
8 whether in the interior or on the coast, above high-water mark,
9 may be taken up by actual occupants in order to encourage the
10 settlement of the country.

11 "But the navigable water and the soils under them,
12 whether within or above the ebb and flow of the tide, shall be
13 and remain public highways and be chiefly valuable for the
14 public purposes of commerce, navigation and fishery and for the
15 improvements necessary to secure and promote those purposes
16 shall not be granted away during the period of territorial
17 government.

18 "But, unless, in case of some international duty or
19 public exigency, shall be held by the United States --

20 Q Or something else.

21 A Or public exigency.

22 Q Or something else; isn't that it?

23 A No. We will mention the one before -- the first
24 three that we mentioned before, "perform international obliga-
25 tions, effect improvement of lands where the promotion and

1 convenience of commerce with foreign nations and among the
2 several states, or to carry out the public purposes appropriate
3 to the objects for which they hold the territory."

4 And they define the objects for which to hold a
5 territory, as being "for the formation of a future state, or
6 future states;" that is the object.

7 Q Do you think those cases hold if the Government
8 was not empowered to convey the beds of navigable waters for
9 any domestic purpose?

10 A I would say -- I don't know what you mean by
11 domestic purpose -- I would say that formation of a future
12 state would be a domestic purpose

13 Q Well, yes, but any other domestic purpose. Do
14 you think -- let's assume for example, that the deeds in this
15 case expressly, without any equivocation or any ambiguity,
16 put the southern boundary of the Cherokee lands in the middle
17 of the main branch of the Arkansas or the northern boundary of
18 the Choctaw in the middle of the Arkansas River, expressly and
19 without any equivocation --

20 A Right.

21 Q -- you would say that that conveyance was in-
22 valid?

23 A I would say under Shively versus Bowlby it
24 certainly would not be one of the objects for which the United
25 States holds the territory; yes, sir.

1 Q Well, yes -- would you say then that the patent
2 to the Indians, to the extent that it covered the navigable
3 riverbed would be invalid? Unconstitutionally?

4 A I think it would be; yes.

5 Q Unconstitutionally?

6 A I would question it under Shively versus Bowlby.

7 Now, we go further and say, however, we don't need
8 to meet that because it don't come back to them. Well --

9 Q Well, I don't know --

10 A I'll reach that in a minute.

11 Q Well, now, you'll reach it, but you are going
12 to talk about that piece of the Arkansas River that's within
13 the boundaries of the Cherokee grant.

14 A Not within the boundaries of the Cherokee
15 grant.

16 Q Well, that runs through -- the Cherokees hold
17 lands on both sides of the river.

18 A That will be a part of my argument, Mr. Justice.

19 Q All right.

20 A In the case of the United States versus Holt
21 State Bank, and I might say that we differ on the facts of the
22 opinion in that case and the counsel for the Choctaws, who has
23 argued previously. We have set forth, however, our under-
24 standing of the facts and the holding of that case at pages
25 35 to 37 of our brief and we refer to the Court to that. I

1 won't go into that in detail here at this time.

2 But, to get in that case, the Court actually re-
3 affirmed the principles laid down in Shively versus Bowlby,
4 where they said "the United States earlier adopted and con-
5 stantly has adhered to the policy of regarding lands under
6 navigable waters in acquired territories while under its sole
7 dominion, as held for the ultimate benefit of future states
8 and so has refrained from making any disposal thereof, save in
9 exceptional instances when impelled to particular disposals
10 by some international duty or public exigency.

11 "It follows from this that disposals by the United
12 States during the territorial period are not lightly to be
13 inferred and should not be regarded as intended unless the
14 intention was definitely declared or otherwise made very plain."

15 That language was used with respect to a statute,
16 a United States statute in the form of a treaty with the
17 Chippewas, which set aside a reservation, a Mud Lake reserva-
18 tion. Within the reservation was a navigable lake: Mud Lake.

19 Mud Lake was not mentioned as being conveyed to the
20 Chippewas and the Court held it was not conveyed, because there
21 was not a specific reference to Mud Lake in the patent.

22 That was the holding of this Court in Holt State
23 Bank. We say that applies with respect to the Arkansas River,
24 and particularly with respect to the part where Cherokees have
25 land on each side.

1 Now, there is, with respect to the Chippewa title,
2 which has been in question here, that title, we think, is a
3 good reservation title; it has been so-defined and held in
4 versus Hitchcock, 185 U.S. 373 and a similar type
5 of title has been affirmed in the United States versus the
6 Santa Fe Pacific Railroad Company, 314 U.S. 339, with respect
7 to the Wallapi Tribe in Arizona.

8 The patents issued to the Cherokees and the Choctaws
9 were authorized by the Indian Removal Act of May 28, 1830. That
10 provided for granting patents to removed Indian tribes and
11 contained the provision that "provided always that such lands
12 shall revert to the United States if the Indians become ex-
13 tinct or abandon the same."

14 So, the Cherokee patent, pursuant to that Indian
15 Removal Act, provides: "The lands hwereby granted, shall revert
16 to the United States if the Cherokee Nation ceases and aban-
17 dons the same."

18 The Choctaw patent provides: "It shall inure to them
19 as long as they shall exist as a nation and live on it."

20 Now, coming to the Cherokee treaties on the Cherokee
21 patent and subject that you expressed particular interest in,
22 Mr. Justice White, the western Cherokees first land in Okla-
23 homa was acquired pursuant to the Treaty of 1828 7 Stat.311.

24 In that treaty it was agreed that 7 million of acres
25 of land, plus an outlet west, should be conveyed to the

1 Cherokees. The description of the land was incomplete and
2 when they got to the -- to where the Arkansas comes to a con-
3 fluence with the Canadian, they angled off up between the two
4 and they didn't close it with the Arkansas State Line, but they
5 provided they would have a survey and which would do everything
6 to correct all that.

7 The 1833 Treaty with the Western Cherokees also
8 covered the same lands substantially, except that down toward
9 the lower part the boundary line between the Creeks and the
10 Cherokees were straightened out and settled; whereas, under the
11 1828 Treaty it was left open, up in the air, you might say.

12 But that boundary was left open, too, on the north-
13 westerly side, but the parties had in mind having a survey and
14 they did have a survey. It was conducted shortly -- work on
15 it was done shortly after the 1828 Treaty under the direction
16 of the Reverend Isaac McCoy, who was commissioned to do this
17 surveying by the War Department.

18 The map which we have provided for the Court here is
19 the result, the final result of the surveying work done under
20 Reverend McCoy and is the basis for the description in the
21 Cherokee patent.

22 The field notes which we have provided -- with which
23 we have provided the Court with copies, on an enlarged basis,
24 both of which are in our brief in the appendices, describe the
25 first line that was run by that surveying crew under McCoy's

1 direction by a surveyor by the name of Donaldson.

2 In that line he ran the line between the State of
3 Arkansas and the Cherokees on the west and the State of
4 Arkansas on the east. And it comes down to this corner and
5 then he uses as a reference point the land -- the Choctaw
6 corner across the river which he fixes upon the south bank of
7 the river and he sets the Cherokee's corner on the north bank
8 of the river.

9 Now, the Cherokee --

10 Q Well to the west of Fort Smith?

11 A Yes; yes, that's on the Arkansas line just west
12 of Fort Smith. The line that was run north from where the
13 Arkansas River runs across the Arkansas State Line; the line
14 between Arkansas and the Cherokees.

15 Now, you met -- in those field notes, of which you
16 have a copy up there, the surveyor -- they are very voluminous.
17 We have the whole field notes, but they are four inches thick.
18 We put in only the parts referring to this problem.

19 And here is what the surveyor says, with respect to
20 that point: --

21 Q Which point?

22 A I am quoting from our Appendix 4, which is
23 thus marked in the copy you have there. "Mile 76 since the
24 1250 change left the canebrake and entered into the open
25 prairie bottom; rich soil, 50 changed to cane again; 80 changed

1 to the north bank of the Arkansas River, set a stake and made
2 around it from which 62 degrees, 20 minutes west of Cottonwood,
3 marked CL 76MS, 36 degrees no minutes east a cottonwood marked
4 U.S. 76M. At this point affixed the southeast corner of the
5 Cherokee land.

6 "Thence, along the channel of the river 164.50
7 change to the south bank where the northern extremity of the
8 eastern boundary of the Choctaw line strikes the river." And
9 he does that for a reference point.

10 He is surveying the Cherokee boundaries, but he's
11 referring to another point which helped set up his point, the
12 Cherokee corner on the north bank of the river.

13 Q But then he says, "thence along the channel of
14 the river," rather than along the north bank of the river.

15 A I know. "And the north bank he says.

16 Q I thought you read "along the channel of the
17 river?"

18 A After he affixes the north bank --

19 Q Well, it crosses from the point on the north
20 bank to the point on the south bank, he has to cross the river
21 to get there.

22 A That's right.

23 Q There the river runs north and south instead
24 of east and west, where they would have to go along the channel.

25 A Right. And there he fixes the Choctaw corner.

1 So, he fixed the Cherokee corner on the north bank and the
2 Choctaw corner on the south bank.

3 Now, let's take the -- now, those field notes are --
4 should be considered in connection with the Cherokee patents--

5 Q Well, Mr. Kirk, with boundaries on each side of
6 the river, each nation, had that been a boundary line between
7 two states, what would be the line in the river?

8 A I would say that if it was on the boundary line
9 between two states the description would call for it to be
10 down the middle of the stream. We have --

11 Q Well, then we have a conveyance from the United
12 States to a nation, why doesn't that same rule of construction
13 apply?

14 A It's not a rule of construction, Mr. Justice,
15 as we have cited in our brief --

16 Q Well, the conveyance in Louisiana versus
17 Mississippi, this Court found that it was. "If any navigable
18 river constitutes the boundary between two independent states,
19 the line defining that point of which the two states separate
20 is the middle of the stream, the channel."

21 A Well, these -- we have a contemporaneous patent.
22 They have a contemporaneous definition of the line of the
23 State of Missouri, which we have cited in our brief, which was
24 in 1820, almost contemporaneous with these documents.

25 Q Well, this is not a recent opinion. The opinion

1 that refers to this is in 1905.

2 A Well, now, this is a navigable stream in this
3 case; there is no -- this particular authority you are reading
4 to me I am not sure of the context of it, what it would be --

5 Q It was the context between the State of
6 Louisiana and Mississippi as to where the boundary line was.

7 A Yes. Well, Mr. Justice, in any event, let me
8 read to you from the language of this Court in the Mingus case.

9 Q Which case?

10 A Mingus.

11 The Atlantic and Pacific Railroad Company versus
12 Mingus, 165 U.S. 413, and referring to these Indian tribes,
13 the Cherokee Tribe in particular, they said: "In some respects
14 they bear the same relation to the Federal Government as the
15 territory did in its second grade of Government under the
16 Ordinance of 1787. Such territory passed its own laws, subject
17 to the approval of Congress and its inhabitants were subject to
18 the constitution and Acts of Congress.

19 "The principal difference consists in the fact that
20 the Cherokees enact their own laws under the restrictions
21 stated, appoint their officers and pay their own expenses.
22 This, however, is no reason by the laws and proceeds of the
23 Cherokee territory, so far as the rights claimed under them,
24 cannot be placed on the same footing as other territories in
25 the Union. It is not a foreign, but a domestic territory

1 a territory which originated under our constitution and laws--

2 Q But it's still a nation, as of that time.

3 A They are a domestic, dependent nation, Mr.
4 Justice, as defined by this Court.

5 Q They didn't have any army or president; did
6 they?

7 A What is that?

8 Q They didn't have any army; did they? This nation.

9 A They have no army; that's correct. They had
10 the word "nation," but it was a very dependent nation. Now,
11 Mr. Chief Justice Marshall, even said that their relationship
12 was like a ward to its guardian; that's how much of a nation
13 they were.

14 Now, the Cherokee patent, conveys its land, covers
15 this land, pursuant to the survey -- to Isaac McCoy's survey,
16 refers to the description from the survey. That patent was
17 dated December 31, 1838 and found in Appendix 9 of our brief.

18 Q Yes, but you couldn't argue -- argue and say that
19 patent follows the survey when the ~~survey~~ ends upon describing
20 the southern boundary of the Cherokee land as ending up as
21 being on the south side of the river.

22 A Mr. Justice --

23 Q Doesn't the terminal point of that description
24 in the patent --

25 A I've been unable to find the language you're

1 talking about. Let me read until it reaches that point.

2 The patent, which I say is found in Appendix 9 of
3 our brief, getting where it comes down to the Canadian River
4 thence down the Canadian River along its north bank to its
5 junction with the Arkansas River.

6 Excuse me, I'll wait until you turn to that --

7 Q Go ahead. I think you quote it on page 53;
8 don't you, in your brief?

9 A Yes; perhaps so. I'm not sure. Anyhow, the
10 patent is in -- the complete patent is --

11 Q In appendix 9.

12 A The complete patent is in appendix 9.

13 Q Okay. Go ahead.

14 A It is also on page 53 of our brief.

15 All right, when we get to this point: "and thence
16 down the Canadian River on its north bank?"

17 Q Yes.

18 A "Thence down the Canadian River on its north
19 bank into its junction with the Arkansas River. Thence down
20 the main channel of the Arkansas River to the western boundary
21 of the State of Arkansas.

22 Q Yes.

23 A "at -- at the northern extremity of the eastern
24 boundary of the lands of the Choctaws and the south bank of the
25 Arkansas River, four chains and 54 links east of Fort Smith and

1 thence north -- and thence north."

2 Now, we say that's a reference point. We say the
3 word "at" means in the vicinity. We say it's a double
4 reference for the surveyors accuracy and it does not take the
5 Cherokee boundary to the south bank of the river.

6 Q So, you think they intended to go down the
7 north side of the river and stop on the north side of the river
8 opposite the north corner of the Choctaws.

9 A Right; right. Opposite the north corner at the
10 corner given by the field notes of the survey.

11 And, so that's where we say the description goes.
12 And, by the way, that is the only reference to any point south
13 of the river in the whole Cherokee patent.

14 Q Have you included in your brief, or is it in the
15 record, any copies of the survey; the notes or maps that were
16 made in -- pursuant to the Treaty of 1855 where the Chicasaws
17 acquired the interest from the Choctaw heirs?

18 A Your Honor, we have not included that.

19 Q Have you looked at it?

20 A No; I have not. I may have, but we didn't --

21 Q By that treaty, as I understand it, undertook
22 to survey the boundary line -- the boundary lines of the
23 Choctaw lands so that they could tell the Chickagaws what they
24 were getting. And they did survey it; and there were maps and
25 field notes. Are you familiar with those?

1 A I may have read them, but I don't have them
2 freshly in mind just now. But we say the contemporaneous
3 maps and field notes are legally effective in this situation,
4 in this case.

5 Q Maybe so, but the instructions to the surveyor
6 at that time instructed him to retrace the old boundaries to
7 reestablish the corners that were established by the old survey.

8 A You may have been given those instructions, but
9 the land had previously been --

10 Q Well, anyway, those results of that survey is
11 not in the record, I take it?

12 A No it is not in the record.

13 We say that now we have another argument before by
14 Appellants to which I should give some note here. They have
15 argued that because there were provisions in the treaties, that
16 at no time would the lands ceded to them be included within
17 the boundaries of a territory or a state. They contended that
18 therefore, there could not have been any holding in trust by
19 the United States for a future territory or state.

20 We say that that conclusion is erroneous and faulty.
21 We say that the Cherokees treaty in particular, says "without
22 their consent." That practically implies that their consent
23 could be sought and obtained and they might have it in mind.

24 We have cited Congressional Reports and other data
25 which shows that future states were contemplated in this area.

1 The facts are that the lands conveyed to them were not included
2 during a future territorial state without their consent. Their
3 consent was obtained.

4 They made agreements with the United States Govern-
5 ment for the allotment of their lands; they made agreements
6 that the tribal sovereignty should be relinquished in favor of
7 the allottees; they made agreements that the laws, their tribal
8 law should be superceded by the laws of Arkansas. They were
9 admitted to citizenship in the United States as full citizens.

10 They put themselves and were put under the juris-
11 diction of the Interior Department as to all of their tribal
12 affairs.

13 We say that they did consent to become a part of
14 future state and they voted on the admission of Oklahoma as a
15 future state; and therefore the United States kept faith with
16 them and they were included in the State of Oklahoma with their
17 consent.

18 Any further questions?

19 Oh, my co-counsel has suggested to Mr. Justice White
20 Black that I may have overlooked that you were referring to
21 Appendix F of the Cherokee brief, the Report of the Commissioner
22 of Indian Affairs, I.D.C. Atkins. In that report he traces the
23 various surveys that were made and comes to the -- he shows
24 that the three earliest surveyors, either affixed the corners
25 of the Cherokee or Choctaw or both on the north or south bank

1 of the river, respectively; he himself -- a later survey, the
2 ones you were talking about, were seeking to relocate the old
3 survey boundaries; I think that's what you were talking about.

4 Q Well, sir, I just wondered about the field
5 reports of the surveys.

6 A No, sir; those have never been provided.

7 Q Thank you.

8 MR. JUSTICE BLACK: Mr. Kirk, your time is up.

9 MR. KIRK: Is my time up? I'm sorry.

10 MR. JUSTICE BLACK: There seems to be a red light
11 there.

12 MR. KIRK: Thank you, sir.

13 MR. JUSTICE BLACK: Mr. Ford.

14 REBUTTAL ARGUMENT BY PEYTON FORD, ESQ.

15 FOR PETITIONERS CHOCTAW NATION AND CHICKASAW NATION

16 MR. FORD: Yes, sir. I had hoped we wouldn't turn
17 the Court into engineers, but apparently we have. So, I wish
18 that you would compare the cause of the survey and the patent
19 owned by the Cherokees and they read the same in reverse.

20 So far as I can tell, there is a difference between
21 47 and 53 degrees; they might have gone around a tree. We have
22 never claimed over half of the river; it's clearly stated in
23 the patent and it's not inconsistent with the treaty.

24 Two, Justice Reed in Alabama v. Texas, speaking of
25 disposal of public lands and the Equal Footing Doctrine, in a

1 concurring opinion, said specifically: "The United States has
2 power to dispose of its public lands under the so-called
3 'Equal Footing Doctrine' and it's not intended to equate the
4 states on an economic basis, but on a political basis." Each
5 state can't hope to have an oil well in it, or Manhattan or --
6 gold or silver; that's not the purpose, and Reed, as late as
7 that, says that.

8 I would like to call the Court's specific attention
9 to the enabling Act of Oklahoma, which is cited on page 26 of
10 our brief and the Oklahoma Constitution, which specifically
11 provides that these Indian tribes will be protected in the
12 possession of their lands.

13 And the previous Act which was referred to by Mr.
14 Kirk under quote of law, as extinguishing the tribe, is simply
15 without meaning.

16 The Court, so far as the map is concerned, and with-
17 out relationship to what value there is, I don't know.
18 Certainly on February 25th in the State of Arkansas v.
19 Tennessee, met and answered the same question concerning
20 evulsion, accretion or erosion, whether it be by natural or
21 artificial means.

22 The Cherokees are an existing viable tribe. They
23 have some 41,000 enrolled, 12,000 full bloods, and a total
24 total descendants are 100,000.

25 The money that we have derived from any recovery in

1 these cases, outside of the per capita distribution to the
2 Indians, not only in the so-called "Outlet case" or in any
3 other cases that Mr. Pierce participated in has gone in trust
4 for the Indians and is used for either rehabilitation, higher
5 education or in various tribal projects.

6 Any questions?

7 It said three minutes; I'm trying to obey.

8 MR. JUSTICE BLACK: That's all, I guess, Mr. Ford.

9 (Whereupon, at 2:10 o'clock p.m. the argument in the
10 above-entitled matter was concluded)

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