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ORAL ARGUMENT OF:

P A G E

Louis F. Claiborne, Esq., on behalf of the  
United States . . . . . 43

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1969

THE CHOCTAW NATION AND  
THE CHICKASAW NATION,

Petitioners

vs

OKLAHOMA, ET AL.

Respondents

No. 41

THE CHEROKEE NATION OR TRIBE  
OF INDIANS IN OKLAHOMA,

Petitioner

vs

OKLAHOMA, ET AL.

Respondents

No. 59

The above-entitled matter came on for argument at  
10:05 o'clock a.m. on October 23, 1969

BEFORE:

- WARREN E. BURGER, Chief Justice
- HUGO L. BLACK, Associate Justice
- WILLIAM O. DOUGLAS, Associate Justice
- JOHN M. HARLAN, 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 Petitioners  
6 (Choctaw and Chicasaw Nations)

7 PEYTON FORD, ESQ.  
8 Washington, D. C.  
9 Counsel for Petitioners  
10 (Cherokee Nation, et al.)

11 LOUIS F. CLAIBORNE, Esq.  
12 Office of the Solicitor General  
13 Department of Justice  
14 Washington, D. C.  
15 For the United States (amicus curiae)

16 M. DARWIN KIRK, Esq.  
17 P. O. Box 1439  
18 Tulsa, Oklahoma 74101  
19 Counsel for Respondents  
20  
21  
22  
23  
24  
25





1           We're not dealing with grants; small grants to  
2 private landowners, we are dealing with what amounts to large  
3 territories ceded to quasi-sovereign tribes, then defined as  
4 nations; in that time considered quasi-independent. The  
5 treaties that we -- the fact that we dealt with them by treaties,  
6 of course, indicates that approach of dealing with Indian  
7 tribes as independent entities.

8           The treaties themselves recognized extensive powers  
9 of self-government in these tribes. It would be inconsistent  
10 with that approach to attempt to reserve, to wish to reserve,  
11 to have an interest in reserving the beds of navigable rivers  
12 or any other territory within the area ceded, except only as  
13 the United States might have some special reason for doing so.  
14 Such as maintaining the area around Fort Gibson in the middle  
15 of the Cherokee grant, which was expressly done.

16           So, here there may have been interests in the United  
17 States in reserving a right of navigation on the Arkansas River  
18 and that can be read into these grants, to the Choctaws and  
19 Cherokees. But of course, the navigational servitude which  
20 as pertains to the United States in all states, does not carry  
21 with it an ownership of the bed of the river and there is no  
22 reason to so read it here.

23           Q     Excuse me. Is there any indication here that  
24 the bed of this river has any particular value by reason of  
25 any minerals or anything imposed in it?

1           A     Precisely, Mr. Justice Black. At that time it  
2 was not known that the bed of this river would become valuable  
3 and there was, therefore, no reason for the United States to  
4 withhold, for its own benefit, the bed of this river. All it  
5 was concerned about -- all it could be concerned about was to  
6 reserve its rights to maintain it as an open highway of  
7 commerce and as a way of access to Fort Gibson within the  
8 Indian territory. But, as to the bed, there was no reason for  
9 the United States to wish to --

10           Q     You didnt' quite understand my question. Is  
11 there anything in the record that indicates that the bed of  
12 this stream, as such, has embodied in it any minerals of any  
13 type that make it of any special value.

14           A     Today, yes, Mr. Justice Black.

15           Q     What is it?

16           A     It's oil.

17           Q     Oil.

18           A     And this controversy arises because very  
19 valuable oil deposits have been discovered in the bed of the  
20 river and so the matter becomes an important tactical dispute.

21           Q     Is the real pragmatic question, then, who owns  
22 the oil there, the Indians or the State of Oklahoma?

23           A     That is exactly the practical question, Mr.  
24 Justice Black.

25                 Now, as to the Equal Footing Doctrine, we say that

1 doctrine has no application here. First, we point out that it  
2 hadn't been invented yet. Part of this is -- in the first  
3 case in this Court to apply that rule -- a lawful, inevitable  
4 rule, was seven after these grants to these Indian tribes.

5 Now, I --

6 Q Before you go on, I wanted to ask: Did the  
7 United States take the position that the Arkansas was then or  
8 is not now -- I guess then -- was not then navigable above  
9 Fort Gibson? Yesterday you said we were talking about the  
10 navigable portion of the Arkansas River. Now, I suppose there  
11 are Indian lands bordering the Arkansas River above Fort  
12 Gibson?

13 A Yes, there certainly were.

14 Q And there still are?

15 A I think no, Mr. Justice White, but there could  
16 be.

17 Q Not these but some others?

18 A They certainly were Cherokee and Creek lands  
19 bordering on the portion of the --

20 Q Are they still there?

21 A I really am not aware of it.

22 Q Well, in any event, in this we would be  
23 settling the question for any of the navigable portion of the  
24 Arkansas in this case.

25 A That is what I think, too, Mr. Justice White.



1 I thought it was agreed by all parties and I may be mistaken  
2 that the navigable course of the Arkansas River ends at Fort  
3 Gibson.

4 Q Has that ever been litigated?

5 A I, frankly, cannot answer. Perhaps one of the  
6 other Counsel will know that.

7 Q What difference does it make, from the point of  
8 view in this case, whether it is navigable or not navigable?

9 A It's the only claim Oklahoma can make to the bed  
10 of the river -- only on the supposition that it was never  
11 included in any grant to any Indian, in which event it still  
12 belongs to the United States, or still did at the time of --  
13 I'm not sure, it may still then belong to the United States,  
14 never having been ceded to the state expressly.

15 Q In your submission yesterday you posed, at least  
16 as I understood it, the Indian tribes gave up the real good  
17 land in Georgia and South Carolina in the Eastern States in  
18 exchange for this land. I suppose they surrendered all rights  
19 of every character to subsurface minerals, oils, in those  
20 eastern lands; is that correct?

21 A I think that is true, Mr. Chief Justice. I am  
22 not clear whether those prior grants were as categorically  
23 feasible grants. I am clear that those grants were not made  
24 with the stipulation, which is quite relevant here, the present  
25 lands would never, under any circumstances, be incorporated

1 within a state and that they were granted in perpetuity as a  
2 permanent home. This language being appropriate precisely  
3 because these tribes have left and shifted westward that it was  
4 appropriate to, at long last, seemed to be guaranteeing them a  
5 place from which they would not be evicted. Though, in the  
6 end they were evicted from Oklahoma, as well.

7 As I say, the Equal Footing Doctrine is inappropriate  
8 here. First, it hadn't been devised yet and therefore, could  
9 hardly be supposed to have been in the minds of the grant  
10 office, but mostly because that is a doctrine which is -- works  
11 for the benefit of a future state. Here we have an expressed  
12 declaration in both treaties to the effect that never will a  
13 state be created in this territory and therefore no occasion  
14 to reserve the benefits of future states that will never come  
15 into existence, the beds of navigable rivers. For these  
16 reasons we suggest --

17 Q May I ask you one question for information?  
18 If the Indians are awarded this land, how will the oil be of  
19 benefit to them? Will they own it in common or the tribe and  
20 if it has to be exported, how will it be done? Who will control  
21 it? Can they do it themselves?

22 A Mr. Justice Black, as to your first question,  
23 the Tribe retains in existence and does now have tribal  
24 property as opposed to the formal property which has been sub-  
25 divided among the individual Indians. There is a Tribal Council.

1 there is a Tribal Government; there are Tribal funds which are  
2 administered for the common benefit of the tribe, some of those  
3 for school purposes.

4           What would happen and how the Indians would choose  
5 to appropriate the revenues from these oil lands, I am not  
6 clear. It might be that the -- technically the property would  
7 lie in trust with the United States -- that some supervision  
8 of these revenues would lie with the Department of the Interior.  
9 That question, frankly, hasn't been fully explored and I am not  
10 sure how it would result.

11           Q     You say it goes for the schools; what schools?

12           A     There are, as I understand it, Cherokee and  
13 Choctaw schools maintained with Tribal funds derived from other  
14 common tribal property.

15           Q     They run their own schools still, in that  
16 section of the country?

17           A     As I understand it, they do; some of them  
18 attend the state schools. They are free to do either. But they  
19 do use some of the tribal funds for that purpose, so I am  
20 advised.

21           Q     But not for their entire educational system from  
22 first grade through high school, isn't that so?

23           A     I think that is correct, Mr. Justice White; it  
24 is not for the whole educational system.

25           MR. CHIEF JUSTICE BURGER: Thank you, Mr. Claiborne.

1 Mr. Kirk?

2 ORAL ARGUMENT OF M. DARWIN KIRK, ESQ.

3 ON BEHALF OF THE STATE OF OKLAHOMA, ET AL.

4 MR. KIRK: Mr. Chief Justice, and may it please the  
5 Court: Our friends the Cherokees have produced a convenient  
6 map which I think will be helpful in following the arguments  
7 which I will make and I will respectfully ask the Court to  
8 regard that map. Also, you might find it helpful to refer to  
9 the little map on Page 25 of the Choctaw brief.

10 Now, this controversy involves the bed of the  
11 navigable portion of the Arkansas River.

12 Q What portion is that?

13 A The portion selected by the Cherokees in  
14 bringing this suit in 1966 was the portion commencing at the  
15 Arkansas line where the City of Fort Smith was located and  
16 ending where the Grand River flows into the Arkansas at Fort  
17 Gibson.

18 Q And it's settled, then, that the Arkansas was  
19 not then navigable?

20 A No; it is settled that the Arkansas was then  
21 thought navigable -- was established as navigable.

22 Q Above that?

23 A No; we're speaking only of the area in contro-  
24 versy.

25 Q But was it settled that it was not navigable



1 above Fort Gibson?

2 A The historical evidence is that there are a  
3 few miles of the Arkansas and few miles of the Verdigris that  
4 are navigable and would be legally so, but the Cherokees didn't  
5 choose to include that in this suit, so we have not treated  
6 it in the suit.

7 Q It certainly is now; isn't it?

8 A Yes, it is now. And at the time that we are  
9 talking about, the time these treaties were made, it was very  
10 definitely navigable.

11 This stretch of the river is a meandering stream, as  
12 you will see on that map. Although it has not been pertinent  
13 in this case and no evidence has been introduced on it, our  
14 engineer estimates that there are a little over a hundred miles  
15 of river bed in this stretch of the river.

16 You will note at the head of this stretch, Fort  
17 Gibson, established in 1824 and at the foot of it, Fort Smith  
18 on which the first military establishment appeared in 1817.  
19 This area had been substantially used in commerce during this  
20 decade previous to the time of the signing of these final  
21 treaties with the Cherokees and the Choctaws. Let us keep these  
22 dates in mind.

23 The first treaty that the Eastern Cherokees signed  
24 and they constituted, I believe, about four-fifths of the entire  
25 tribe -- was in 1835. All treaties previous to that and then

1 negotiated with the Western Cherokees, who, I believe, con-  
2 stituted only about one-fifth of the Cherokee numbers. They  
3 were a group that separated from the rest and went out west  
4 voluntarily and the rest didn't want to and negotiated over  
5 many years and finally arrived at an agreement in 1835.

6 Now, the final Choctaw Treaty, the one which super-  
7 ceded all previous treaties and the one upon which the Choctaw  
8 claims and the patent is based, was executed in 1830.

9 So, in this decade previous to that, this stretch  
10 of the Arkansas River up to the Grand was established as a  
11 useful artery of commerce. The trial court examined into the  
12 available facts carefully and reached a very definite conclus-  
13 ion on that subject.

14 The trial court said: "It is the conclusion of the  
15 Court as to this issue that it was common knowledge in the legal  
16 sense from at least as early as 1824 until sometime after  
17 November 16, 1907, (the day of Oklahoma statehood), the Arkansas  
18 River, in its natural state was a navigable river below its  
19 confluence with the Grand River, regularly used throughout the  
20 remainder of its course in what is now Oklahoma as a highway  
21 of commerce during the major portion of each year. Accordingly,  
22 it is the decision of this Court, based upon judicial knowledge  
23 alone and without taking evidence, that this stretch of the  
24 Arkansas River was navigable in fact and in law at the time  
25 the western domains, now a part of Oklahoma, were ceded to the

1 Choctaw Nation and to the Cherokee Nation And at the time the  
2 treaties were made pursuant to which the lands were ceded, and  
3 also at the time when Oklahoma was admitted to statehood on  
4 November 16, 1907." History records substantial riverboat  
5 navigation along that stretch of the Arkansas River. During this  
6 period there were regularly scheduled trips at the ports  
7 of Fort Gibson and at the port of <sup>Three Forks</sup>, just above Fort  
8 Gibson. In 1833 seventeen boats regularly docked at Fort  
9 Gibson. There were <sup>then</sup> 22 established landings between Fort Smith  
10 and Fort Gibson, including Redland, Sallisaw, <sup>b</sup>Weber's Falls, and  
11 Vian.

12 It actually was the only method by which substantial  
13 commerce could come into this area. And, as a result of this  
14 navigable water, this part of Oklahoma became the first part  
15 that had any substantial settlements made in it. It is a vital  
16 link between Fort Smith and Fort Gibson and a vital link between  
17 Fort Gibson and the outside world.

18 History is replete with records of substantial  
19 stores for the Army posts <sup>and</sup> recruits being brought in. A great  
20 many of the Indians who later came in under these treaties were  
21 brought up this river in boats -- in steamboats. They devised  
22 a shallow-draft steamboat which could negotiate this river very  
23 well in the major portions of each year.

24 And so there is no question that this was an estab-  
25 lished, navigable body of water before these treaties were made.

1 It was so found by the trial court, and has not been challenged  
2 in this case that I know of.

3 The ownership of the Mississippi River and its  
4 tributaries, and I should say that the Arkansas River is the  
5 second longest tributary of the Mississippi; the longest being  
6 the Missouri. The negotiators during the Louisiana treaty / negotiations  
7 were quite cognizant of the necessity of securing all these  
8 waters, because of navigation and many other reasons.

9 In a letter dated May 13, 1803, from Robert  
10 Livingston and James Monroe, to James Madison, the Secretary of  
11 State / they said: "The acquisition of full control and use of the  
12 Mississippi River and all streams that enter into it, from their  
13 sources to the ocean, was one of the paramount reasons / cul- for the negotiations  
14 minating / in the Louisiana Purchase in 1803." President Jefferson,  
15 in submitting the Louisiana Purchase Treaty to Congress, to the  
16 Senate for ratification; / and to Congress for the appropriation,  
17 said: "Whilst the property and sovereignty of the Mississippi  
18 and its waters secure an independent outlet for the produce of  
19 the Western States and an uncontrolled navigation through their  
20 whole course, free from collision with other powers and the  
21 dangers to our peace from that source. the fertility of the  
22 country, its climate and extent, promise in due season an impor-  
23 tant aids to our Treasury, an ample provision for our posterity  
24 and a wide spread for the blessings of freedom and equal  
25 laws."



1 Q Mr. Kirk.

2 A Yes.

3 Q Let me see if I can understand your argument;  
4 who do you represent?

5 A The State of Oklahoma, sir.

6 Q Only the State of Oklahoma?

7 A Just the State of Oklahoma; yes.

8 Q And I see there are names to your brief, of --

9 A Pardon me, Mr. Justice Black, I am representing  
10 actually, all of the Respondents which include the State of  
11 Oklahoma's lessees, also; oil and gas lessees and the sand and  
12 gravel lessees.

13 Q The State of Oklahoma has already leased these  
14 lands?

15 A The State of Oklahoma has leased these lands;  
16 in fact, it has been leasing them since about 1908.

17 Q Has there been any litigation about it before?

18 A Not with the Cherokee Tribe or the Choctaw  
19 Tribe, until this suit was instituted in 1966.

20 Q How long had the State of Oklahoma been making  
21 leases?

22 A Nearly 60 years.

23 Q And are they developing oil there now?

24 A There is no oil developed there. Mr. Claiborn,  
25 I believe, was mistaken on that subject; I am sure he was in

1 good faith. There is some gas production.

2 Q These oil companies are represented; what's  
3 their representation, if it's not for the oil?

4 A Because of the gas. They have oil and gas  
5 leases.

6 Q Is any of that being developed, then?

7 A Yes, there is some gas production on some of the  
8 leases.

9 Q How long has it been developed?

10 A It's quite recent; just in the last three or  
11 four years, I would say.

12 Q Well, who is this controversy really between?

13 A The controversy is between the State of  
14 Oklahoma and the Cherokee Tribe and the Choctaw.

15 Q I know that's what it appears, but who is it  
16 actually between?

17 A Could I say this, Mr. Justice Black? The  
18 values of the land involved far exceed the value of the minerals.  
19 And there is no claim by any other respondent to the lands other  
20 than the State.

21 Q Your claim is that the State of Oklahoma was  
22 given the bed of the stream when it became a state and it has  
23 owned it ever since?

24 A That is correct.

25 Q And it never has been conveyed to anybody else?

1 A That is correct.

2 Q Now, is there, at the end of this lawsuit, a  
3 controversy between the various oil companies as to whether the  
4 State can give it to them or the Indians can give it to them?

5 A There is no controversy there, Mr. Justice  
6 Black?

7 Q Well, what would it be, then?

8 A There is no controversy between the state and  
9 any oil and gas --

10 Q I'm not talking about between the state. Are  
11 three two groups of oil companies and at the end of this are  
12 they going to have a fight over which one gets it, depending  
13 upon whether it goes to the Indians or the State?

14 A No; there is not.

15 Q Well, what are all these oil companies whose  
16 names are signed to your brief -- why are they interested?

17 A Because they own oil and gas leases from the  
18 State --

19 Q From the state? And not from the Indians?

20 A Not from the Indians; that is correct.

21 Q Well, they are bound to have to fight that out  
22 at the end, aren't they?

23 A No; not if the State of Oklahoma prevails, they  
24 have good leases.

25 Q That's right; but suppose the State of Oklahoma

1 does not prevail?

2 A If the State of Oklahoma does not prevail, then  
3 they would have to make their peace with whichever of the  
4 Indian tribes does prevail.

5 As stated yesterday by Mr. Kile, there is a conflict  
6 between the Choctaws and Cherokees.

7 Q I understand that. Now, do any of them already  
8 have leases from the Indians?

9 A None that I know of.

10 Q You don't know?

11 A I know of none and I have not heard of any.

12 Q We go back to something you said in response to  
13 Mr. Justice Black. You said "the land," and by that I assume  
14 you mean the land underneath the bed of the river. The land of  
15 the river bed is worth more than any estimated value of sub-  
16 surface products? Is that in this record?

17 A Yes, sir; the value is no<sup>known.</sup> / and the oil  
18 and gas development, actually is not/<sup>the greatest value</sup> either, but these are  
19 undisputable facts. The law is and we have set it forth in our  
20 brief, that the State claims the riverbed between highwater  
21 marks. Now, that was established years ago in the law of  
22 Oklahoma as being the extent of the State's claims to the bed  
23 of the navigable streams, Mr. Chief Justice.

24 And there the stream is being stabilized and in  
25 some places, straight/<sup>ened</sup> by the United States Army Engineers in



1 this Arkansas River Navigation Project. It leaves a consider-  
2 able amount of the area/<sup>formerly</sup>covered by water that is barren. And  
3 Mr. Kile mentioned that in talking about the avulsed beds. I  
4 believe that is what he intended to say.

5 Q May I ask you a question, Mr. Kirk. Just from  
6 a casual look at the briefs and all, it look like this is  
7 ultimately a fight as to which oil companies will get leases;  
8 and that will depend upon whether the State or the Indians own  
9 the land.

10 A Mr. Justice Black, perhaps that could be  
11 assumed, but it is not a fact.

12 Q Well, what's the reason for all these briefs  
13 by the oil companies?

14 A The oil companies are seeking to protect their  
15 respective leases from --

16 Q That's right.

17 A <sup>Sometimes</sup> there is only one lease on maybe a very limited,  
18 are of riverbed.

19 Q Only what?

20 A Some of the oil companies here have only one  
21 lease on a very limited area of riverbed. Now, this --

22 Q About 25, it looks like to me.

23 A Well, I say one -- you will find one company  
24 that will have only one lease on one, say a 320 acre tract, which  
25 encompasses a part of the riverbed. But we have 100 miles of

1 riverbed here to consider.

2 Q Are you representing the Indians?

3 A No; I am representing the State of Oklahoma and  
4 its lessees, Mr. Justice Black.

5 Q And the oil companies that have leases?

6 A The oil companies and the sand and gravel  
7 companies that are parties to this litigation.

8 Q Have you got a covenant in your leases, guaran-  
9 teeing your title?

10 A I think --

11 Q I suppose you are obliged to --

12 A I believe there is a representation of title;  
13 yes.

14 Q And you have the usual royalty on your leases;  
15 on the oil and gas; one-eighth or what?

16 A Yes. I'm not sure of the amount. One-eighth.

17 Q Is that producing revenue for the state now?

18 A A few of them are. It has not been -- I will  
19 say that there is no oil; there has been some gas; it's been  
20 rather disappointing. It looked a lot better when the suit  
21 started than it does now.

22 Q When did it actually start between the Indians?

23 A The Indians brought the suit in December, 1966,  
24 Mr. Justice Black.

25 Q And there had been no lawsuits before that?

That is

1 A / the first suit that the Indians had brought, in  
2 challenging this, and Oklahoma has exerted dominion control  
3 over this river for 60 years,

4 Q But you didn't use it prior to that?

5 A Yes, we did. We executed many gas leases and --

6 Q But I understood you to say that in the past  
7 four years there had been a big jump in the gas business.

8 A In the last four years there has been a dis-  
9 covery of gas; yes, a gas field over here --

10 Q That's when the Indians decided they were  
11 interested in the land?

12 A That's right. That got them interested and  
13 apparently they decided to file this suit then. They had stood  
14 by for 60 years without filing any suit or bringing the  
15 question to court.

16 Q Well, what value is the river bed to the  
17 State of Oklahoma, other than for mineral production?

18 A The riverbed encompasses, within the highwater  
19 marks, a great deal of land and the land values are very sub-  
20 stantial.

21 Q For what?

22 A Agriculture. These riverbottom lands where the  
23 river is now being controlled through the navigation project,  
24 are very valuable lands. They can be smoothed over with a  
25 bulldozer and put on production.

1 Q Do you mean when the river is deepened and  
2 handled so that what used to be covered by water isn't covered  
3 by water any more?

4 A That is right.

5 Q And those lands are then exposed and then used?

6 A Right.

7 Q And those are the lands that Oklahoma would  
8 like to own?

9 A That's right. That's the real value in this  
10 case.

11 Q Any other use except agriculture?

12 A Well, of course, the gas production is --

13 Q Leaving that out.

14 A Probably the new navigation channel makes  
15 certain areas along the riverbed valuable for industrial plants  
16 or any number of things, but the navigation project, plus the  
17 gas development probably had something to do with the Indians  
18 deciding in 1966 to file their suit.

19 Q Is there anything in this record showing the  
20 aggregate number of acres derived between the high and low  
21 water marks that Oklahoma claims?

22 A No, there is nothing in the record, and actually,  
23 we have never ascertained it. It's a very difficult civil  
24 engineering job.

25 Q I should think it would be. It's a very

1 substantial area in total.

2 A It is.

3 Now, Mr. Kile in his argument yesterday, referred to  
4 our preliminary statement in our brief and states that we  
5 accept the challenge in that statement -- that's at Page 9 if  
6 the Court cares to refer to it again. And he read what we  
7 stated, and I am going to read it again because it is our  
8 position in this case on that point. Page 9, directly under  
9 "preliminary statement."

10 "The question to be resolved is simple and direct.  
11 Did the United States convey or agree to convey the river bed  
12 to the Cherokees or the Choctaws? The answer is -- No! Not  
13 by the standards this Court has established for the beds of  
14 navigable waters, nor even by the accepted standards of ordinary  
15 conveyancing. In the judgment of the courts below there was no  
16 ambiguity on this subject and each of them concluded that the  
17 treaties and patents did not provide for a conveyance of the  
18 bed of the river.

19 "Petitioners, not having met the burden of showing  
20 inclusion of the river bed under their treaties or patents,  
21 have sought to shift the burden by arguing that the State must  
22 show that the United States reserved the river bed when it made  
23 the treaties and patents. Since the United States did not con-  
24 vey the river bed there was no need to reserve it."

25 We say that the river bed was not conveyed and the



1 Court of Appeals sustained us in that.

2 Now, let us refer to the language of the treaties  
3 and the patents, because there is where the language is upon  
4 which the Choctaws and Chickasaws -- and the Cherokees, must  
5 stand before.

6 In the treaty of October 18, 1820 with the Choctaws,  
7 the -- called the Treaty of Doak's Stand -- "The lands ceded" --  
8 and I'm not going to read the whole lengthy description, just  
9 the only part that is --

10 Q What page are you reading from?

11 A Well, this is not in -- this is --

12 Q Not in your brief?

13 A This is Page 56.

14 Q Of your brief?

15 A Page 56 of our brief, yes.

16 Q Thank you. Article IV?

17 A The Treaty of October 18, 1820 at Doak's Stand,  
18 a tract of country, and I haven't included all of this -- I am  
19 not going to read all of those lengthy descriptions -- I'll  
20 read the parts referring to the Arkansas River.

21 "A tract of country west of the Mississippi River,  
22 situate between the Arkansas and Red River,  
23 and bounded as follows: Beginning on the Arkansas River where the lower  
24 boundary line of the Cherokees strikes the same. thence up  
25 the Arkansas to the Canadian forks."

1           That's all it said about the Arkansas River, just  
2 up the Arkansas in that treaty. But they do make it quite  
3 clear that it's a vast tract of land that lies between the  
4 Arkansas and the Red River. Now, if you will look at that  
5 little map on Page 25 of the Choctaw brief, you will find it  
6 oversimplified, but somewhat helpful, which shows where that  
7 boundary goes.

8           The vast tract there between the Arkansas and the Red  
9 River and that's what the Government agreed to convey to them.

10          Now --

11          Q     Let me go back to that language now that you  
12 are emphasizing, to see if I understand you.

13          A     Yes.

14          Q     The second line -- in the middle of the first  
15 line -- "where the lower boundary line of the Cherokees strikes  
16 the same;" that's the Arkansas River. Would you say it strikes  
17 it at the high water mark or the low mark or the center of the  
18 channel? Where?

19          A     Well, they are really locating that because of  
20 the Arkansas State boundary. The Cherokee southeastern corner  
21 was located by the surveyor, Isaac McCoy, upon whose basis these  
22 surveying -- the Cherokee patent was drawn, along the north  
23 bank of the Arkansas and he located the northeastern boundary  
24 of the Choctaws on the south bank of the Arkansas.

25          Now, let's take the final treaty between the

1 Choctaws and the United States in which all -- the previous  
2 treaty was superceded and merged, you might say. That's the  
3 Treaty of Dancing Rabbit Creek, September 13, 1830. You  
4 will find a reference to that at Page 59, I  
5 believe, of our brief. 59 of our brief.

6 " Beginning near Fort Smith where the  
7 Arkansas boundary crosses the Arkansas River, running thence  
8 to the source of the Canadian forks. Now, that's the only  
9 mention of the Arkansas River. "Running thence to the source  
10 of the Canadian Forks." That's all that's said about the  
11 Arkansas River in that treaty, and that's the final treaty.

12 Now, the patent -- their patents. The Choctaws  
13 didn't set out the patents in their brief, so we had to set it  
14 out and it's shown on Appendix 5 of our brief.

15 Q Are you speaking of Roman V?

16 A It's Roman XI in Appendix 5.

17 Patent to the Choctaws, dated March 23, 1842.  
18 I won't read all of that; I'll read just the part that mentions  
19 the Arkansas River, the part that now is before the Court. If  
20 you want to read everything that's said, it's there.

21 The United States under a grant specially to be made  
22 by the President of the United States" -- they are reciting the  
23 previous treaty, the 1830 treaty -- "the United States under a  
24 grant, specially to be made by the President of the United  
25 States, shall cause to be conveyed to the Choctaw Nation a tract of

1 country west of the Mississippi River in a fee simple to them  
2 and to their descendants to inure to them while they shall exist a  
3 as a Nation and live on it: -- Beginning near Fort Smith where  
4 the Arkansas boundary crosses the Arkansas river, running thence  
5 to the source of the Canadian Fork, if in the limits of the  
6 United States, or to those limits; thence due south to the Red  
7 River, and down Red river to the West boundary of the territory  
8 of Arkansas; thence North along that line to the beginning"---  
9 Now, that is the description.

10 Q There is a sameness of the call with respect to  
11 the Red River as with respect to the Arkansas?

12 A That's right. The Red River is a non-  
13 navigable stream.

14 Q Well, I know, but that wouldn't make it --  
15 there is a question here as to whether the bed of the stream is  
16 included in the patent or in the treaty.

17 A Correct. The rule is different on a navigable  
18 stream from a non-navigable stream.

19 Q Well, it isn't -- it isn't as clear from the  
20 patent that it is included.

21 A That is correct.

22 Q As to the right of the Government over the  
23 navigable stream, what is the difference so far as the state  
24 is concerned between a navigable and a non-navigable stream?

25 A It is our position, Mr. Justice Marshall, that

1 the state, upon obtaining Statehood, acquires the beds of the  
2 navigable streams. And that the United States holds it in  
3 trust for the future states to be formed.

4 Q But doesn't the state also take jurisdiction  
5 over the non-navigable streams?

6 A No, the state does not own any non-navigable  
7 streams.

8 Q Then you say the state has no jurisdiction over  
9 the Red River?

10 A That is correct.

11 Q Well, who has jurisdiction?

12 A The grant owners, I believe on the south side;  
13 I believe --

14 Q Well, in this particular area of the Choctaw  
15 Nation, don't they still own that?

16 A As riparian owners on the north side, I under-  
17 stand they claim to own the middle.

18 Q Only the riparian owners, but not as a result  
19 of the treaty?

20 A That's right.

21 Q Well, what was the provision in the treaty that  
22 "we shall not give any of this to the states?"

23 A What is that --

24 Q Part of the treaty which says none of this  
25 grant shall ever be given to a state. Didn't you say that in



1 treaty?

2 A No, the treaty didn't say that. The treaty  
3 said that the land was ceded to the Choctaws shall at no time  
4 be included within the limits of a future territory or state.

5 In the treaty with the Cherokees they said the land  
6 ceded to the Cherokees shall at no time be included within the  
7 limits of a future territory or state, without their consent.

8 Now, we think that getting the consent of the  
9 Choctaws could be implied -- I mean they could always consent.

10 Q You mean that the fact that they didn't object  
11 means that they consented?

12 A Wasn't there a later treaty?

13 They did consent. No, I will tell you that  
14 there were later treaties in which they did consent, Your Honor.

15 Q But if it were held, I suppose, that this patent  
16 to the Cherokees and Choctaws included the bed of the Arkansas  
17 River; the same patent and the same language should include the  
18 bed of the Red River.

19 A Well --

20 Q Wouldn't it, really?

21 A Well, if it expressly included it; yes.

22 Q Well, I am not asking you to concede away your  
23 case, but if it were held in this case, contrary to your conten-  
24 tion, that this patent conveys the bed of the Arkansas River to  
25 the Cherokees or to the Choctaws, the same patent would convey

1 the bed of the Red River?

2 A Yes, it's true.

3 Q And to give our contention to the riparian  
4 owners on the other side.

5 A Excuse me, Mr. Justice, my throat is getting a  
6 little hoarse and I'd like to have a little water, if I might.

7 MR. CHIEF JUSTICE BURGER: We apologize; that should  
8 have been placed there at the outset of your argument. We will  
9 have it for you in a minute.

10 Q Is anything said in any of these, whether they  
11 call them treaties or conveyances, it refers to the navigable  
12 river, particularly?

13 A No; there is no mention about navigability.

14 Now, with respect to the Cherokee treaties and  
15 patents we have, and if you wish to follow it, on Page 50 in  
16 the --

17 Q Fifty of your brief?

18 A Page 50 of our brief.

19 Our reference is to the Cherokee Treaty of May 6,  
20 1828. The only reference to the Arkansas River is: "to the  
21 main branch of the Arkansas River, to its junction with the  
22 Canadian River --

23 Q What part now; can you help us identify it?

24 A On Page 50 of our brief.

25 Q Under Article 2?

1           A     Yes, under Article 2. The complete description  
2 is given there.

3           Q     How far down from "commencing," is the pertinent  
4 part?

5           A     The only part where the Arkansas is mentioned  
6 is: "To the main branch of the Arkansas River, thence down said  
7 River to its junction with the Canadian River." Now, on that  
8 treaty the area between Fort Smith and the confluence  
9 the Canadian was entirely left open; it wasn't even mentioned.  
10 Now, that was the treaty with the Western Cherokees. We have a  
11 map at the back of our brief to show that.

12                 Now, the treaty of February 13, 1833; now that may  
13 be found, or the description, on Page 51. And omitting the  
14 previous language, and going only to where it mentioned the  
15 Arkansas; that is: "Down the old Western Territory line of  
16 Arkansas Territory to the Verdigris and down quite a few miles"  
17 -- now, here's where they mention the Arkansas -- "to the  
18 Arkansas, thence down the Arkansas," as you can see, it's just  
19 a few miles there, "to a point, thence down the Canadian to the  
20 Arkansas; thence down the Arkansas to the point on the Arkansas  
21 where the eastern Choctaw boundary strikes said river."

22                 Now, the patent is New Echota, the one where the  
23 eastern Cherokees finally joined, December 29, 1835. This  
24 patent is shown in full in our Appendix 9.

25           Q     What's the Roman Numeral designation?

1 A XXIX Roman Numeral, Appendix.

2 Q Which one of these -- in which one of these  
3 do your claim they were conveyed the bed of the  
4 stream?

5 A Well, they haven't been very specific about  
6 that, Mr. Justice Black. But, apparently they invoke all these  
7 treaties and they hope to find an inclusion somewhere?

8 Q Well, is that a claim, that something conveying  
9 them the land conveys the beds of the streams, too?

10 A Apparently that is their contention. Now, the  
11 only place here in the patent where the Arkansas is mentioned is  
12 where it says:

13 Q Where is that?

14 A In the Patent on Page 33; at the top of Page 33.

15 Q You are still in the Appendix, now?

16 A Yes. I apologize. In my notes I have tried to  
17 leave out anything that didn't expressly refer to the Arkansas.

18 Well, anyhow, this was taken from this treaty:

19 "Thence down the main channel of the Arkansas River  
20 to the western boundary of the State of Arkansas." Now, that's  
21 the only reference to the Arkansas River there, except the  
22 reference above to the junction of the Arkansas River.

23 Q May I ask, to be clear about what you -- why you  
24 are presenting these. Are you presenting these to show that at  
25 no place in any of the treaties that they carry any reference to

1 the bed of the stream?

2 A Right. And I'd like to call the attention of  
3 the Court to the conclusion of the Court of Appeals on that  
4 subject. Now, that is found in the Appendix; the general  
5 appendix, at Page 144-a. Mr. Justice White asked a question  
6 on that yesterday which I believe was not answered correctly.

7 I call attention to what the Court of Appeals said:  
8 "The Indians seek comfort from the technical language of the  
9 treaties and grants. They attach significance to such phrases  
10 as "to the Arkansas River and down the Arkansas and thence  
11 down the main channel of the Arkansas. We agree with  
12 Oklahoma, that references to the Arkansas River are for the  
13 purpose of establishing reference points, <sup>monuments</sup> or boun-  
14 daries. They do not indicate an intent, much less a clear  
15 intent to convey the river bed."

16 Now, that was the conclusion of the Court of  
17 Appeals in passing on these treaties and patents that I have  
18 recently referred to.

19 Q What about the point that if you read the  
20 Cherokee patent, the Cherokee lands straddle the Arkansas?  
21 And you cross the Arkansas at one point to get south of the  
22 river and you cross back north at another point. What are you  
23 going to do about that?

24 A That's about 40 percent, I would say, of the --

25 Q But that lies below the junction where the



1 Canadian --

2 A About 40 percent has the Cherokee lands on both  
3 sides.

4 Q But, certainly the -- if you follow these  
5 calls they gave as fee simple, all there were were in the  
6 boundaries of that meets and bounds description.

7 A That is true but --

8 Q And there was a river bed, clearly within  
9 the bounds of this metes and bounds description.

10 A That is correct. As to that stretch of it.

11 Q What's the answer to that?

12 A The answer to that is that there was no clear,  
13 definite, specific description of the river bed in the treaties  
14 or the patents referring to that portion or any portion of the  
15 Arkansas River bed; that under the authorities set forth in  
16 the decisions, starting back with Martin versus Waddell,  
17 Pollard versus Hagan, Shively versus Bowlby and the United  
18 States versus the Holt State Bank.

19 The beds of navigable waters are held by this --  
20 were not, under the Constitution, conveyed to or relinquished  
21 to the Federal Government. The 13 original Colonies got the  
22 the water beds of navigable waters. The states, since admitted,  
23 were admitted on a equal footing with the original states.

24 Q Your argument -- you say those cases hold that  
25 the United States never owned the river beds to give away in the

1 first place?

2 A Right. They had administration over them.  
3 And they would only -- the policy of Congress as set forth  
4 exhaustively in Shively versus Bowlby, expresses the fact that  
5 those -- the navigable waters have not been conveyed away,  
6 except under exceptional circumstances.

7 Q So, they do have the title to convey away under  
8 certain circumstances?

9 A Under certain circumstances. These circum-  
10 stances are set forth in the Opinion of Shively versus Bowlby.  
11 "In order to perform international obligations to effect the  
12 improvement of such lands for the promotion and convenience of  
13 commerce, with foreign nations among the several states, or to  
14 carry out other public purposes appropriate to the objects for  
15 which the United States holds the territory."

16 Now, Counsel for Cherokees and Choctaws are arguing  
17 that they come within the last exception, you might say, to the  
18 general rule. We say they do not; there was no reason for it--  
19 they are an agricultural people; they didn't make their living  
20 by fishing; they didn't make their living by commerce; there  
21 was no purpose in conveying a highway of commerce already  
22 established to them in the treaties with them. And, therefore,  
23 this purpose would not have been carried out in conveying to  
24 them.

25 Furthermore, of course, we say they were not conveyed

1 to them under the rule of Holt State Bank -- the United States  
2 versus Holt State Bank.

3 Q I didn't understand your argument based on the  
4 fact that they were not commercial people; they were not  
5 fishermen. This doesn't have to do unless I am mistaken, with  
6 the water, either for navigational purposes, or for fishing  
7 purposes or any other. We are talking about the bed of the  
8 river; the land under the river and in their own -- aren't we?

9 A That is correct.

10 Q There is no question about the continuing right  
11 of the United States. Always, in any navigable stream, there  
12 is navigational easement.

13 A That's right. Yes; there have been a few cases  
14 over on the west coast where small water-covered area was  
15 conveyed to certain Indians on a reservation where they made  
16 their living by fishing.

17 Q But that has to do with the water; fishing  
18 rights in the water.

19 A Where they made their living by fishing.

20 Q Well, that has to do with fishing rights in the  
21 water. The issue here is not water but land; isn't it?

22 A Yes, Mr. Justice Stewart.

23 Q Is it the Indians' position that the land they  
24 left had all these rivers and everything on it, and it was to  
25 be assumed that what the Government gave them was the equivalent

1 of what they gave up.

2 A Yes.

3 Q That's their position; is it not?

4 A No. I think that what they gave them was what  
5 was conveyed to them. Now, there is no evidence as to what they  
6 gave up in this case. What they got was what was conveyed to  
7 them.

8 Q And they were conveyed property in fee simple.

9 A They were conveyed the property in fee simple,  
10 subject to certain very important --

11 Q As to this land where there is land on both  
12 sides of the river, they had fee simple to everything but the  
13 river beds?

14 A They had fee simple except that the patents to  
15 them provided that the -- the Choctaw patent provided that the  
16 lands here granted shall revert to the United States if the  
17 Cherokee Nation ceases and abandons them. That's the Cherokee  
18 patent; excuse me.

19 The Choctaw patent provide that the land shall  
20 inure to them so long as they shall exist as a nation and live  
21 on it.

22 A Stop it. I respectfully say that is not what  
23 I was asking you. Your argument was, as I understood it, and I  
24 now ask you is that your argument: That where the river was in  
25 the middle of a piece of the property that the Nation was given

1 fee simple of everything but the river bottom.

2 A Right. Under the language I have just read;  
3 the qualification I have just read.

4 Q Well, how can you spell that out and leave the  
5 river bottom out?

6 A We have -- because it was a navigable river  
7 bottom; because --

8 Q The river bottom is not navigable. The river

9 A The river is navigable. And the bottom follows  
10 the navigation rights established.

11 Q Right.

12 A And the bottom follows the navigation rights  
13 established by --

14 Q Well, it is not now. The river bottom is not  
15 the bottom of the navigable river; is it?

16 A The one we're talking about, Mr. Justice  
17 Marshall, is; yes.

18 Q Well, I thought you said there was one where  
19 there were miles of land that was just land and could be farmed.

20 A Well, that is land between the high water marks  
21 previously established by the river before stabilization of the  
22 United States Army Engineers, which creates an artificial  
23 avulsive change.

24 Q So, if you look at it from the time it was  
25 granted they did not have jurisdiction over the bed of the



1 navigable river, according to you?

2 A Correct.

3 Q And so that it is now worth something to the  
4 state, the land -- the navigable river now belongs to the state?  
5 You didn't mind before, did you?

6 A It's been -- the state has collected the revenue  
7 from this river bed from sand and gravel and oil and gas  
8 leases for 60 years. It has been of value to the state; it  
9 has gotten more valuable lately.

10 Q Well, were the Indians making any claim to it  
11 at that time?

12 A They did not; not until this suit was filed in  
13 1966.

14 Now, the Holt State Bank rule in that case there,  
15 certain reservations were established for the Chippewa Indian  
16 Tribe. Under certain treaties made prior to Minnesota state-  
17 hood, these treaties expressly described certain land as being  
18 reserved for these Indians. They do create a reservation,  
19 contrary to what Counsel for the Cherokees and Choctaws have  
20 argued. The statute shows this.

21 Now, in the Red Lake Indian reservation, within the  
22 boundaries of that reservation was a lake called "Mud Lake."  
23 That -- in 1889 -- the last treaties were in 1855, prior to  
24 Minnesota statehood -- the state being admitted in 1858, I  
25 believe. The Treaty of 1855 included this Mud Lake. And in

1 1839 the Government made a further treaty with the Indians, in  
2 which the Red Lake Reservation was to be ceded back to the  
3 Government and was ceded back to the Government. The Government  
4 then was going to divide the land into tracts and sell it off  
5 and deposit the money in a trust fund for the benefits of the  
6 Chippewas.

7 A number of tracts were sold to settlers by the  
8 Government, and patents issued to the purchasers, along the  
9 shores of Mud Lake.

10 Later on the Government developed a project to drain  
11 mud lake and that lay bare certain valuable agricultural land  
12 between the riparian lines of the settlers who had bought the  
13 land from the Government and the water -- the place to where the  
14 water had receded. And they claimed, as riparian proprietors  
15 under the Minnesota law.

16 The Federal Government sued on behalf of the  
17 Chippewas, contending that this lake was not a navigable lake  
18 and not being a navigable lake, when the water was drained away,  
19 the land laid bare did not inure to the benefit of the riparian  
20 proprietors, but they claim it did inure to the benefit of the  
21 Chippewas. It was within the Red Lake Reservation boundaries.  
22 And there was no question of that.

23 The Court held, in substance, that in the treaty  
24 with the Chippewas, which did expressly encompass this area  
25 within the boundaries, the United States did not expressly and

1 distinctly convey the navigable water bottoms. They first held,  
2 by the way, that the land -- that the bottoms were navigable,  
3 contrary to the United States -- the lake was navigable, con-  
4 trary to the contention of the United States.

5 And, accordingly, the Court held since there was no  
6 specific description of this land encompassed all around by the  
7 reservation boundaries; that there could not be inferred any  
8 intention to convey the navigable water bottoms in view of the  
9 long-established policy of this country to hold the beds of  
10 navigable waters in trust for future states.

11 Now, that, in substance, is the holding in the Holt  
12 State Bank and we think it's the holding under which the part  
13 -- the Arkansas River that has Cherokee land on both sides  
14 should continue to be owned and held by the State of Oklahoma.

15 Now, the argument of counsel for the other side,  
16 seems to be based principally on the agreement in the Cherokee  
17 treaty that the lands ceded to them should not, at any future  
18 time, be embraced within the boundaries of a future state,  
19 without their consent. Remember that, without their consent.

20 The Choctaw Treaty says that the lands ceded to them  
21 should, at no time be included within the boundaries of a  
22 future territory or state. Now, in 1893, by Act of Congress  
23 of March 18, 1893 27 stat.645. Congress created a commission  
24 for the purpose of inducing the Cherokees and Choctaws and other  
25 tribes to relinquish tribal rights and to accept allotment of

1 their lands in severalty to tribal members, for the ultimate  
2 object of including said lands in a state.

3 The result of this Act and in ensuing Acts of  
4 Congress, were agreements with the Cherokees. 32 stat.716 and  
5 with the Choctaws, 30 stat.495, 32 stat.641, in 1902, which  
6 provide for the allotment of the lands to individual members  
7 of the respective tribes and relinquishment of the general  
8 powers of the tribal government. These agreements were followed  
9 by the Act of April 28, 1904, 3 stat.573, which supplanted  
10 the Tribal Laws and put the laws of Arkansas, in effect, in  
11 Indian territory.

12 Q That part of Indian territory.

13 A Yes; that is correct.

14 Now, in 1901 an Act of Congress was passed making  
15 all members of the five civilized tribes, including Cherokees  
16 and Choctaws and Chicasaws, making them citizens of the United  
17 States. Now, in the Acts of April 26, 1906, continued tribal  
18 governments for limited purposes, pending termination at some  
19 future state and for regulation of tribal affairs under the  
20 Interior Department.

21 The Interior Department was given complete and  
22 comprehensive regulation over the tribes. The Cherokees and  
23 Choctaws became citizens of the United States as a result of  
24 these Congressional Acts and as citizens of the territory, they  
25 voted with other citizens in the elections concerned with the

1 admission of Oklahoma to the Union. And Oklahoma was admitted  
2 on November 16, 1907.

3 Now, the tribes continued to exist in a sort of  
4 de jure form. They had practically everything -- there was very  
5 little that their tribal governments have to decide. They have  
6 no legislative powers; they have very limited administrative  
7 powers; everything they do has to be approved by the Department  
8 of the Interior. Mr. W. F. Semple, Counsel for the Choctaws  
9 for many years, and later on their principal chief, in a text-  
10 book written by him on Oklahoma Indian land titles, said: "The  
11 Act of Congress of April 26, 1906, and continuing with the  
12 tribal governments, also provided that the President of the  
13 United States could remove the tribal chiefs or appoint one in  
14 case of death or removal. All of the civilized tribes had a  
15 Chief or Governor, although in the Cherokee and Seminole Nations  
16 there are very few unsold common properties.

17 "Their duties are principally to sign deeds to the  
18 remaining land and employ attorneys to handle <sup>claims</sup> against the  
19 Government.

20 Q When did the Indians there become voters in  
21 Oklahoma?

22 A Upon Oklahoma statehood, November 16, 1908.

23 Q I recall Senator Owens. As a Senator, was he  
24 elected?

25 A Senator Owens was elected in the first election.



1 Q First election?

2 A Yes; he was a Cherokee.

3 Section 28 of the Act of April 6, 1906 -- I am  
4 still reading from Mr. Sample -- says: "That the tribal govern-  
5 ment shall be continued and in full force and effect for all  
6 purposes authorized by law unless otherwise provided by law,  
7 but in fact, the legislative have long since ceased  
8 to function. The tribal laws were supplanted by the Act of  
9 April 28, 1904 which put the laws of Arkansas in force and  
10 effect for Indian territory as to Indians, Freedmen and white  
11 persons alike.

12 Now, some interest has been expressed as to the  
13 present status of the Indian tribes in Oklahoma as to their  
14 schooling. This is common knowledge, which counsel for the  
15 Choctaws and Cherokees know, but it hasn't been divulged, so  
16 we are going to cite House Report Number 2503, dated December  
17 15, 1952.

18 Q Not in your brief?

19 A No, it is not in the brief. We didn't know that  
20 matter was going to become an issue here.

21 Q Could you give us that citation again?

22 A House Report Number 2503, 82nd Congress, 2nd  
23 Session, dated December 15, 1952. The only thing I wanted to  
24 read for you was this statement:

25 "There are no reservations for Cherokee or Choctaws

1 or Chicasaws in Oklahoma."

2 Q There are no what?

3 A Reservations. Their lands were allotted in  
4 severalty; they are citizens. They live in a community like  
5 everybody else.

6 Q Is there anything in this record that says that  
7 they are not, as of today, Nations?

8 A Well, actually, I think the Nation business was  
9 put to rest in the case of the Cherokees versus Georgia in which  
10 Mr. Chief Justice Marshall stated that the Cherokees were not  
11 Nation, so that that could bring an action in the United States  
12 Courts. And he had --

13 Q Is there anything in this record to show that  
14 they are not tribes?

15 A No; nothing. They are certainly tribes.

16 Q Well, if they are tribes, why don't they have  
17 the right to maintain this suit?

18 A We don't question their right to maintain this  
19 suit.

20 Q Well, what is the claim you are making on that  
21 particular point that they don't have reservations?

22 A Well, the Court was interested in that question  
23 and we attempted to provide the information. I didn't think it  
24 was particularly material, except that they are civilized  
25 members of the community.

1 Q They are citizens and officeholders out there,  
2 aren't they?

3 A Right; they are, all over the State. Why, you  
4 can't tell when you are talking to a Cherokee or --

5 Q Do they look just like other people?

6 A I've been raised with them all my life and I  
7 never know whether my neighbor is a Cherokee or Choctaw or what  
8 he is, they are mixed with whites so much.

9 Q Former Chief Judge of the Court of Criminal  
10 Appeals, Judge Barefoot was a Cherokee.

11 A Right. They are completely immersed in the  
12 community. They are just like all of the rest of us, in fact,  
13 one of my counsel here, Mr. Groom, is part Cherokee. If you  
14 would like to look at a Cherokee Indian --

15 Now, in regard to the schooling: we have a 1952  
16 report -- this is House Report Number 2503, 82nd Congress 2nd  
17 Session, and seems to be the last one that's been made on  
18 Agency Area Statistics on Indian Education. Now, the data here  
19 that I am going to read are data on Indian children ages 6 to  
20 18 inclusive, having one-fourth degree or more Indian blood,  
21 and covers Fiscal Year 1952.

22 Now, five civilized tribes -- we left them separate  
23 all the way through, I think. They lumped the five civilized  
24 tribes together: Cherokees, Choctaws, Chicasaws, Seminoles and  
25 Creeks.

1 Q And what?

2 A And Creeks.

3 Children attending public schools -- the five  
4 civilized tribes -- 13,894; children attending government  
5 schools, 1,864. Roughly 90 percent are attending public  
6 schools and the others attend government schools.

7 Q Could I go back a moment with you, sir. Is it  
8 your contention here that if a patent to either one of these  
9 tribes had specifically and expressly said that the river bed  
10 of the Arkansas is included in the grant, wouldn't that be an  
11 admission that there would have been no conveyance?

12 A No, fortunately we don't have to make that  
13 contention.

14 Q Well, I think you do --

15 A Well, if there were sufficient evidence for it.  
16 I don't think Congress's powers to deal with the lands --

17 Q If these patents are sufficiently clear in the  
18 sense that they fully intended to convey all or part of the  
19 river beds, you would say that the United States had the power  
20 to do that?

21 A I would question that exercise of power, Mr.  
22 Justice White; fortunately, we don't have to do that. I would  
23 question that exercise of power.

24 Q Wouldn't you say -- looking at your brief, it  
25 seems to me you have pretty well conceded that the patents to

1 Cherokee, for example, where, from the mouth of the Canadian  
2 to the boundary of the State of Arkansas, that if you just read  
3 that patent you end up on the western boundary of the State of  
4 Arkansas on the south side of the river. That's what the  
5 patent says: to the northerly point of the eastern boundary of  
6 Choctaw lands on the south side of the river.

7 A I believe it says "at the south side of the  
8 river;" isn't that correct?

9 Q Yes.

10 A Which is different.

11 Q And you say it would have been a lot better had  
12 that patent said, "opposite."

13 A We said that in our brief; that is correct.

14 Q And then you resort to field notes of a survey.  
15 What is your understanding in Oklahoma as to what controls a  
16 deed or patent?

17 A Well, field notes are evidence, I would say. In  
18 this case they are evidence. We're not saying that --

19 Q Do you know any cases in Oklahoma where field  
20 notes override the clear deed?

21 A No, sir; and we don't contend these field notes  
22 override the --

23 Q Do you disagree, then, that in this patent the  
24 call for the southeastern corner of the Cherokee lands is on  
25 the south side of the Arkansas River?



1           A     We say it would be on the south bank of the  
2 Arkansas River.

3           Q     Now remember, that's on the south --

4           A     Cherokees? No; the Cherokees are on the north.

5           Q     Then how could you possibly read that patent  
6 that way when it says that when you go from the mouth of the  
7 Canadian down the river to the boundary of Arkansas you end up  
8 at a point on the northeast/point of Choctaw land and on the south  
9 side of the river.

10          A     That is merely for the purpose of locating --

11          Q     Where the southeast corner of Cherokee land is.

12          A     No, I don't agree with that.

13          Q     Well, you don't explain it in your brief, so I  
14 am just wondering how you explain it here.

15          A     We contend that is merely location.

16          Q     The only thing you can do is to go and --

17          A     We contend that is merely a location point and  
18 the evidence of the field notes is pertinent on the subject.

19          Q     And you say when the patent says on the south  
20 side of the Arkansas River it didn't mean that?

21          A     Well, we don't exactly say that; we say that's  
22 merely a location.

23          Q     A location for what?

24          A     It's a location for the lower end of this land.

25          Q     Well, isn't that the eastern here?

1           A     The issue is whether the entire bed of the river  
2 is included -- and if there is clear and definite language that  
3 would justify and warrant the inclusion of this entire bed of  
4 this river. We say there is no such language.

5           Q     Well, it says one corner of the Cherokee lands  
6 is at the northern extremity of the eastern boundary of the  
7 lands of the Choctaws.

8           A     The word "at," if you will note the footnote.

9           Q     Is at the northern extremity of the eastern  
10 boundary of the land of the Choctaws, on the south bank of the  
11 Arkansas River.

12          A     All right; that's my point. That's --

13          Q     That doesn't mean it's there at all?

14          A     Oh, no. That means the vicinity -- we give them  
15 that in the note there -- it is our contention to review  
16 -- this is to establish navigable waters years prior to the time  
17 of these treaties and patents that when the treaties and patents  
18 were made, there was no description of the river bed that would  
19 constitute a conveyance of the river bed. We contend that the  
20 provisions of the treaties to the effect that no future state --  
21 that the lands ceded will never be included in any future  
22 territory or state, simply did not forever renounce the  
23 possibility of this land ever becoming a part of a future  
24 state or territory; that the government did not violate its  
25 covenant with the Indians; that it sought their consent; that

1 it got their consent; that they agreed to be included in a  
2 future territory or state and that the Government has kept  
3 faith with them and that the basis of their entire argument  
4 false.

5 Q How long after the admission of Oklahoma to the  
6 Indians was the first lease made of the river bed by the State  
7 of Oklahoma to outsiders?

8 A I have -- we do not have a record exactly of  
9 that. Of course, we have called the Court's attention to a  
10 ruling by the Interior Department in 1908 to the effect that the  
11 Cherokees did not own this land. It was submitted to them and --

12 Q Who submitted it?

13 A The <sup>Loweree Rucker</sup> Company made a request for a  
14 lease from the Interior Department. A letter was written as an  
15 opinion by the Acting Commissioner of Indian Affairs, and  
16 approved by the Secretary of the Interior. This letter was  
17 written in response to an application made by the <sup>Loweree Rucker</sup>  
18 Company to the Interior Department for permission to enter into  
19 a contract to take sand and gravel from the Arkansas River.  
20 In denying jurisdiction in the matter, the Acting Commissioner  
21 said, after citing authorities, among them Shively versus  
22 Bowlby.

23 In other words, when the United States conveyed by  
24 warranty deed the lands occupied by the Cherokees, Creeks,  
25 Choctaws, Chicasaws and Seminoles, they did not convey the

1 ownership of the beds of navigable streams but reserved them  
2 for the benefit of the future state within whose boundaries  
3 they would fall.

4 Q And what's the date of that?

5 A March 27, 1908; approved by the Secretary of  
6 the Interior.

7 Now, that has remained unchallenged by either  
8 Cherokees or Choctaws for almost 60 years.

9 Q Then has Oklahoma been exercising dominion,  
10 among other things, by leasing the river beds for 60 some years?

11 A It has; yes. Now, we have records in the  
12 Supreme Court of Oklahoma -- cases from 1913 to 1940, and I can  
13 give you the citations of those: The United States versus --  
14 also in the Federal Courts -- the United States versus Mackie,  
15 214 Fed.137, 1913. State versus Nolegs, 139 Pac.943(1914).  
16 Rail Oil and Gas Company versus the United States, 1922.

17 Q What's the thrust of these; what's the point of  
18 these cases?

19 A They all show exercise of dominion over the  
20 river bed by the State of Oklahoma in the official court reports.

21 Q If you wish, you may supply those citations as  
22 they are not in your briefs.

23 A Very well, thank you.

24 So, we have a ruling by the Interior Department on  
25 the subject; we have these successive assertions of title by

1 the state evidenced in these various decisions I have cited.

2 Q You also have the position of the United States  
3 as stated by the Solicitor General as of today.

4 A Yes, we have that as stated today; that is  
5 correct. They differ from their previous position; at least  
6 the Department of Justice does.

7 Now, there is one thing that Mr. Kile has called to  
8 the Court's attention, to the fact that should the controversy  
9 be decided in favor of the Indians there would be a controversy  
10 between the Cherokees and the Choctaws.

11 In the trial court and also appearing as amicus  
12 curiae in the Court of Appeals we have a representative of  
13 certain riparian landowners, who, if the Indians should become  
14 victorious, the tribe under whom they claim, they are the  
15 present grantees of the allottees of the riparian lands from  
16 the Choctaws. They, undoubtedly will, and their interest in  
17 this case/<sup>was</sup>that they would seek to recover the river beds from  
18 the Choctaws as riparian proprietors, and those questions all  
19 would remain to be settled, also.

20 Q Can I get back to one detail, please. You  
21 certain agree that the patent of the Cherokees was prepared  
22 from Mr. McCoy's field notes?

23 A Correct.

24 Q And plats; how do you know that?

25 A Well, the records show that --



1 Q What records?

2 A They are unchallenged; we made the assertion in  
3 our brief and its unchallenged. We can produce the records if  
4 you like.

5 Q Well, what record would it be?

6 A Well, it could be --

7 Q How could you ever know who --

8 A The War Department instructed Mr. -- the  
9 Secretary of War instructed Mr. Isaac McCoy to make this survey.

10 Q There is no question he made the survey, filed  
11 his notes and his plats, but I am just wondering whether --  
12 what happens to Mr. McCoy's notes and plats as to the patents.

13 A That was stated to be the purpose of making this  
14 survey.

15 Q But there is no reference to the survey in the  
16 patent.

17 A No; the patent was granted after the survey.

18 Your Honor, I believe my time has elapsed and --

19 MR. CHIEF JUSTICE BURGER: Not quite; not quite.

20 MR. KIRK: Are there any more questions?

21 MR. CHIEF JUSTICE WHITE: I think not.

22 Thank you, Mr. Kirk.

23 Mr. Ford, are you dividing the remaining time or are  
24 you using it all? You have 14 minutes.

25 MR. FORD: Unless the Court has some questions to

1 ask me, I have no rebuttal.

2 MR. CHIEF JUSTICE BURGER: Gentlemen, we thank you  
3 for your submission. The case is submitted.

4 (Whereupon, at 11:45 o'clock a.m. the argument in  
5 the above entitled case was concluded)

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