No. 79, Original

In the Supreme Court of the United States

October Term, 1983

STATE OF OKLAHOMA,
Plaintiff,

vs.

STATE OF ARKANSAS,
Defendant.

REPORT OF SPECIAL MASTER

WILLIAM H. BECKER
United States Senior District Judge
Special Master

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

TABLE OF CONTENTS

Table of Cases

No. 79, Original

In the Supreme Court of the United States

October Term, 1983

STATE OF OKLAHOMA,
Plaintiff,

vs.

STATE OF ARKANSAS,
Defendant.

REPORT OF SPECIAL MASTER

NATURE OF CASE AND CONTROVERSY

This case was brought originally in the Supreme Court of the United States (Supreme Court) by the State of Oklahoma (Oklahoma) against the State of Arkansas (Arkansas) to determine a controversy between Oklahoma and Arkansas concerning which State has sovereign control over a tract of land, sovereign control of which is claimed by both States.

JURISDICTION

The Supreme Court has original jurisdiction of this controversy pursuant to provisions of Article III, Section 2, of the Constitution of the United States, and of 28 U.S.C. § 1251(a) (as amended effective December 29, 1978). This is conceded by each of the parties, Oklahoma and Arkansas.

THE PARTIES

The only parties to this original case are the States, Oklahoma and Arkansas. Therefore, the recommendations of the Special Master in this report concern only the sovereign rights of Oklahoma and Arkansas over the disputed tract of land, and possible rights of others derived from or dependent on the rights of Oklahoma and Arkansas.

The recommendations herein do not directly concern the rights, if any, of parties that are not joined in this action including, but not limited to, the Choctaw, Chickasaw and Cherokee Nations and Tribes and individual members thereof.

APPOINTMENT OF SPECIAL MASTER

The Honorable William H. Becker, United States Senior Judge for the Western District of Missouri, was appointed Special Master and directed "to submit such reports as he may deem appropriate." *Oklahoma v. Arkansas,* 439 U.S. 1124, 99 S.Ct. 1038, 59 L.Ed.2d 85 (1979). After directing the proceedings described hereinafter, the Special Master submits this report.

THE PLEADINGS

On April 19, 1978, Oklahoma filed in the Supreme Court a Motion for Leave to File Bill of Complaint and Complaint. In response, on May 19, 1978, Arkansas filed a Motion and Memorandum in Support of Motion to Deny Leave to File Bill of Complaint. The Motion for Leave to File Bill of Complaint was granted by the Supreme Court, and Arkansas was allowed sixty days in which to answer.

Oklahoma v. Arkansas, 439 U.S. 812, 99 S.Ct. 71, 58 L.Ed. 2d 104 (1978). Arkansas filed its Answer to the Complaint on November 29, 1978.

Allegations of the Complaint of Oklahoma

In the Complaint, Oklahoma alleged in substance and in part: (1) that pursuant to an Act of Congress, dated June 16, 1906, providing enabling legislation for the creation of the State of Oklahoma, the inhabitants of the Territory of Oklahoma and Indian Territory, as they then existed, adopted a constitution, and upon the issuance of a Proclamation of Statehood, dated November 16, 1907, became the State of Oklahoma; (2) that Article I of the Constitution of the State of Arkansas, adopted September 7, 1874, recognized the acts of Congress and treaties existing January 1, 1837, establishing Indian Territories, and defined the western "border" of Arkansas to coincide with the eastern boundary of Indian Territory; (3) that Arkansas erroneously asserts sovereignty over a tract of land which was originally a portion of Indian Territory and which, by virtue of the incorporation of all Indian Territory into the State of Oklahoma upon the entry of Oklahoma into the Union, now lies entirely within the "borders" of Oklahoma; (4) that the assertion of sovereignty by Arkansas over the tract of land is apparently based upon an Act of Congress dated February 10, 1905; (5) that the Act of February 10, 1905 served only to extend the police powers of Arkansas over the disputed tract of land until the admission of Oklahoma into the Union, at which time it was anticipated that those police powers and attendant duties and obligations would be assumed by Oklahoma; (6) that the temporary powers accorded Arkansas by the Act of February 10, 1905 were automatically terminated upon the admission of Oklahoma into the Union; and (7)

that Arkansas wrongfully continues to assert sovereignty and control over the tract of land.

Oklahoma prayed for a declaratory judgment under 28 U.S.C. §§ 2201 and 2202 declaring the disputed tract of land to be within the boundaries of Oklahoma and directing the termination of any rights of sovereignty asserted by Arkansas over the tract of land.

Answer of Arkansas

In its Answer, Arkansas admitted in substance and in part: (1) that pursuant to an Act of Congress, dated June 16, 1906, the inhabitants of the Territory of Oklahoma and Indian Territory, as they then existed, adopted a constitution, and upon the issuance of a Proclamation of Statehood, dated November 16, 1907, became the State of Oklahoma; (2) that the Constitution of the State of Arkansas, adopted in 1874, declared that the State of Arkansas was "bounded on the west to the north bank of Red River, as by act of Congress and treaties existing January 1, 1837, defining the western limits of the Territory of Arkansas," and that the above described western boundary of Arkansas coincided with the eastern boundary of Indian Territory; (3) that the disputed tract of land was originally a portion of Indian Territory; and (4) that the assertion of sovereignty over the tract of land by Arkansas is based upon an Act of Congress dated February 10, 1905.

Arkansas denied all allegations of Oklahoma which were not specifically admitted by Arkansas, thereby denying, among other things, the allegations of Oklahoma that the Act of Congress dated February 10, 1905 served only to extend the police power of Arkansas over the disputed tract of land until the admission of Oklahoma into the Union.

Arkansas also alleged that the assertion of sovereignty by Arkansas over the tract of land is also based upon an Act of the State legislature of Arkansas, dated February 16, 1905, enacted pursuant to the Act of Congress of February 10, 1905. As an affirmative defense, Arkansas alleged that the long acquiescence by Oklahoma in the possession of Arkansas of the disputed tract of land, and the long and continuous exercise of dominion and sovereignty by Arkansas over the tract of land, bar this action and are conclusive of "Arkansas's title."

THE PROCEEDINGS BEFORE THE SPECIAL MASTER

On January 22, 1979, the Special Master was appointed by the Supreme Court "with authority to fix the time and conditions for the filing of additional pleadings and to direct subsequent proceedings, and with authority to summon witnesses, issue subpoenas, and take such evidence as may be introduced and such as he may deem necessary to call for." *Oklahoma v. Arkansas, supra,* 439 U.S. 1124, 99 S.Ct. 1038, 59 L.Ed.2d 85 (1979).

On March 13, 1979, the Special Master entered of record a Request to Counsel requesting, among other things, that counsel confer and stipulate in writing to uncontroverted facts; that counsel submit in writing a schedule of the sequence of actions necessary and desirable for efficient "pretrial" and "trial" before the Special Master; that counsel include in the schedule the applicable processes, if any, described in the *Manual for Complex Litigation;* and that counsel submit in writing a plan for prepayment of the allowable expenses of a court reporter.

By letter dated May 14, 1979, the Special Master received a written report from counsel stating, among other

things, that it appeared possible to stipulate to all the pertinent facts; that counsel for Oklahoma had undertaken to prepare a preliminary draft of stipulation to be submitted to Arkansas; that counsel had agreed that this was not complex litigation as contemplated by the *Manual for Complex Litigation;* and that Oklahoma had agreed to prepay all allowable expenses of a court reporter, reserving a right to request reimbursement should Oklahoma succeed on the merits.

After a prehearing conference on August 27, 1979, before the Special Master with counsel for both parties present, the Special Master entered an order on August 29, 1979, setting a time schedule for the completion of the prehearing processes. Pursuant to this order of August 29, 1979, counsel filed the following:

(1) Plaintiff's List of Numbered Exhibits, Submission of Numbered Copies of Exhibits to Opposing Counsel, Filing Lists of Witnesses and Submission of Proposed Stipulations of Fact.

(2) Defendant's List of Numbered Exhibits, Submission of Numbered Copies of Exhibits to Opposing Counsel, Filing Lists of Witnesses and Submission of Proposed Stipulations of Fact.

(3) Plaintiff's Final List of Numbered Exhibits; Submission of Additional Numbered Copies to Opposing Counsel; Final List of Witnesses; and Submission of Final Proposed Stipulations of Fact.

On December 11, 1979, the Special Master entered a Prehearing Order (attached to this report without caption and signatures as Special Master's (SM) Exhibit 1) which, among other things, listed the admitted facts which required no proof; found that there were no issues of fact

remaining to be litigated upon "trial;" set forth a stipulation of counsel to the "authenticity, genuineness, due execution and admissibility" of exhibits listed therein; and set forth the issues of law which remained to be litigated upon "trial."

Thereafter, pursuant to the order of August 29, 1979, Oklahoma filed its Prehearing Brief of the Plaintiff containing among other things numerous unproven factual contentions; Arkansas filed its Prehearing Brief of the Defendant; and Oklahoma filed its Prehearing Reply Brief of the Plaintiff.

A second prehearing conference was held before the Special Master with counsel for both parties present on July 28, 1980. At this conference the Special Master expressed his concern that all the factual contentions in the Prehearing Brief of the Plaintiff Oklahoma may not have been supported by a judicially noticeable source or by a stipulated fact or document listed in the Prehearing Order of December 11, 1979. Therefore, counsel for Oklahoma was requested to file an amended prehearing brief eliminating the alleged factual history and background which was not uncontroverted, not stipulated as true, or not contained in authenticated documents. Counsel for Oklahoma was further directed to file a motion or request under Rule 201 of the *Federal Rules of Evidence* (F.R.E.) for judicial notice of the unstipulated, alleged facts upon which Oklahoma relied. Thereafter, these requests of the Special Master were set forth in a Memorandum to Counsel Concerning Amended Prehearing Briefs, filed November 6, 1980.

Pursuant to these requests, Oklahoma filed (1) an Amended Prehearing Brief of the Plaintiff, and (2) a Motion (under Rule 201, F.R.E.) for the Special Master to

Take Judicial Notice of Facts. Arkansas filed a Response to Motion (of Oklahoma) for the Special Master to Take Judicial Notice of Facts, with a supporting memorandum. Thereafter, Oklahoma filed a Reply to Response of the State of Arkansas to Motion to Take Judicial Notice of Facts. A ruling by the Special Master on the motion of Oklahoma to take judicial notice was reserved, and is contained in this report.

At the prehearing conference of July 28, 1980, the Special Master also gave counsel an opportunity to file supplemental briefs discussing any recent relevant Supreme Court decisions including, but not limited to, *California v. Nevada,* 447 U.S. 125, 100 S.Ct. 2064, 65 L.Ed.2d 1 (1980). A Supplemental Memorandum Brief discussing the issues presented in *California v. Nevada, supra,* was filed by Arkansas. A supplemental brief was not filed by Oklahoma.

The final plenary and evidentiary hearing and oral arguments were held before the Special Master at Fort Smith, Arkansas, on July 23, 1981. A summary of the documents and evidence placed into the record at the final hearing follows.

The Record of the Final Hearing of July 23, 1981

At the final evidentiary hearing of July 23, 1981, the entire Prehearing Order of December 11, 1979 (SM Exhibit 1) and all the stipulated facts and exhibits listed therein were offered by Oklahoma and were admitted without objection into evidence. Transcript of Hearing of July 23, 1981 (Tr.) 7-9. In addition, the Special Master directed entry of the following transcripts into the record (Tr. 4-5):

(1) Transcript of the prehearing conference of August 27, 1979, entered as Court's Exhibit 1.

(2) Transcript of the prehearing conference of July 28, 1980, entered as Court's Exhibit 2.

The following parts of the record before the Special Master were offered by Arkansas and were conditionally admitted subject to a determination of their relevancy and materiality in arriving at recommended findings of fact by the Special Master (Tr. 28-30):

(1) Request to Counsel, filed March 13, 1979.

(2) Orders of Special Master Setting Schedule for Completion of Prehearing Processes, . . . , filed August 29, 1979.

(3) Defendant's List of Numbered Exhibits, Submission of Numbered Copies of Exhibits to Opposing Counsel, Filing Lists of Witnesses and Submission of Proposed Stipulations of Fact, filed October 27, 1979.

(4) Plaintiff's Final List of Numbered Exhibits; Submission of Additional Numbered Copies to Opposing Counsel; Final List of Witnesses; and Submission of Final Proposed Stipulations of Fact, filed November 16, 1979.

(5) Order Extending Time for Filing of Prehearing Briefs, filed December 5, 1979.

(6) Prehearing Brief of the Plaintiff, filed January 7, 1980.

(7) Prehearing Brief of the Defendant, filed February 14, 1980.

(8) Prehearing Reply Brief of the Plaintiff, filed March 3, 1980.

(9) Supplemental Memorandum Brief (of the defendant), filed August 8, 1980.

(10) Amended Prehearing Brief of Plaintiff, filed September 2, 1980.

(11) Memorandum to Counsel Concerning Amended Prehearing Briefs, filed November 6, 1980.

(12) Entry of Appearance (on behalf of the plaintiff), filed June 18, 1981.

(13) Order Setting Final Hearing and Oral Arguments, filed July 1, 1981.

(14) Entry of Appearance (on behalf of the defendant), filed July 15, 1981.

Ruling on the motion by Oklahoma to take judicial notice of facts was reversed (Tr. 9-11, 17-20). In regard to the motion for judicial notice, the following pleadings were entered into the record:

(1) Motion for the Special Master to Take Judicial Notice of Facts, filed December 3, 1980.

(2) Response to Motion for the Special Master to Take Judicial Notice of Facts, filed January 20, 1981.

(3) Reply to Response of the State of Arkansas to Motion to Take Judicial Notice of Facts, filed January 29, 1981.

Although the parties were given an opportunity, no witnesses were called and no further evidence was offered by either party.

Thereafter, the action was ordered submitted before the Special Master.

RECOMMENDED RULING ON MOTION OF OKLAHOMA TO TAKE JUDICIAL NOTICE

The Motion for the Special Master to Take Judicial Notice of Facts, filed by Oklahoma, is attached to this report (without caption and signatures) as SM Exhibit 2. The following rulings on that motion are recommended. It is recommended that paragraphs (1), (2) and (3) of the motion be granted and the facts judicially noticed to the extent incorporated in the recommended findings of fact herein. Further, it is recommended that paragraphs (4) to (14), inclusive, of the motion be denied for failure to comply with Rule 201, F.R.E., and rules of evidence relating to judicial notice in original proceedings in the Supreme Court. The adjudicative facts included in the Motion for the Special Master to Take Judicial Notice of Facts have been included in the recommended findings of fact to the extent material and relevant.

RECOMMENDED FINDINGS OF FACT

As noted above, the parties have stipulated to the material facts and to the authenticity and admissibility of all exhibits.[1] After reviewing the stipulated facts and exhibits, and the relevant statutes and treaties, the Special Master recommends the following findings of fact:

1. Oklahoma brought this case to determine whether Oklahoma or Arkansas has sovereign control, claimed by

---

1. The stipulated facts are listed in Section III, paragraphs 1 through 17, of the Prehearing Order of December 11, 1979 (SM Exhibit 1). The stipulation to the authenticity and admissibility of the exhibits and a list of the exhibits admitted in evidence are set forth in Section V of the Prehearing Order (SM Exhibit 1).

both States, over a tract of land. The tract in question (referred to hereinafter as the "disputed tract") is described in the stipulation of the parties as follows:

> As shown by the "Original Field Notes of Township 8 and 9 North Range 32 West" of the original government surveyor, William Clarkson, Jr., dated December 28, 1828 (Plaintiff's Exhibit B) and by the map of the United States Surveyor John Fisher, prepared in 1904 (Plaintiff's Exhibit A), there was a tract of land containing 55 acres more or less bounded on the East by the Western boundary of the State of Arkansas and on the West by the Poteau and Arkansas Rivers, hereafter referred to as the disputed tract.

Stipulated Facts, SM Exhibit 1, Section III, Paragraph 3. The above description contains a minor clerical error.[2]

2. The disputed tract was acquired by the United States in the Louisiana Purchase of 1803. Under the "Treaty with the Choctaws, 1820," commonly referred to as the Treaty of Doak's Stand,[3] the Choctaw Nation of In-

---

2. The stipulated description of the disputed tract is technically incorrect. The State of Arkansas was not admitted into the Union until 1836. Therefore, as shown by the map of William Clarkson, Jr., dated December 28, 1828 (Plaintiff's Exhibit B), the disputed tract was bounded on the east by the western boundary of the Territory of Arkansas and not the State of Arkansas. The stipulated description correctly states that, as shown by the map of John Fisher, prepared in 1904 (Plaintiff's Exhibit A), the disputed tract was bounded on the east by the western boundary of the State of Arkansas. It is the extension of that western boundary of Arkansas in 1905 to include the disputed tract that is challenged in this action. Defendant's Exhibits K, L, M, N and O are additional maps of the general area in question.

3. The early history of the Choctaw Nation and the removal of the Choctaw Indians from the State of Mississippi to land now in Oklahoma and Arkansas was discussed by the Supreme Court in *United States v. John*, 437 U.S. 634, 98 S.Ct. 2541,

(Continued on following page)

dians ceded to the United States a tract of land located east of the Mississippi River; in consideration and part satisfaction for this cession, the United States ceded to the Choctaw Nation a tract of land described in Article 2 of the Treaty of 1820 as follows:

> [A] tract of country west of the Mississippi River, situate between the Arkansas and Red River, and bounded as follows: — Beginning on the Arkansas River, where the lower boundary line of the Cherokees strikes the same; thence up the Arkansas to the Canadian Fork, and up the same to its source; thence due South to the Red River; thence down Red River, three miles below the mouth of Little River, which empties itself into Red River on the north side; thence a direct line to the beginning.

Treaty with the Choctaws, 1820, 7 Stat. 210 at 211 (October 18, 1820); Stipulated Facts, SM Exhibit 1, Section III, Paragraph 4; Plaintiff's Exhibit D-1. The disputed tract was within the boundaries of the land ceded to the Choctaw Nation under the Treaty of 1820. Stipulated Facts, SM Exhibit 1, Section III, Paragraph 4.

Footnote continued—

57 L.Ed.2d 489 (1978), and cases therein cited. At the time of the Revolutionary War, the Choctaw Indians occupied large areas of land in the present State of Mississippi. When Mississippi became a State on December 10, 1817, the Choctaw Indians had claims, recognized by the United States under several treaties with the Choctaw Nation, to large areas of land within Mississippi. "The popular pressure to make these lands available to non-Indian settlement, and the responsibility for these Indians felt by some in the Government, combined to shape a federal policy aimed at persuading the Choctaws to give up their lands in Mississippi completely and to remove to new lands in what for many years was known as the Indian Territory, now a part of Oklahoma and Arkansas. The first attempt to effectuate this policy, the Treaty of Doak's Stand, 7 Stat. 210 (1820), resulted in an exchange of more than 5 million acres." *United States v. John, supra*, 437 U.S. 634, 98 S.Ct. 2541, 57 L.Ed.2d 489 at 493-494 (1978).

3. Five years later, under the "Treaty with the Choctaws, 1825," the Choctaw Nation ceded back to the United States an eastern portion of the land the Choctaw Nation acquired under the Treaty with the Choctaws, 1820. The land ceded by the Choctaw Nation to the United States was described in Article 1 of the Treaty with the Choctaws, 1825 as follows:

> The Choctaw Nation do hereby cede to the United States all that portion of the land ceded to them by the second article of the Treaty of Doak Stand, as aforesaid, lying east of a line beginning on the Arkansas, one hundred paces east of Fort Smith, and running thence, due south, to Red river: it being understood that this line shall constitute, and remain, the permanent boundary between the United States and the Choctaws; and the United States agreeing to remove such citizens as may be settled on the west side, to the east side of said line, and prevent future settlements from being made on the west thereof.

Treaty with the Choctaws, 1825, 7 Stat. 234 at 234-235 (January 20, 1825); Stipulated Facts, SM Exhibit 1, Section III, Paragraph 5; Plaintiff's Exhibit D-2. The "line" set forth in Article 1 of the Treaty of 1825 was the last adjustment of the eastern boundary of the Choctaw lands and the western boundary of Arkansas south of the Arkansas River, until 1905. Stipulated Facts, SM Exhibit 1, Section III, Paragraph 5.

4. In 1828 the western boundary of the Territory of Arkansas as it then existed was defined in the "Treaty with the [Western] Cherokees, 1828" (Plaintiff's Exhibit D-3) by referring to the "Eastern Choctaw line." Article 1 of the Treaty with the [Western] Cherokees, 1828 provided:

> The Western boundary of Arkansas shall be, and the same is, hereby defined, viz: A line shall be run, commencing on Red River, at the point where the Eastern Choctaw line strikes said River, and run due North with said line to the River Arkansas, thence in a direct line to the South West corner of Missouri.

Treaty with the [Western] Cherokees, 1828, 7 Stat. 311 (May 6, 1828); Stipulated Facts, SM Exhibit 1, Section III, Paragraph 2; Plaintiff's Exhibit D-3.

5. Two years later, by the "Treaty with the Choctaws, 1830," also known as the Treaty of Dancing Rabbit Creek, the United States agreed to convey to the Choctaw Nation *in fee simple* the land ceded to the Choctaw Nation under the previous Treaty of 1820 and as reduced by the Treaty of 1825. Articles II and IV of the Treaty with the Choctaws, 1830, stated:

> Article II. The United States under a grant specially to be made by the President of the U. S. shall cause to be conveyed to the Choctaw Nation a tract of country west of the Mississippi River, *in fee simple* to them and their descendants, to inure to them while they shall exist as a nation and live on it, beginning near Fort Smith where the Arkansas boundary crosses the Arkansas River, running thence to the source of the Canadian fork; if in the limits of the United States, or to those limits; thence due south to Red River, and down Red River to the west boundary of the Territory of Arkansas; thence north along that line to the beginning. The boundary of the same to be agreeably to the Treaty made and concluded at Washington City in the year 1825. The grant to be executed so soon as the present Treaty shall be ratified.
>
> * * *

> Article IV. The Government and people of the United States are hereby obliged to secure to the said Choctaw Nation of Red People the jurisdiction and government of all the persons and property that may be within their limits west, so that no Territory or State shall ever have a right to pass laws for the government of the Choctaw Nation of Red People and their descendants; and that no part of the land granted them shall ever be embraced in any Territory or State; but the U. S. shall forever secure said Choctaw Nation from, and against, all laws except such as from time to time may be enacted in their own National Councils, not inconsistent with the Constitution, Treaties, and Laws of the United States; and except such as may, and which have been enacted by Congress, to the extent that Congress under the Constitution are required to exercise a legislation over Indian Affairs. But the Choctaws, should this Treaty be ratified, express a wish that Congress may grant to the Choctaws the right of punishing by their own laws, any white man who shall come into their nation, and infringe any of their national regulations. [Emphasis added.]

Treaty with the Choctaws, 1830, 7 Stat. 333 at 333-334 (September 27, 1830); Plaintiff's Exhibit D-4.[4]

---

4. The historical background of the three Treaties with the Choctaw Nation, dated 1820, 1825 and 1830, was discussed in *United States v. John, supra,* 437 U.S. 634, 98 S.Ct. 2541, 57 L.Ed.2d 489 at 493-495 (1978); *Choctaw Nation v. Oklahoma,* 397 U.S. 620, 90 S.Ct. 1328, 25 L.Ed.2d 615 at 618-620 (1970), *rehearing denied,* 398 U.S. 945, 90 S.Ct. 1834, 26 L.Ed.2d 285 (1970); *Choctaw Nation v. United States,* 119 U.S. 1, 7 S.Ct. 75, 30 L.Ed. 306 at 318-319 (1886); and cases therein cited. In *United States v. John, supra,* 437 U.S. 634, 98 S.Ct. 2541, 57 L.Ed.2d 489 at 493-495 (1978), the Supreme Court noted that after the Treaty of 1820 most Choctaws remained in Mississippi because of "complications arising when it was discovered that much of the land

(Continued on following page)

6. The State of Arkansas was admitted into the Union on June 15, 1836. Act of June 15, 1836, 5 Stat. 50; Stipulated Facts, SM Exhibit 1, Section III, Paragraph 1. By referring to the Treaty with the [Western] Cherokees, 1828, quoted in part above, Congress defined the western boundary of the State of Arkansas as beginning at the southwest corner of the state of Missouri and "from thence to be bounded on the west, to the north bank of Red river, by the lines described in the first article of the treaty between the United States and the [Western] Cherokee nation of Indians west of the Mississippi, made and concluded at the city of Washington on the 26th day of May, in the year of our Lord one thousand eight hundred and twenty-eight." Act of June 15, 1836, 5 Stat. 50 at 51; Stipulated Facts, SM Exhibit 1, Section III, Paragraph 2.

7. In 1837 the Choctaw and Chickasaw Tribes agreed with the United States that the Chickasaw Indians could form a "Chickasaw district" within the boundaries of the Choctaw Nation. Treaty Between the Choctaws and Chickasaws, 1837, 11 Stat. 573 (January 17, 1837). In 1855 the boundaries and title of the Choctaw and Chickasaw lands were described in Article 1 of the "Treaty with the Choctaws and Chickasaws, 1855," as follows:

> The following shall constitute and remain the boundaries of the Choctaw and Chickasaw country, viz: Beginning at a point on the Arkansas River,

---

Footnote continued—

promised the Indians already had been settled;" that a delegation of Choctaws therefore went to Washington, D.C., to "untangle the situation" and to negotiate the Treaty of 1825; that even after the Treaty of 1825 few Choctaws moved from Mississippi; that in 1830 the Mississippi Legislature passed an Act purporting to abolish the Choctaw government; and that the Choctaw Nation therefore entered into the Treaty of 1830 agreeing to move from the State of Mississippi.

> one hundred paces east of old Fort Smith, where the western boundary line of the State of Arkansas crosses the said river, and running thence due south to Red River; thence up Red River to the point where the meridian of one hundred degrees west longitude crosses the same; thence north along said meridian to the main Canadian River; thence down said river to its junction with the Arkansas River; thence down said river to the place of beginning.
>
> And pursuant to an act of Congress approved May 28, 1830, the United States do hereby forever secure and guarantee the lands embraced within the said limits, to the members of the Choctaw and Chickasaw tribes, their heirs and successors, to be held in common; so that each and every member of either tribe shall have an equal, undivided interest in the whole: *Provided, however,* no part thereof shall ever be sold without the consent of both tribes; and that said land shall revert to the United States if said Indians and their heirs become extinct, or abandon the same.

Treaty with the Choctaws and Chickasaws, 1855, 11 Stat. 611 at 611-612 (June 22, 1855); Plaintiff's Exhibit D-5. A subsequent treaty in 1866 with the Choctaw and Chickasaw Nations or Tribes changed the western boundary, but did not alter the eastern boundary of the Choctaw and Chickasaw lands. Treaty with the Choctaws and Chickasaws, 1866, 14 Stat. 769 (April 28, 1866); Plaintiff's Exhibit D-6.

8. In 1871 Congress enacted legislation which, among other things, ended the practice of making treaties with the Indian Nations. In a proviso of this legislation, Congress stated:

> *Provided,* That hereafter no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty: *Provided, further,* That nothing herein contained shall be construed to invalidate or impair the obligation of any treaty heretofore lawfully made and ratified with any such Indian nation or tribe.

Act of March 3, 1871, 16 Stat. 544 at 566.

9. In 1890 Congress created the Territory of Oklahoma. Act of May 2, 1890, 26 Stat. 81. The boundaries of the Territory of Oklahoma were described in Section 1 of that Act. In Section 29 of that Act, Congress also described the boundaries of a tract of land referred to in Section 29 of the Act as "Indian Territory." Section 29 stated in part:

> That all that part of the United States which is bounded on the north by the State of Kansas, on the east by the States of Arkansas and Missouri, on the south by the State of Texas, and on the west and north by the Territory of Oklahoma as defined in the first section of this act, shall, for the purposes of this act, be known as the Indian Territory.

Act of May 2, 1890, 26 Stat. 81 at 93. All the lands of the Choctaw Nation, including the disputed tract, were at that time within the boundaries of Indian Territory. Stipulated Facts, SM Exhibit 1, Section III, Paragraph 6.

10. In 1893, to enable the creation of a State or States embracing the land of Indian Territory, Congress created a commission to negotiate with the Choctaw, Chickasaw, Creek, Cherokee and Seminole Nations or

Tribes[5] for the purpose of extinguishing the national or tribal title to Indian lands by cession to the United States, by allotment and division of the land in severalty among the Indians of those tribes, or by other methods agreed upon by the Nations and Tribes and the United States. Act of March 3, 1893, Section 16, 27 Stat. 612 at 645; Defendant's Exhibit B.

11. In two subsequent acts Congress provided for the allotment of described tracts of the Choctaw and Chickasaw lands among the members and citizens of the Choctaw and Chickasaw Nations. Act of June 28, 1898, 30 Stat. 495, Plaintiff's Exhibit D-7; Act of July 1, 1902, 32 Stat. 641, Plaintiff's Exhibit D-8.[6]

12. The Act of June 28, 1898 also abolished all tribal courts in Indian Territory (Act Section 28, 30 Stat. 495 at 504-505), provided that "the laws of the various tribes or

---

5. The Choctaw, Chickasaw, Creek, Cherokee, and Seminole Indian Nations are commonly referred to as the "Five Civilized Tribes." See *Marlin v. Lewallen*, 276 U.S. 58, 48 S.Ct. 248, 72 L.Ed. 467 at 468 (1928).

6. The commission created under Section 16 of the Act of March 3, 1893, 27 Stat. 645, was commonly known as the Dawes Commission. *In the matter of Heff*, 197 U.S. 488, 25 S.Ct. 506, 49 L.Ed. 848 at 853 (1905). In Section 4 of the Act of July 1, 1902, 32 Stat. 641, Congress noted that the Act of June 28, 1898, 30 Stat. 495, ratified an "agreement made by the Commission to the Five Civilized Tribes with the commissioners representing the Choctaw and Chickasaw tribes of Indians at Atoka, Indian Territory." The Act of July 1, 1902 ratified an "agreement, made by the Commission to the Five Civilized Tribes with the commissions representing the Choctaw and Chickasaw tribes of Indians on the twenty-first day of March, nineteen hundred and two." Preamble to the Act of July 1, 1902, 32 Stat. 641. For a discussion of the Dawes Commission, the Act of June 28, 1898, and the Act of July 28, 1898, see *Winton v. Amos*, 255 U.S. 373, 41 S.Ct. 342, 65 L.Ed. 684 (1921); *In the matter of Heff, supra*, 197 U.S. 488, 25 S.Ct. 506, 49 L.Ed. 848 (1905); *Stephens v. Cherokee Nation*, 174 U.S. 445, 19 S.Ct. 722, 43 L.Ed. 1041 (1899); *Choctaw Nation v. Oklahoma, supra*, 397 U.S. 620, 90 S.Ct. 1328, 25 L.Ed.2d 615 (1970), *rehearing denied*, 398 U.S. 945, 90 S.Ct. 1834, 26 L.Ed.2d 285 (1970); and cases therein cited.

nations of Indians shall not be enforced at law or in equity by the courts of the United States in the Indian Territory" (Act Section 26, 30 Stat. 495 at 504) and extended the "jurisdiction of the court and municipal authority" and the "laws and ordinances" of the city of Fort Smith, Arkansas over the disputed tract (Act Section 9, 30 Stat. 495 at 497; Stipulated Facts, SM Exhibit 1, Section III, Paragraph 7). See Section 9 of the Act of June 28, 1898 which provided:

> That the jurisdiction of the court and municipal authority of the city of Fort Smith for police purposes in the State of Arkansas is hereby extended over all that strip of land in the Indian Territory lying and being situate between the corporate limits of the said city of Fort Smith and the Arkansas and Poteau rivers, and extending up the said Poteau River to the mouth of Mill Creek; and all the laws and ordinances for the preservation of the peace and health of said city, as far as the same are applicable, are hereby put in force therein: *Provided,* That no charge or tax shall ever be made or levied by said city against said land or the tribe or nation to whom it belongs.

30 Stat. 495 at 497; Plaintiff's Exhibit D-7.

13. Section 26 of the Act of July 1, 1902 expressly reserved the "strip of land," described in Section 9 of the Act of June 28, 1898 from the allotment of Choctaw and Chickasaw lands in the following language:

> 26. The following lands shall be reserved from the allotment of lands herein provided for:
>
> * * *
>
> (c) The strip of land lying between the city of Fort Smith, Arkansas, and the Arkansas and Poteau

rivers, extending up the said Poteau River to the mouth of Mill Creek.

32 Stat. 641 at 645; Plaintiff's Exhibit D-8.

1905 Consent of Congress to Annexation of Disputed Tract by Arkansas

14. In 1905 Congress gave the "consent of the United States" to the State of Arkansas to extend the western boundary of Arkansas to include the disputed tract. Act of February 10, 1905, 33 Stat. 714; Stipulated Facts, SM Exhibit 1, Section III, Paragraph 8; Plaintiff's Exhibit D-9. This Act was entitled "An Act To extend the western boundary line of the State of Arkansas" and stated:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the consent of the United States is hereby given for the State of Arkansas to extend her western boundary line so as to include all that strip of land in the Indian Territory lying and being situate between the Arkansas State line adjacent to the city of Fort Smith, Arkansas, and the Arkansas and Poteau rivers, described as follows, namely: Beginning at a point on the south bank of the Arkansas River one hundred paces *east* of old Fort Smith, where the western boundary line of the State of Arkansas crosses the said river, and running southwesterly along the south bank of the Arkansas River to the mouth of the Poteau; thence, at right angles with the Poteau River to the center of the current of said river; thence southerly up the middle of the current of the Poteau River (except where the Arkansas State line intersects the Poteau River) to a point in the middle of the current of the Poteau River opposite the mouth of Mill Creek,

> and where it is intersected by the middle of the current of Mill Creek; thence up the middle of Mill Creek to the Arkansas State line; thence northerly along the Arkansas State line to the point of beginning: *Provided,* That nothing in this Act shall be construed to impair any right now pertaining to any Indian tribe or tribes in said part of said Indian Territory under the laws, agreements, or treaties of the United States, or to affect the authority of the Government of the United States to make any regulations or to make any law respecting said Indians or their lands which it would have been competent to make or enact if this Act had not been passed. [Emphasis added to the word "east".]

Act of February 10, 1905, 33 Stat. 714 at 714-715; Plaintiff's Exhibit D-9.

15. On February 16, 1905, Arkansas extended the western boundary of Arkansas to include the disputed tract. Act No. 41, February 16, 1905 (now published at Ark. Stat. Ann. § 5-101 (Repl. 1976)); Stipulated Facts, SM Exhibit 1, Section III, Paragraph 9; Defendant's Exhibit E. The Act states:

> The western boundary line of the State of Arkansas is extended as follows, so as to include all that strip of land in the Indian Territory lying and being situated between the Arkansas State line adjacent to the city of Fort Smith, Arkansas, and the Arkansas and Poteau rivers, described as follows, namely: Beginning at a point on the south bank of the Arkansas River one hundred [100] paces *east* [west] of Old Fort Smith, where the western boundary line of the State of Arkansas crosses the said river, and running southwesterly along the south bank of the Arkansas

> River to the mouth of the Poteau; thence at right angles with the Poteau River to the center of the current of said river; thence southerly up the middle of the current of the Poteau River (except where the Arkansas State line intersects the Poteau River) to a point in the middle of the current of the Poteau River opposite the mouth of Mill Creek, and where it is intersected by the middle of the current of Mill Creek; thence up the middle of Mill Creek to the Arkansas State line; thence northerly along the Arkansas State line to the point of beginning. [Emphasis added; brackets, and material within, in original.][7]

Ark. Stat. Ann. § 5-101 (Repl. 1976).

---

7. The Compiler's Notes following Ark. Stat. Ann. § 5-101 (Repl. 1976), state that the bracketed word "west" was inserted by the compiler "upon the authority" of *Bowman v. State*, 93 Ark. 168, 129 S.W. 80 (1909). In the *Bowman v. State* opinion, *supra*, the Arkansas Supreme Court concluded that the word "east" emphasized above in both the Act of Congress dated February 10, 1905, and the Act of the Arkansas Legislature dated February 16, 1905, was a clerical error. The Court stated:

> [T]here can be no doubt as to the territory intended to be ceded to the State of Arkansas. The general description, both in the act of Congress and the acts of our Legislature, in general terms describes it by permanent lines, so that its location could not be mistaken. In the particular description it is perfectly plain that the use of the word "east" in the clause, "Beginning at a point on the south bank on the Arkansas River 100 paces east of Old Fort Smith," was a clerical mistake; for the point designated as the beginning point was one "where the western boundary line of the State of Arkansas crosses the said river." Obviously, the word intended to be used was "west," instead of "east." The particular description in the present case can be made effective by either rejecting as surplusage the mistaken description "100 paces east of Old Fort Smith," or by substituting the word "west" for "east."

Bowman v. State, 93 Ark. 168 at 170-171, 129 S.W. 80 at 81-82 (1909). It may be that the correct boundary description is *east* of old Fort Smith and that the *Bowman v. State* opinion, *supra*, is incorrect. See map, Defendant's Exhibit K. In any event the supposed minor error is insignificant.

16. Thereafter, Congress passed the Act of April 26, 1906, entitled "An Act To provide for the final disposition of the affairs of the Five Civilized Tribes in the Indian Territory, and for other purposes." Act of April 26, 1906, 34 Stat. 137, Plaintiff's Exhibit D-10. Among other things, that Act abolished tribal taxes (Act Section 11, 34 Stat. 137 at 141); authorized the Secretary of the Interior to assume control of tribal schools (Act Section 10, 34 Stat. 137 at 140-141); and, like the Acts of 1898 and 1902 described above, provided for the allotment of the tribal lands. Although the Act of April 26, 1906, reduced the powers of the tribal governments, that Act did not end the "tribal existence" of the Five Civilized Tribes. Section 28 of the Act provided:

> That the tribal existence and present tribal governments of the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes or nations are hereby continued in full force and effect for all purposes authorized by law, until otherwise provided by law, but the tribal council or legislature in any of said tribes or nations shall not be in session for a longer period than thirty days in any one year: *Provided,* That no act, ordinance, or resolution (except resolutions of adjournment) of the tribal council or legislature of any of said tribes or nations shall be of any validity until approved by the President of the United States: *Provided further,* That no contract involving the payment or expenditure of any money or affecting any property belonging to any of said tribes or nations made by them or any of them or by any officer thereof, shall be of any validity until approved by the President of the United States.

Act of April 26, 1906, 34 Stat. 137 at 148.

17. Less than two months after the passage of the Act of April 26, 1906, Congress enacted legislation permitting the inhabitants of the Territory of Oklahoma and Indian Territory to adopt a constitution and become the State of Oklahoma. Act of June 16, 1906, 34 Stat. 267; Stipulated Facts, SM Exhibit 1, Section III, Paragraph 10; Defendant's Exhibit F. Section 1 of the Act of June 16, 1906 provided:

> That the inhabitants of all that part of the area of the United States now constituting the Territory of Oklahoma and the Indian Territory, as at present described, may adopt a constitution and become the State of Oklahoma, as hereinafter provided: *Provided,* That nothing contained in the said constitution shall be construed to limit or impair the rights of person or property pertaining to the Indians of said Territories (so long as such rights shall remain unextinguished) or to limit or affect the authority of the Government of the United States to make any law or regulation respecting such Indians, their lands, property, or other rights by treaties, agreement, law, or otherwise, which it would have been competent to make if this Act had never been passed.

Act of June 16, 1906, 34 Stat. 267 at 267-268. Thereafter, on November 16, 1907, the State of Oklahoma was admitted into the Union. Stipulated Facts, SM Exhibit 1, Section III, Paragraph 1.

18. Pursuant to the Act of April 26, 1906, 34 Stat. 137, the surplus Indian lands after allotment and the Indian lands reserved from allotment were to be sold. "Among the lands to be sold were lots comprising the entirety of the disputed tract." Stipulated Facts, SM Exhibit 1, Section III, Paragraph 11. As shown by the copies of the

patents in Plaintiff's Exhibits C-1 through C-24,[8] the chief executive officers of the Choctaw and Chickasaw Nations sold the lots of the disputed tract and issued patents to the purchasers. Stipulated Facts, SM Exhibit 1, Section III, Paragraph 11. With the exception of the lots comprising Block 13 of the disputed tract, all the lots in the disputed tract were sold and all the patents thereto were issued after November 16, 1907 (the date when Oklahoma was admitted into the Union). Stipulated Facts, SM Exhibit 1, Section III, Paragraph 11. The lots in Block 13 of the disputed tract were conveyed by the Choctaw and Chickasaw Nations to Isaac S. Lowrey on June 11, 1906 (Plaintiff's Exhibit C-1) and "are now and have been a part of the State of Arkansas since" June 11, 1906. Stipulated Facts, SM Exhibit 1, Section III, Paragraph 12.

19. The State of Arkansas has exercised sovereignty, dominion, control, and exclusive criminal and civil jurisdiction over the disputed tract continuously since the enactment of Act No. 41 (Ark. Stat. Ann. § 5-101 (Repl. 1976)) on February 16, 1905. Stipulated Facts, SM Exhibit 1, Section III, Paragraph 14. "A part of the disputed tract here in question is now the Fort Smith National Historic Site." Stipulated Facts, SM Exhibit 1, Section III, Paragraph 16. Upon issuance of the patents to the lots in the disputed tract, the tax exempt status of the lands ceased. Stipulated Facts, SM Exhibit 1, Section III, Paragraph 15. From and after the dates of the patents, Sebastian County, Arkansas, has continuously levied and collected real property taxes on the lots within the disputed

---

8. Plaintiff's Exhibits C-1 through C-24 are certified copies of the patents issued by the Choctaw and Chickasaw Nations conveying the lots of the disputed tract. The patents expressly refer to the map by John Fisher dated August 3, 1904 (Plaintiff's Exhibit A) which shows the location of the lots and blocks of the disputed tract.

tract, with the exception of such land that may have acquired a tax exempt status under Arkansas law. Stipulated Facts, SM Exhibit 1, Section III, Paragraph 15. "LeFlore County, Oklahoma, has never levied or collected real property taxes on [the] lots within the disputed tract." Stipulated Facts, SM Exhibit 1, Section III, Paragraph 15. "Maps produced by the Arkansas State Highway and Transportation Department, Division of Planning and Research, in cooperation with the U. S. Department of Transportation and the Federal Highway Administration, and by the Oklahoma Department of Transportation, Planning Division, in cooperation with the U. S. Department of Transportation and the Federal Highway Administration, depict the boundary line between Sebastian County, Arkansas, and LeFlore County, Oklahoma, in such a way that the disputed tract is shown to lie entirely within the State of Arkansas." Stipulated Facts, SM Exhibit 1, Section III, Paragraph 17.

RECOMMENDED CONCLUSIONS OF LAW

In Section VI of the Prehearing Order of December 11, 1979, the issues of law raised in this action are listed as follows:

> (A) Did the Congress of the United States have the unilateral authority to transfer, without the consent of the Choctaw and Chickasaw Nations of Indians, a portion of the lands of the said Choctaw and Chickasaw Nations of Indians into the jurisdiction of the State of Arkansas.
>
> (B) Whether the State of Oklahoma, upon admission to the Union of States on November 16, 1907, pursuant to the Act of Congress, June 16, 1906, (Enabling Act), succeeded to the territory defined as being

within the sovereign jurisdictional limits of the Choctaw and Chickasaw Nations of Indians so as to prohibit any change in the jurisdiction encompassed within the said State of Oklahoma without the necessity of complying with Article IV, Section 3, Para. 1, of the Constitution of the United States.

(C) Whether the continuous exercise of sovereignty and jurisdiction by the State of Arkansas from 1905 to the present day, more than 72 years of which was without complaint on the part of the State of Oklahoma, operates as an acquiescence in the boundaries as established by the Acts of Congress and the General Assembly of the State of Arkansas so as to preclude the State of Oklahoma from now challenging said boundary line.

After considering these issues, the Special Master recommends that judgment be entered in favor of the State of Arkansas and against the State of Oklahoma, for the following reasons.

I.

Congressional Power to Transfer Indian Lands to Arkansas Without Consent of Indian Nations

The first issue to be decided in this action is whether Congress had the power to consent to the extension of the western boundary of Arkansas to include the disputed tract without the consent of the Choctaw and Chickasaw Nations to the alteration of the eastern boundary of those Nations. At the outset, the Special Master notes that he is unable to determine if Oklahoma has conceded this issue of the necessity of consent. On one hand Oklahoma states that Congress did not have the authority or power to change the boundary of the Choctaw and Chickasaw lands

without the consent of the Choctaw and Chickasaw Nations.[9] On the other hand, it appears that Oklahoma has admitted that Congress had the power to alter the boundary in question, even if the boundary change was in violation of treaties with the Choctaw and Chickasaw Nations.[10] The Special Master will discuss the merits of the issue of the necessity of consent in order to report on all possible contentions in this action.

The boundary that was changed in 1905 was the line between the Choctaw and Chickasaw lands and the State of Arkansas. The boundary was changed by the combined action of Congress and the State of Arkansas. Act of February 10, 1905, 33 Stat. 714; and Act No. 41, February 16, 1905, Ark. Stat. Ann. § 5-101 (Repl. 1976). Therefore, the issue is whether Congress and a State, by joint action, have the power to change the boundary of a State which is also the boundary of an Indian Nation.

Under the Constitution of the United States, Congress has the power to admit new States into the Union. U.S.

---

9. For example, Oklahoma states that "[e]ven in the face of the sweeping plenary power of the Congress to legislate in the area of Indian affairs, it is still a basic proposition of Plaintiff's claim that Congress has no authority to transfer the disputed tract into the jurisdiction of the State of Arkansas." Amended Prehearing Brief of the Plaintiff at 32. Oklahoma adds that the "Act of February 10, 1905, was a purely unilateral act on the part of Congress" and "could not be effective to accomplish what it purports to attempt without the express or implied consent of the Choctaw and Chickasaw Nations." Amended Prehearing Brief of the Plaintiff at 34.

10. For example, Oklahoma states that "[i]t is not now nor has it been at any stage of this litigation the position of Plaintiff that Congress was without the power to unilaterally abrogate . . . specific treaty commitments to the Choctaw and Chickasaw Nations of Indians by passage of the Act of February 10, 1905." Prehearing Reply Brief of the Plaintiff at 1. Oklahoma has also recognized that sovereignty over Block 13 of the disputed tract was transferred to Arkansas pursuant to the Act of February 10, 1905. Stipulated Facts, SM Exhibit 1, Section III, Paragraph 12; Amended Prehearing Brief of the Plaintiff at 35.

Const., Art. 4, § 3, Clause 1. From this power "springs" the power of Congress to establish the boundaries of new States. *United States v. Louisiana,* 363 U.S. 1, 80 S.Ct. 961, 4 L.Ed.2d 1025 at 1048 (1960), *rehearing denied,* 364 U.S. 856, 81 S.Ct. 36, 5 L.Ed.2d 80 (1960); *Texas v. Louisiana,* 410 U.S. 702, 93 S.Ct. 1215, 35 L.Ed.2d 646 at 651 (1973), *rehearing denied,* 411 U.S. 988, 93 S.Ct. 2266, 36 L.Ed.2d 966 (1973).

After a State is admitted into the Union, the right of the State to rely on its boundaries cannot be "impaired by any subsequent action on the part of the United States." *New Mexico v. Colorado,* 267 U.S. 30, 45 S.Ct. 202, 69 L.Ed. 499 at 502 (1925), *modification denied,* 267 U.S. 582, 45 S.Ct. 353, 69 L.Ed. 798 (1925). Consequently, Congress cannot change the boundaries of a State without the consent of that State. *Washington v. Oregon,* 211 U.S. 127, 29 S.Ct. 47, 53 L.Ed. 118 at 118 (1908), *rehearing denied,* 214 U.S. 205, 29 S.Ct. 631, 53 L.Ed. 969 (1909).

In certain circumstances, a State has the power to change its own boundaries. However, the consent of Congress to the boundary change is required. *Virginia v. Tennessee,* 148 U.S. 503, 13 S.Ct. 728, 37 L.Ed. 537 at 545 (1893); *Poole v. Fleeger,* 36 U.S. 185, 11 Pet. 185, 9 L.Ed. 680 at 690 (1837).[11]

Therefore, the boundaries of a State can be altered either by Congress with the consent of the State, or by a State with the consent of Congress. Compare *Texas v. Louisiana, supra,* 410 U.S. 702, 93 S.Ct. 1215, 35 L.Ed.2d 646 (1973), *rehearing denied,* 411 U.S. 988, 93 S.Ct. 2266, 36

---

11. In *Virginia v. Tennessee,* 148 U.S. 503, 13 S.Ct. 728, 37 L.Ed. 537 at 545 (1893), relying on *Poole v. Fleeger,* 36 U.S. 185, 11 Pet. 185, 9 L.Ed. 680 at 690 (1837), the Supreme Court stated that, with the consent of Congress, a compact made between two States establishing State boundaries is valid.

L.Ed.2d 966 (1973), discussing an extension of the Texas boundary; *Missouri v. Kansas,* 213 U.S. 78, 29 S.Ct. 417, 53 L.Ed. 706 (1909), discussing an extension of the Missouri boundary. Thus, by acting together, Congress and the State of Arkansas had the power to extend the western boundary of Arkansas in 1905, unless that power was lacking or limited by the fact that the boundary in question was also the eastern boundary of the Choctaw and Chickasaw lands.[12]

As noted above, in 1871 the United States turned from regulating Indian affairs by treaty to regulation by legislation of Congress. Act of March 3, 1871, 16 Stat. 544 at 566; *Board of County Commissioners v. Seber,* 318 U.S. 705, 63 S.Ct. 920, 87 L.Ed. 1094 at 1103 (1943), *rehearing denied,* 319 U.S. 782, 63 S.Ct. 1162, 87 L.Ed. 1726 (1943); *United States v. Kagama,* 118 U.S. 375, 6 S.Ct. 1109, 30 L.Ed. 228 at 231 (1886). Since then, in many opinions, the Supreme Court has recognized the broad power of Congress over the Indian Nations and Tribes, often describing this power

---

12. The Special Master notes that if the boundary in question were a line between Arkansas and a Territory of the United States, Congress would have had the power to change that boundary and Oklahoma would be bound by that congressional action. See *New Mexico v. Colorado,* 267 U.S. 30, 45 S.Ct. 202, 69 L.Ed. 499 at 502 (1925), *modification denied,* 267 U.S. 582, 45 S.Ct. 353, 69 L.Ed. 798 (1925); *Missouri v. Iowa,* 48 U.S. 660, 7 How. 660, 12 L.Ed. 861 at 864, 867 (1849). The boundary in question was a line between Arkansas and "Indian Territory" as that territory was defined in the Act of May 2, 1890, 26 Stat. 81 at 93. But no organized territorial government was ever established in Indian Territory. See *Southern Surety Company v. Oklahoma,* 241 U.S. 582, 36 S.Ct. 692, 60 L.Ed. 1187 at 1189 (1916); *Stewart v. Keyes,* 295 U.S. 403, 55 S.Ct. 807, 79 L.Ed. 1507 at 1512 (1935), *rehearing denied,* 296 U.S. 661, 56 S.Ct. 81, 80 L.Ed. 470 (1935); *Jefferson v. Fink,* 247 U.S. 288, 38 S.Ct. 516, 62 L.Ed. 1117 at 1121 (1918). Therefore, the Special Master does not base his conclusion upon the powers of Congress to alter the boundary of a territory of the United States, but will examine the issue whether Congress and the State of Arkansas had the power to change the boundary of an Indian Nation.

as "plenary."[13] *United States v. Sioux Nation of Indians,* 448 U.S. 371, 100 S.Ct. 2716, 65 L.Ed.2d 844 (1980); *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978); *Winton v. Amos,* 255 U.S. 373, 41 S.Ct. 342, 65 L.Ed. 684 (1921); *Williams v. Johnson,* 239 U.S. 414, 36 S.Ct. 150, 60 L.Ed. 358 (1915); *Board of County Commissioners v. Seber, supra,* 318 U.S. 705, 63 S.Ct. 920, 87 L.Ed. 1094 at 1103 (1943), listing eleven additional Supreme Court cases in footnote 18.

Because of this plenary power, the Indian Nations within the United States did not, and do not, possess the full sovereign powers of independent nations. Instead, they have the "limited sovereignty" recently described by the Supreme Court as follows:

> The powers of Indian tribes are, in general, *"inherent powers of a limited sovereignty which has never been extinguished."* F. Cohen, Handbook of Federal Indian Law 122 (1945) (emphasis in original). Before the coming of the Europeans, the tribes were self-governing sovereign political communities. See *McClanahan v. Arizona State Tax Comm'n,* 411 U.S. 164, 172, 36 L.Ed.2d 129, 93 S.Ct. 1257. Like all sovereign bodies, they then had the inherent power to

---

13. A discussion of the constitutional sources of the federal legislative power over the Indian Nations and Tribes can be found in 2 Antieau, *Modern Constitutional Law,* §§ 12:95 and 12:127 and Cohen, *Handbook of Federal Indian Law,* Chapter 5, §§ 1-5. This legislative power is derived from several Articles of the United States Constitution, including Article II, § 2, Clause 2 (treaty making power), Article I, § 8, Clause 3 (power to "regulate Commerce . . . with Indian Tribes") and Article IV, § 3, Clause 2 (power "to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States"). *Morton v. Mancari,* 417 U.S. 535, 94 S.Ct. 2474, 41 L.Ed.2d 290 at 301-302 (1974); *McClanahan v. State Tax Commission of Arizona,* 411 U.S. 164, 93 S.Ct. 1257, 36 L.Ed.2d 129 at 135, note 7 (1973); *United States v. Celestine,* 215 U.S. 278, 30 S.Ct. 93, 54 L.Ed. 195 at 197 (1909).

prescribe laws for their members and to punish infractions of those laws.

Indian tribes are, of course, no longer "possessed of the full attributes of sovereignty." *United States v. Kagama, supra,* at 381, 30 L.Ed. 228, 6 S.Ct. 1109. Their incorporation within the territory of the United States, and their acceptance of its protection, necessarily divested them of some aspects of the sovereignty which they had previously exercised. By specific treaty provision they yielded up other sovereign powers; by statute, in the exercise of its plenary control, Congress has removed still others.

But our cases recognize that the Indian tribes have not given up their full sovereignty. We have recently said: "Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory . . . . [They] are a good deal more than 'private, voluntary organizations.'" *United States v. Mazurie,* 419 U.S. 544, 557, 42 L.Ed.2d 706, 95 S.Ct. 710; see also *Turner v. United States,* 248 U.S. 354, 354-355, 63 L.Ed. 291, 39 S.Ct. 109; *Cherokee Nation v. Georgia, supra,* at 16-17, 8 L.Ed. 25. The sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance. But until Congress acts, the tribes retain their existing sovereign powers. In sum, Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status. See *Oliphant v. Suquamish Indian Tribe, ante,* p. 191, 55 L.Ed.2d 209, 98 S.Ct. 1011.

United States v. Wheeler, 435 U.S. 313, 98 S.Ct. 1079, 55 L.Ed.2d 303 at 312-313 (1978).

Although the power of Congress over Indian affairs is of a plenary nature, it is not absolute. *Delaware Tribal Business Committee v. Weeks,* 430 U.S. 73, 97 S.Ct. 911, 51 L.Ed.2d 173 at 183 (1977), *rehearing denied,* 431 U.S. 960, 97 S.Ct. 2688, 53 L.Ed.2d 279 (1977); *United States v. Alcea Band of Tillamooks,* 329 U.S. 40, 67 S.Ct. 167, 91 L.Ed. 29 at 39 (1946). This legislative power is subject to "pertinent constitutional restrictions" and "limitations inhering in . . . a guardianship." *United States v. Sioux Nation of Indians, supra,* 448 U.S. 371, 100 S.Ct. 2716, 65 L.Ed.2d 844 at 875 (1980), quoting *United States v. Creek Nation,* 295 U.S. 103, 55 S.Ct. 681, 79 L.Ed. 1331 at 1335 (1935), *rehearing denied,* 295 U.S. 769, 55 S.Ct. 911, 79 L.Ed. 1709 (1935). For example, the plenary power "does not enable the United States to give the tribal lands to others, or to appropriate them to its own purposes, without rendering, or assuming an obligation to render, just compensation for them." *United States v. Creek Nation, supra,* 295 U.S. 103, 55 S.Ct. 681, 79 L.Ed. 1331 at 1335 (1935), *rehearing denied,* 295 U.S. 769, 55 S.Ct. 911, 79 L.Ed. 1709 (1935). Compare *United States v. Sioux Nation of Indians, supra,* 448 U.S. 371, 100 S.Ct. 2716, 65 L.Ed.2d 844 at 871-881 (1980), discussing the "taking" by Congress of Indian property in violation of the Fifth Amendment of the United States Constitution. For another example, the Indian legislation of Congress is subject to the Due Process Clause of the Fifth Amendment. *Morton v. Mancari,* 417 U.S. 535, 94 S.Ct. 2474, 41 L.Ed.2d 290 at 301-303 (1974), and cases therein cited.

Applying the above general principles, the Special Master concludes that the Act of Congress of February 10, 1905 was a valid exercise of the plenary power of Congress over Indian affairs. If the sovereignty of an Indian Nation is subject to "complete defeasance" by Congress, it follows

that the sovereignty of an Indian Nation over a portion of its lands can be ended by an Act of Congress. Therefore, Congress had the power to diminish the boundaries of the Choctaw and Chickasaw lands, and to end all sovereign powers of the Choctaw and Chickasaw Nations over the disputed tract. Consent of the Choctaw and Chickasaw Nations to the 1905 boundary change was not necessary. Compare *Rosebud Sioux Tribe v. Kneip,* 430 U.S. 584, 97 S.Ct. 1361, 51 L.Ed.2d 660 (1977), concluding that Congress had the power to diminish the boundaries of the Rosebud Indian Reservation without Indian consent, even though a treaty with the Rosebud Sioux Tribe stated that Indian consent was necessary.

In its prehearing brief, Oklahoma acknowledges the "plenary" power of Congress and the "limited sovereignty" of the Indian Nations, but apparently suggests that these principles are not applicable to the Choctaw, Chickasaw and other Indian Nations of the Five Civilized Tribes. Oklahoma invites attention to the "degree of tolerance Congress afforded the Five Civilized Tribes as political entities" (Amended Prehearing Brief of the Plaintiff at 31); the fee simple title held by the Choctaw Nation; and Article IV of the Treaty with the Choctaws, 1830 (quoted above) which stated that no part of the land granted to the Choctaw Nation shall ever be embraced in any Territory or State. The Special Master concludes that these distinctions, and contentions based thereon, do not diminish the plenary power of Congress for the following reasons:

First, although the Five Civilized Tribes "had long been treated more liberally than other Indians, they remained none the less wards of the government, and in all respects subject to its control." *Ex parte Webb,* 225 U.S. 663, 32 S.Ct. 769, 56 L.Ed. 1248 at 1257 (1912). In

many cases the Supreme Court has recognized the plenary power of Congress over the Five Civilized Tribes and the limited sovereignty of those tribes. Examples are *Sizemore v. Brady,* 235 U.S. 441, 35 S.Ct. 135, 59 L.Ed. 308 (1914) (Creek Nation); *Board of County Commissioners v. Seber, supra,* 318 U.S. 705, 63 S.Ct. 920, 87 L.Ed. 1094 (1943), *rehearing denied,* 319 U.S. 782, 63 S.Ct. 1162, 87 L.Ed. 1726 (1943) (Creek Nation); *Williams v. Johnson, supra,* 239 U.S. 414, 36 S.Ct. 150, 60 L.Ed. 358 (1915) (Choctaw and Chickasaw Nations); *Winton v. Amos, supra,* 255 U.S. 373, 41 S.Ct. 342, 65 L.Ed. 684 (1921) (Choctaw Nation); *Cherokee Nation v. Hitchcock,* 187 U.S. 294, 23 S.Ct. 115, 47 L.Ed. 183 (1902) (Cherokee Nation); *Gritts v. Fisher,* 224 U.S. 640, 32 S.Ct. 580, 56 L.Ed. 928 (1912) (Cherokee Nation); *Stephens v. Cherokee Nation,* 174 U.S. 445, 19 S.Ct. 722, 43 L.Ed. 1041 (1899) (the Five Civilized Tribes); and cases therein cited.[14]

Second, the Supreme Court has expressly recognized that the Choctaw Nation is an Indian Tribe subject to the laws of Congress. The sovereign powers of the United States and the Choctaw Nation were compared by the Supreme Court as follows:

> The United States is a sovereign Nation, not suable in any court except by its own consent, and upon such terms and conditions as may accompany that consent, and is not subject to any municipal law. Its Government is limited only by its own Con-

---

14. In *Sizemore v. Brady,* 235 U.S. 441, 35 S.Ct. 135, 59 L.Ed. 308 at 310 (1914), the Supreme Court said:

> Like other tribal Indians, the Creeks were wards of the United States, which possessed full power, if it deemed such a course wise, to assume full control over them and their affairs, to ascertain who were members of the tribe, to distribute the lands and funds among them, and to terminate the tribal government.

> stitution, and the Nation is subject to no law but the law of nations. On the other hand, the Choctaw Nation falls within the description in the terms of our Constitution, not of an independent State or sovereign Nation, but of an Indian Tribe. As such, it stands in a peculiar relation to the United States. It was capable under the terms of the Constitution of entering into treaty relations with the Government of the United States, although, from the nature of the case, subject to the power and authority of the laws of the United States when Congress should choose, as it did determine in the Act of March 3, 1871, embodied in section 2079 of the Revised Statutes, to exert its legislative power.

Choctaw Nation v. United States, 119 U.S. 1, 7 S.Ct. 75, 30 L.Ed. 306 at 314-315 (1886).

Third, the fee simple title held by the Choctaw Nation did not limit the power of Congress to consent to the 1905 boundary change. While discussing the power of Congress over the Pueblo Indians, the Supreme Court stated:

> It also is said that such legislation cannot be made to include the lands of the Pueblos, because the Indians have a fee-simple title. It is true that the Indians of each pueblo do have such a title to all the lands connected therewith, excepting such as are occupied under Executive orders, but it is a communal title, no individual owning any separate tract. In other words, the lands are public lands of the pueblo, and so the situation is essentially the same as it was with the *Five Civilized Tribes,* whose lands, although owned in fee under patents from the United States, were adjudged subject to the legislation of Congress enacted in the exercise of the government's

guardianship over those tribes and their affairs. [Emphasis added.]

United States v. Sandoval, 231 U.S. 28, 34 S.Ct. 1, 58 L.Ed. 107 at 115 (1913), citing five Supreme Court cases concerning the Five Civilized Tribes.

A fee simple title is relevant to determination whether Congress has taken private property of the Indians for public use without just compensation, in violation of the Fifth Amendment of the United States Constitution. *United States v. Sioux Nation of Indians, supra,* 448 U.S. 371, 100 S.Ct. 2716, 65 L.Ed.2d 844 at 871-881 (1980). Oklahoma, however, has not expressly raised that issue. In any event, the issue here is not a "taking" of the title to the disputed tract or other "private property" of the Indians, but is the "taking" of the sovereign powers of the Choctaw and Chickasaw Nations. The Act of February 10, 1905 did not end or transfer the tribal title to the disputed tract; the Choctaw and Chickasaw Nations sold and conveyed the lots of the disputed tract for consideration after its enactment. Stipulated Facts, SM Exhibit 1, Section III, Paragraphs 11 and 12; Plaintiff's Exhibits C-1 through C-24. Therefore, the "taking clause" of the Fifth Amendment did not limit the plenary power of Congress in this case.[15]

Finally, the terms of the treaties with the Choctaw and Chickasaw Nations, including Article IV of the Treaty

---

15. The Special Master finds that the reliance by Oklahoma on *Choctaw Nation v. Oklahoma, supra,* 397 U.S. 620, 90 S.Ct. 1328, 25 L.Ed.2d 615 (1970), *rehearing denied,* 398 U.S. 945, 90 S.Ct. 1834, 26 L.Ed.2d 285 (1970), is misplaced. A fee simple title is relevant and may be controlling in an action to resolve a disputed title to land. The Special Master concludes, however, that under the *Choctaw Nation v. Oklahoma* case, *supra,* and other opinions of the Supreme Court, the presence of a fee simple title did not limit the power of Congress to alter the boundary here in question.

with the Choctaws, 1830, did not restrict the power of Congress to consent to the 1905 boundary change. In a leading case on this issue the Supreme Court stated:

> Until the year 1871 the policy was pursued of dealing with the Indian tribes by means of treaties, and, of course, a moral obligation rested upon Congress to act in good faith in performing the stipulations entered into on its behalf. But, as with treaties made with foreign nations . . . the legislative power might pass laws in conflict with treaties made with the Indians.

Lone Wolf v. Hitchcock, 187 U.S. 553, 23 S.Ct. 216, 47 L.Ed. 299 at 306 (1903). In the absence of circumstances not present in this action, Congress has the power to unilaterally abrogate treaty commitments with the Indian Nations and Tribes. *United States v. Sioux Nation of Indians, supra,* 448 U.S. 371, 100 S.Ct. 2716, 65 L.Ed.2d 844 at 871-876 (1980); *Rosebud Sioux Tribe v. Kneip, supra,* 430 U.S. 584, 97 S.Ct. 1361, 51 L.Ed.2d 660 at 669 (1977); 2 Antieau, *Modern Constitutional Law,* at 407-408; and cases therein cited.[16]

For the above reasons, the Special Master concludes that Congress had the power to consent to a change in the boundary of the Choctaw and Chickasaw lands, and to transfer sovereign control over the disputed tract to the State of Arkansas. Having concluded that this power existed, the Special Master will next address the contention of Oklahoma that Congress did not fully exercise that power in the Act of February 10, 1905.

---

16. The cases cited include the following: *Thomas v. Gay,* 169 U.S. 264, 18 S.Ct. 340, 42 L.Ed. 740 (1898); *Lone Wolf v. Hitchcock,* 187 U.S. 553 at 565-566, 23 S.Ct. 216, 47 L.Ed. 299 (1903); *Choate v. Trapp,* 224 U.S. 665 at 671, 32 S.Ct. 565, 56 L.Ed. 941 (1912); and *Menominee Tribe of Indians v. United States,* 391 U.S. 404, 88 S.Ct. 1705, 20 L.Ed.2d 697 (1968).

II.

Exercise of Power by Congress to Transfer Sovereignty Over the Disputed Tract to Arkansas

Oklahoma contends that, even if Congress had the power to transfer sovereignty over the disputed tract to Arkansas, Congress did not fully exercise that power in the Act of February 10, 1905. Oklahoma argues, "All Congress purported to undertake [in the Act of February 10, 1905] was a boundary change in the anticipation of future events *to be effective upon the occurrence of those events.*" (Emphasis added.) Amended Prehearing Brief of the Plaintiff at 36-37. The "future events" referred to by Oklahoma apparently were the allotment of the Choctaw and Chickasaw lands and the termination of the jurisdiction of the Choctaw and Chickasaw Nations over the disputed tract. Combining its interpretation of the Act of February 10, 1905 with its interpretation of historical events, Oklahoma then contends that the Act of February 10, 1905 and the later legislative action by Arkansas, transferred only Block 13 of the disputed tract to Arkansas. The argument of Oklahoma is as follows:

> [H]ow can one explain the Congressional Action of February 10, 1905. It is suggested that it was never the intention of Congress to unilaterally abrogate the treaty commitments or Indian policy of the United States, even as to these peculiar parcels of land. It must be remembered that Congress had set in motion the processes by which these Tribes would be extinguished. See Act of June 28, 1898, 30 Stat. 495; Act of July 1, 1902, 32 Stat. 641. The Treaties of Doak's Stand and Dancing Rabbit Creek granted the lands in "fee simple" but with a condition subsequent of defeasance should the Choctaw Nation abandon the lands or

cease to exist. Congress was attempting to effect the latter occurrence. Extinguishment of the Tribes of Indian Territory as political entities was the prime prerequisite to the creation of a state in the area. Everyone anticipated allotment and sale of surplus lands would soon be completed leaving Congress free to do precisely that to which it consented in the Act of February 10, 1905.

The Tribes continued to exist, even under the Curtis Act of July 1, 1902, and the Curtis Act of April 26, 1906, 34 Stat. 137, long after they were supposed to have been terminated. Under the Curtis Act of 1906 the tribes were to exist until all the allotments had been selected and patented and the surplus lands sold and patented. As this process took place, the Choctaw and Chickasaw Nations were gradually diminished, geographically speaking, and ultimately to be extinguished. To the extent some lands passed out of tribal jurisdiction prior to Oklahoma Statehood, the Act of February 10, 1905, and the subsequent legislative action of Arkansas operated to immediately transfer those lands into the State of Arkansas. It is on this basis that Oklahoma asserts no claim to the Mill Creek enclave entirely embraced within Block 13. See Plaintiff's Exhibit C-1. The patent to Block 13 issued from the Choctaw and Chickasaw Nations, June 11, 1906. As tribal sovereignty over Block 13 was extinguished by sale prior to Oklahoma statehood, the tract was still a part of a territory of the United States which Congress could transfer into another state without abrogating any treaty commitments. It is respectfully submitted that Congress and all others involved had anticipated the same process and consequences for the rest of the lands embraced by the

> act further down stream at the bend of the Poteau River. Such was not to be the case, however. As demonstrated by Plaintiff's Exhibits C-2 through C-24, all the remaining lots comprising Blocks 1-12 were not sold or patented until 1908 or later.

Amended Prehearing Brief of the Plaintiff at 34-36.

In opposition, Arkansas contends that the "intent of Congress in passing the Act of February 10, 1905, is apparent from the face of the Act and congressional committee reports. Congress intended to authorize Arkansas immediately to extend its western boundary to include in the State of Arkansas the area in question, which was explicitly and clearly described in the Act." Prehearing Brief of the Defendant at 4.

The issue requires the statutory construction of the Act of February 10, 1905. The Act (previously quoted herein) is as follows:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the consent of the United States is hereby given for the State of Arkansas to extend her western boundary line so as to include all that strip of land in the Indian Territory lying and being situate between the Arkansas State line adjacent to the city of Fort Smith, Arkansas, and the Arkansas and Poteau rivers, described as follows, namely: Beginning at a point on the south bank of the Arkansas River one hundred paces east of old Fort Smith, where the western boundary line of the State of Arkansas crosses the said river, and running southwesterly along the south bank of the Arkansas River to the mouth of the Poteau; thence at right angles with the Poteau River to the center of the current of said river; thence

> southerly up the middle of the current of the Poteau River (except where the Arkansas State line intersects the Poteau River) to a point in the middle of the current of the Poteau River opposite the mouth of Mill Creek, and where it is intersected by the middle of the current of Mill Creek; thence up the middle of Mill Creek to the Arkansas State line; thence northerly along the Arkansas State line to the point of beginning: *Provided,* That nothing in this Act shall be construed to impair any right now pertaining to any Indian tribe or tribes in said part of said Indian Territory under the laws, agreements, or treaties of the United States, or to affect the authority of the Government of the United States to make any regulations or to make any law respecting said Indians or their lands which it would have been competent to make or enact if this Act had not been passed.

33 Stat. 714-715; Plaintiff's Exhibit D-9.

For discussion, the Act of February 10, 1905 can be divided into two parts. The first part is the clause which consents to a boundary change to include the disputed tract. The second part is the proviso. Oklahoma argues that Congress only gave "consent" to an extension of the boundary; that there are no words evidencing intent to abrogate prior treaty obligations or Indian policy; that a contrary intent is manifested in the proviso of the Act; and that Congress therefore intended a boundary change to be effective upon future events. Amended Prehearing Brief of the Plaintiff at 36. Oklahoma further states, "The proviso operates as a limitation on the permission of Congress to the transfer of the disputed tract into Arkansas." Prehearing Reply Brief of the Plaintiff at 2.

Arkansas argues that the proviso was added "to indicate clearly Congress' intent that the Indians' title to the

land and the authority of Congress to make regulations and laws respecting said Indians or their lands were not affected by the Act." Prehearing Brief of the Defendant at 4.

The underlying legal principle is that congressional intent will control. *Rosebud Sioux Tribe v. Kneip, supra,* 430 U.S. 584, 97 S.Ct. 1361, 51 L.Ed.2d 660 at 664 (1977). But the congressional intent to terminate or diminish the sovereignty of an Indian Nation or Tribe must be expressed on the face of the Act or be clear from the surrounding circumstances and legislative history. *Solem v. Bartlett,* 465 U.S. ....., 104 S.Ct. 1161, 79 L.Ed.2d 443 at 450 (1984); *DeCoteau v. District County Court,* 420 U.S. 425, 95 S.Ct. 1082, 43 L.Ed.2d 300 at 314 (1975), *rehearing denied,* 421 U.S. 939, 95 S.Ct. 1667, 44 L.Ed.2d 95 (1975), and cases therein cited. And "ambiguities in legislation affecting retained tribal sovereignty are to be construed in favor of the Indians." *Washington v. Yakima Indian Nation,* 439 U.S. 463, 99 S.Ct. 740, 58 L.Ed.2d 740 at 758 (1979), *rehearing denied,* 440 U.S. 940, 99 S.Ct. 1290, 59 L.Ed.2d 500 (1979).

For the following reasons the Special Master concludes that the contention of Oklahoma is without merit.

The consent clause authorized Arkansas immediately to extend its western boundary to include the disputed tract as defined in the Act. The proviso reserved (1) the power of Congress over the Indians, and (2) the existing rights of the Indian Tribes in the disputed tract. The proviso was added to define the limits of State power over the Indian Tribes and tribal members if and when the disputed tract became a part of the State of Arkansas. The Act did not expressly condition the boundary change upon the occurrence of future events. It is concluded that the proviso should not be construed as precluding an immediate boundary change.

This construction is consistent with a line of Supreme Court opinions discussing the enabling acts of Congress which consent to the immediate admission of new States into the Union, but limit the power of the States over Indian Tribes and tribal members within their boundaries after admission. Many of these enabling acts had provisos which are similar to the one here in question. See *Blue Jacket v. The Board of Commissioners of the County of Johnson,* 72 U.S. 737, 5 Wall. 737, 18 L.Ed. 667 (1867), discussing the Kansas enabling act which had a similar proviso; *Ex parte Webb, supra,* 225 U.S. 663, 32 S.Ct. 769, 56 L.Ed. 1248 (1912), discussing a similar proviso in the Oklahoma enabling act; *Ward v. Race Horse,* 163 U.S. 504, 16 S.Ct. 1076, 41 L.Ed. 244 (1896), discussing a similar proviso in the enabling act for the Territory of Wyoming, and the absence of that proviso in the enabling act for the State of Wyoming; *Washington v. Yakima Indian Nation, supra,* 439 U.S. 463, 99 S.Ct. 740, 58 L.Ed.2d 740 (1979), *rehearing denied,* 440 U.S. 940, 99 S.Ct. 1290, 59 L.Ed.2d 500 (1979); *Organized Village of Kake v. Egan,* 369 U.S. 60, 82 S.Ct. 562, 7 L.Ed.2d 573 (1962); *Draper v. United States,* 164 U.S. 240, 17 S.Ct. 107, 41 L.Ed. 419 (1896); *United States v. McBratney,* 104 U.S. 621, 26 L.Ed. 869 (1882).[17]

---

17. These and related opinions of the Supreme Court apply the principle of Indian law that the power of a State over Indian Tribes and tribal members within its boundaries is sometimes limited. As noted in *McClanahan v. State Tax Commission of Arizona, supra,* 411 U.S. 164, 93 S.Ct. 1257, 36 L.Ed.2d 129 at 135-136 (1973), to determine the extent of State power over Indians the Supreme Court considers, among other things, the statutes of Congress which define the limits of State power. The Special Master concludes that the proviso in the Act of February 10, 1905, like similar provisos and other clauses in several enabling acts of Congress, was added by Congress to define the limits of State power over the Indians and not to condition the boundary change in question upon termination of the rights of Indians.

The construction by the Special Master of the Act of February 10, 1905 is also consistent with the legislative history of the Act of February 10, 1905. Senate Report No. 3687, which quoted House Report No. 4141, is as follows:

> The Committee on Territories, to whom was referred the bill (H. R. 18280) to extend the western boundary line of the State of Arkansas, have given the same a careful consideration and recommend its passage without amendment.
>
> House Report 4141, Fifty-eighth Congress, third session, is adopted and made a part of this report as follows:
>
> The Committee on the Judiciary has had under consideration the bill (H. R. 18280) to extend the western boundary line of the State of Arkansas, and return the same to the House with the recommendation that it do pass.
>
> The purpose of the bill is to authorize the State of Arkansas to change and extend her western boundary line adjacent to the city of Fort Smith, so as to include within the State a small and irregular tract of land situated between the present boundary line of the State and the Arkansas and Poteau rivers, so as to make the center of the channel of the Poteau River the boundary line of the State adjacent to said city.
>
> The change, if the bill becomes a law, will authorize the State to annex to itself three small irregular pieces of land, in the aggregate only about 15 acres.
>
> This property is now largely the rendezvous for criminals. It has no city government; no sewerage, light, or water system; no churches or schools, and

> is a menace to the health, peace, and morals of the city.
>
> The boundary line, as authorized in the bill, conforms to the natural boundary by conforming at this point to the meandering of said Poteau and Arkansas rivers. In the opinion of your committee no valid or meritorious objections can be urged against the passage of the bill.

Senate Report No. 3687, 58th Congress, 3d Session, February 6, 1905; Defendant's Exhibit D.[18]

Nothing in these legislative reports supports the contention of Oklahoma that Congress intended to condition the boundary change upon the occurrence of future events, other than the future action by "the State of Arkansas to extend her western boundary line." This action by Arkansas was promptly taken. Further, the legislative reports quoted above clearly state that the purpose of the bill was to authorize the boundary change, and that the bill if enacted would authorize Arkansas to annex the disputed tract. It is unlikely that Congress would consent to a boundary change by a State to improve the conditions of the disputed tract, and at the same time condition that boundary change upon future events other than the action of the State extending the boundary.

---

18. It is noted that three different figures for the area of the disputed tract are found in the material submitted in this action. In the stipulated description of the disputed tract, the area is described as 55 acres. Stipulated Facts, SM Exhibit 1, Section III, Paragraph 3. In House Report No. 4141, the area is described as 15 acres. Defendant's Exhibit D. At page 61 of Morris, Goins and McReynolds, *Historical Atlas of Oklahoma,* Second Edition, the area is described as 130 acres. The *Historical Atlas of Oklahoma, supra,* was submitted by Oklahoma with plaintiff's Motion for the Special Master to take Judicial Notice of Facts, and is cited several times in the Amended Prehearing Brief of the Plaintiff.

Therefore, the Special Master concludes that the Act of February 10, 1905 consented to an immediate boundary change, which was not conditioned upon the allotment of the Indian lands and the termination of the jurisdiction of the Choctaw and Chickasaw Nations over the disputed tract. This leaves for discussion the issue whether the disputed tract thereafter became a part of Oklahoma when Oklahoma became a State, or a part of Arkansas pursuant to Act No. 41, Ark. Stat. Ann. § 5-101 (Repl. 1976), February 16, 1905.

III.

Effect of Admission of Oklahoma as a State

Oklahoma contends that the enabling act for the State of Oklahoma, dated June 16, 1906, authorized the inhabitants of the Territory of Oklahoma and Indian Territory to adopt a constitution and become the State of Oklahoma; that the disputed tract, with the exception of Block 13, was located then within the boundaries of Indian Territory because the Act of February 10, 1905 did not consent to an immediate boundary change; and that all the disputed tract, with the exception of Block 13, therefore became part of Oklahoma.

Having considered this argument, the Special Master concludes that when Oklahoma became a State it did not acquire sovereign control of the disputed tract.

As concluded in Section I above, Congress had the power to consent to an extension of the western boundary of Arkansas. And as concluded in Section II above, Congress exercised this power and consented to an immediate extension of the western boundary of Arkansas to include the disputed tract. Act of February 10, 1905, 33 Stat. 714; Plaintiff's Exhibit D-9. Thereafter, Arkansas extended its western boundary to include the disputed tract. Act

No. 41, Ark. Stat. Ann. § 5-101 (Repl. 1976), February 16, 1905; Defendant's Exhibit E. The disputed tract was thus included in the State of Arkansas by the joint action of Congress and the State of Arkansas.

Over a year later, on June 16, 1906, Congress enacted the enabling act for the State of Oklahoma. Section 1 of that Act provided in part:

> That the inhabitants of all that part of the area of the United States now constituting the Territory of Oklahoma and the Indian Territory, as *at present described,* may adopt a constitution and become the State of Oklahoma, as hereinafter provided. [Emphasis added.]

Act of June 16, 1906, 34 Stat. 267; Defendant's Exhibit F.[19]

Because the western boundary of Arkansas previously had been extended into Indian Territory to include the disputed tract, the disputed tract was not within the boundaries of Indian Territory at the time of the enabling act. Therefore, under the express language of the enabling act emphasized above, the boundaries of the new State of Oklahoma did not include the disputed tract.

Further, it is doubtful that by the enabling act of June 16, 1906, Congress intended to abrogate or repeal

---

19. The boundaries of the Territory of Oklahoma and Indian Territory were described earlier in the Act of May 2, 1890, 26 Stat. 81. In the Act of May 2, 1890, Congress "erected" a portion of what was then known as "Indian Territory" into the Territory of Oklahoma. The boundaries of the Territory of Oklahoma were described in Section 1 of that Act. The boundaries of the reduced "Indian Territory" were described in Section 29 of that Act as follows:

> [A]ll that part of the United States which is bounded on the north by the State of Kansas, *on the east by the States of Arkansas* and Missouri, on the south by the State of Texas, and on the west and north by the Territory of Oklahoma as defined in the first section of this act, shall, for the purposes of this act, be known as the Indian Territory. [Emphasis added.]

the extension of the western boundary of Arkansas which Congress authorized on February 10, 1905. As Congress stated in the legislative reports on the Act of February 10, 1905, the boundary line authorized by the Act of February 10, 1905 "conforms to the natural boundary by conforming at this point to the meandering of said Poteau and Arkansas rivers." House Report No. 4141; Defendant's Exhibit D.

Moreover, even if Congress had intended to place the disputed tract within the State of Oklahoma, it was without power to do so. After the western boundary of Arkansas was extended, Congress could not place the disputed tract within the boundaries of Oklahoma without the consent of Arkansas. U.S. Const., Art. 4, § 3, Clause 1; *New Mexico v. Colorado, supra,* 267 U.S. 30, 45 S.Ct. 202, 69 L.Ed. 499 at 502 (1925), *modification denied,* 267 U.S. 582, 45 S.Ct. 353, 69 L.Ed. 798 (1925); *Washington v. Oregon, supra,* 211 U.S. 127, 29 S.Ct. 47, 53 L.Ed. 118 at 119 (1908), *rehearing denied,* 214 U.S. 205, 29 S.Ct. 631, 53 L.Ed. 969 (1909). No consent by Arkansas, express or otherwise, has been shown in this action.

For these reasons, it is concluded that the disputed tract did not become a part of the State of Oklahoma, but remained within the boundaries of the State of Arkansas under the Act of February 10, 1905 and the subsequent legislation by Arkansas.

IV.

Acquiescence of Oklahoma in Exercise by Arkansas of Sovereignty Over Disputed Tract

The remaining issue before the Special Master is the contention of Arkansas that the doctrine of acquiescence is applicable in this action. Because of the conclusions in Sections I, II and III it is unnecessary to decide if

the disputed tract has become a part of the State of Arkansas under the doctrine of acquiescence. Nevertheless, to report fully and make recommendations on all issues presented in this action, this contention of Arkansas will be addressed.

As stated in *Ohio v. Kentucky,* 410 U.S. 641, 93 S.Ct. 1178, 35 L.Ed.2d 560 at 568-569 (1973):

> "The rule, long-settled and never doubted by this court, is that long acquiescence by one state in the possession of territory by another and in the exercise of sovereignty and dominion over it is conclusive of the latter's title and rightful authority." *Michigan v. Wisconsin,* 270 U.S. 295, 308, 70 L.Ed. 595, 46 S.Ct. 290 (1926). To like effect are *Vermont v. New Hampshire,* 289 U.S. 593, 613, 77 L.Ed. 1392, 53 S.Ct. 708 (1933); *Maryland v. West Virginia,* 217 U.S. 1, 42-44, 54 L.Ed. 645, 30 S.Ct. 268 (1910); *Louisiana v. Mississippi,* 202 U.S. 1, 53-54, 50 L.Ed. 913, 26 S.Ct. 408 (1906); *Virginia v. Tennessee,* 148 U.S. 503, 523, 37 L.Ed. 537, 13 S.Ct. 728 (1893); *Indiana v. Kentucky,* 136 U.S. at 509-510, 518, 34 L.Ed. 329; *Rhode Island v. Massachusetts,* 4 How. 591, 639, 11 L.Ed. 1116 (1846).

The facts in this action fully and clearly support the contention of Arkansas. The parties, for example, stipulated that Arkansas has continuously "exercised sovereignty, dominion and control, and exclusive criminal and civil jurisdiction over the disputed tract" since the enactment of Act No. 41, Ark. Stat. Ann. § 5-101 (Repl. 1976), on February 16, 1905. Stipulated Facts, SM Exhibit 1, Section III, Paragraph 14. Oklahoma conceded that "Arkansas has to this date exercised an unbroken jurisdictional continuity over the lands here in dispute. If the doctrine of acquiescence as pronounced in the decisions of the United States Supreme Court has any appli-

cation to the case at bar Oklahoma's claim must fail." Amended Prehearing Brief of the Plaintiff at 43-44.

Oklahoma, therefore, contends that the doctrine is not legally applicable and attempts to distinguish the Supreme Court opinions which apply the doctrine. Oklahoma argues:

> The vast majority of the cases where the doctrine has been applied involve boundaries defined by water courses. . . . A limited number of the cases involve ill-defined or difficult to locate boundaries. . . . No case has been discovered where an established identifiable boundary has been unilaterally changed by Congress in derrogation [sic] of existing rights established by law and the action thereafter vindicated on the doctrine of acquiescence. Indeed, it would appear Art. IV, § 3, para. 1 of the United States Constitution was expressly intended to prohibit such action. The doctrine has never been employed as a means by which to circumvent the clear prohibitions of the Constitution.
>
> We are not here concerned with the legal consequences of the meanderings or sudden convulsions of a river. Nor can it be said this case involves the judicial resolution of the factum of where a described boundary actually locates upon the surface of the earth. In this case, Plaintiff asserts Congress had no lawful authority to permit the inclusion of the tract in Arkansas when Choctaw and Chickasaw rights therein had not prior to statehood been extinguished and the attempt to effect such a transfer after statehood of Plaintiff is in derrogation [sic] of the Constitution. Under such circumstances, Oklahoma would submit the doctrine of acquiescence has no application.

Amended Prehearing Brief of the Plaintiff at 44-45.

In *California v. Nevada, supra,* 447 U.S. 125, 100 S.Ct. 2064, 65 L.Ed.2d 1 at 7-8 (1980), the Supreme Court dismissed a similar argument concluding the following:

> The State of Nevada's primary contention is that the Special Master's reliance upon the doctrine of acquiescence was in error. Basically, the argument is that once Nevada and California had conducted the 1863 joint survey which produced the Houghton-Ives line the Federal Government had no constitutional authority to mark a different line which had the effect of removing territory from one State and granting it to the other. Since the Congress was without power to determine the Von Schmidt and United States Coast and Geodetic Survey lines, the argument continues, they are without legal effect. And because States may not confer upon the Federal Government a power which the Constitution does not vest in it, acquiescence in those lines cannot make them lawful. Thus, Nevada concludes, either (1) Congress is constitutionally empowered to redraw the boundaries of the several States, in which case the Von Schmidt and Geodetic Survey lines may be upheld regardless of acquiescence, or (2) Congress is constitutionally powerless to alter those boundaries, in which case no mere century of acquiescence can convert a surpation into law.
>
> The flaw in this argument is that it assumes that there must be a particular relationship between the *origins* of a boundary and the legal *consequences* of acquiescence in that boundary. In fact, however, no such relationship need exist. Longstanding acquiescence by California and Nevada can give the Von Schmidt and Geodetic Survey lines the force of law whether or not federal authorities had the power to draw them. And the determination that the two States' conduct has had precisely this effect, therefore,

> does not place any sort of constitutional imprimatur upon the federal actions involved. See *Ohio v. Kentucky,* 410 U.S. 641, 648-651, 35 L.Ed.2d 560, 93 S.Ct. 1178, 64 Ohio Ops.2d 283 (1973); *Indiana v. Kentucky,* 136 U.S. 479, 509-510, 34 L.Ed. 329, 10 S.Ct. 1051 (1890). Accordingly, we need not address the issue of federal power to which Nevada adverts. It is enough that California claims and has always claimed all territory up to a specifically described boundary—the 120th meridian and the oblique line with which it connects—and that both States had long acquiesced in particular lines marking that boundary. If Nevada felt that those lines were inaccurate and operated to deprive it of territory lawfully within its jurisdiction the time to object was when the surveys were conducted, not a century later. *Ohio v. Kentucky, supra,* at 649, 35 L.Ed.2d 560, 93 S.Ct. 1178, 64 Ohio Ops.2d 283. [Footnote omitted.]

The distinctions raised by Oklahoma in this action are based upon the "origin" of the boundary which Oklahoma now contests. Under the analysis quoted above from the *California v. Nevada* opinion, *supra,* these distinctions do not render the doctrine of acquiescence inapplicable. The Special Master concludes, therefore, that, as a separate ground the doctrine of acquiescence is legally and factually applicable in this action, and that the disputed tract has become a part of the State of Arkansas under the doctrine of acquiescence.[20]

---

20. Oklahoma attempted to distinguish *California v. Nevada,* 447 U.S. 125, 100 S.Ct. 2064, 65 L.Ed.2d 1 (1980), in its oral argument at the final hearing of June 23, 1981. Transcript of Final Hearing at 55-57. Although its argument is not clear, Oklahoma apparently draws a distinction between acquiescence in (1) a State as described in an act of Congress and (2) the actual State boundary which is later surveyed according to that description. Oklahoma argues that in *California v. Nevada, supra,*

(Continued on following page)

CONCLUSIONS AND RECOMMENDED JUDGMENT

For the foregoing reasons, the Special Master recommends entry of a judgment that the disputed tract has become a part of the State of Arkansas (1) by the joint legislative action of Congress and the State of Arkansas, and as a separate ground, (2) under the doctrine of acquiescence. For each reason the western boundary of the State of Arkansas has been extended to include the disputed tract. Therefore, judgment should be entered in favor of the State of Arkansas and against the State of Oklahoma, dismissing the claim of the State of Oklahoma with prejudice.

All costs should be taxed against the State of Oklahoma, and the State of Oklahoma directed to pay to the State of Arkansas the portion of the costs prepaid by the State of Arkansas.

Respectfully submitted,

WILLIAM H. BECKER
Special Master

Footnote continued—

the parties agreed on the legal description of the boundary between California and Nevada, but disagreed on where that line falls on the Earth. Oklahoma argues that in this action the parties disagree that the boundary described in the Act of February 10, 1905, is the correct legal boundary between Arkansas and Oklahoma.

The Special Master has considered this distinction and concludes that the argument of Oklahoma relies upon a too narrow interpretation of the *California v. Nevada* opinion, *supra*. In both this action and *California v. Nevada, supra,* the applicability of the doctrine of acquiescence was challenged by the argument that the parties have acquiesced in a line which resulted from alleged unconstitutional action of Congress. The difference between the actions is that in *California v. Nevada, supra,* the alleged unconstitutional action was a new survey of the boundary between California and Nevada, while in this action the alleged unconstitutional action is the extension of the western boundary of Arkansas. The Special Master finds that this distinction does not render the holding in *California v. Nevada, supra,* inapplicable.

SPECIAL MASTER'S EXHIBIT 1

The following prehearing proceedings are pursuant to Rule 16 of the Federal Rules of Civil Procedure and Rule 20 of the United States District Court of the Western District of Missouri.

IT IS ORDERED:

I. These proceedings are an original action before the United States Supreme Court now pending by reference in the United States District Court of the Western District of Missouri, Senior United States District Judge William H. Becker serving by appointment as Special Master to the United States Supreme Court. The nature of the action is a dispute as to the proper boundary between the states of Arkansas and Oklahoma. The action was initiated in the United States Supreme Court on a "Motion for Leave to File Bill of Complaint and Complaint" filed on behalf of the State of Oklahoma as plaintiff. The State of Arkansas, the named Defendant in the foregoing pleading of the State of Oklahoma, responded in the United States Supreme Court by filing its "Motion and Memorandum in Support of Motion to Deny Leave to File Bill of Complaint." On October 2, 1978, the United States Supreme Court entered its Order granting the State of Oklahoma's Motion for Leave to File a Bill of Complaint and granting the Defendant, State of Arkansas, sixty (60) days in which to answer. Thereafter, the Defendant, State of Arkansas, timely filed with the United States Supreme Court its Answer. On January 22, 1979, the United States Supreme Court entered its Order appointing the Honorable William H. Becker, Senior Judge of the United States District Court for the Western District of Missouri, as Special Master

in this original proceeding "with authority to fix the time and conditions for the filing of additional pleadings and to direct subsequent proceedings, and with authority to summon witnesses, issue subpoenas, and take such evidence as may be introduced and such as he may deem necessary to call for."

II. Jurisdiction of the United States Supreme Court for this original action has been invoked upon the grounds stated in Article III, Section 2 of the Constitution of the United States, and 28 U.S.C. § 1251(a)(1).

III. The following facts are admitted, and require no proof:

1. Plaintiff and Defendant are sovereign States of the United States of America. Plaintiff, the State of Oklahoma, was admitted to the Union on November 16, 1907. Defendant, the State of Arkansas, was admitted to the Union on June 15, 1836.

2. When admitted to the Union, the Western boundary of the State of Arkansas was, beginning at a point at the south-west corner of the State of Missouri, "and from thence to be bound on the west, to the north bank of the Red River, by the lines described in the first article of the treaty between the United States and the Cherokee Nation of Indians west of the Mississippi, made and concluded in the City of Washington on the twenty-sixth day of May, in the year of our Lord one thousand eight hundred and twenty-eight; . . ." The Western boundary of the then Territory of Arkansas being described in the Treaty with the Western Cherokee, 1828, 7 Stat. 311, (Plaintiff's Exhibit D-3), was as follows: "The Western boundary of Arkansas shall be, and the same is, hereby defined, viz: A line shall be run, commencing on the Red River, at the point where the Eastern Choctaw line

strikes said River, and run due North with said line to the River Arkansas, thence in a direct line to the Southwest corner of Missouri."

3. As shown by the "Original Field Notes of Township 8 and 9 North Range 32 West" of the original government surveyor, William Clarkson, Jr., dated December 28, 1828 (Plaintiff's Exhibit B) and by the map of the United States Surveyor John Fisher, prepared in 1904 (Plaintiff's Exhibit A), there was a tract of land containing 55 acres more or less bounded on the East by the Western boundary of the State of Arkansas and on the West by the Poteau and Arkansas Rivers, hereafter referred to as the disputed tract. The disputed tract of land was at different times, until June 28, 1898, under the complete dominion and control of the Cherokee, Chickasaw and Choctaw Nations of Indians.

4. Under the Treaty with the Choctaw, 1820, 7 Stat. 210, (Plaintiff's Exhibit D-1), commonly referred to as the Treaty of Doak's Stand, the Choctaw Nation of Indians, in exchange for lands ceded by them to the United States East of the Mississippi River, were in turn ceded lands generally described as follows:

> "Beginning on the Arkansas River, where the lower boundary line of the Cherokees strikes the same; thence up the Arkansas to the Canadian Fork, and up the same to its source; thence due South to the Red River; thence down Red River, three miles below the mouth of Little River, which empties itself into Red River on the north side; thence a direct line to the beginning."

Said described lands include within its boundaries as set forth the disputed tract herein.

5. Under the Treaty with the Choctaw, 1825, 7 Stat. 234 (Plaintiff's Exhibit D-2), the Choctaw Nation of Indians ceded back to the United States all lands ceded to said Choctaw Nation of Indians under the Treaty of Doak's Stand lying east of a north south line beginning on the Arkansas River one hundred paces east of Fort Smith as it existed in 1825. Said treaty with the Choctaws, 1825, was the last adjustment of the western boundary of Arkansas and the Eastern boundary of the Choctaw lands undertaken until 1905.

6. By Act of Congress, May 2, 1890, 26 Stat. 81, all of land organized and established as a Territory of the the the disputed tract, were embraced within a larger tract of land organized and established as a Territory of the United States and called Indian Territory.

7. By Act of Congress, June 28, 1898, 30 Stat. 495, (Plaintiff's Exhibit D-7) "the jurisdiction of the court and municipal authority of the city of Fort Smith for police purposes . . ." was extended over the disputed tract.

8. By Act of Congress, February 10, 1905, 33 Stat. 714, "consent of the United States" was given to the State of Arkansas to extend its western boundary so as to include the disputed tract.

9. By Act of the Legislature of the State of Arkansas, February 16, 1905, Ark. Stat. Ann. § 5-101 (Repl. 1976), (Defendant's Exhibit E), the State of Arkansas acted to extend its western boundary so as to include the disputed tract.

10. By Act of Congress, June 16, 1906, 34 Stat. 267, Indian Territory and Oklahoma Territory were permitted to adopt a constitution and organize as a new State subject to admission to the Union of States.

11. Pursuant to an Act of Congress, April 26, 1906, 34 Stat. 137, (Plaintiff's Exhibit D-10) the surplus lands and lands reserved from allotment of the Choctaw and Chickasaw Nations of Indians were to be sold. Among the lands to be sold were lots comprising the entirety of the disputed tract. The chief executive officers of the Choctaw and Chickasaw Nations of Indians, upon the sale of the aforementioned lots, issued patents to the purchasers thereof. (Plaintiff's Exhibits C-1 through C-24, inclusive). All of the sales and patents issued pursuant thereto occurred subsequent to November 16, 1907, with the exception of those lots comprising Block 13. (Plaintiff's Exhibit C-1).

12. The lands conveyed by the Choctaw Indian Nation to Isaac Lowrey, June 11, 1906, to-wit:

Lots 1, 2, 3, 4, 5, 6, and 7, Block 13, West Fort Smith, as reflected in the patent appended hereto as Exhibit C-1 are now and have been a part of the State of Arkansas since the date of said patent.

13. The words "LeFlore Co." on Plaintiff's Exhibit A should be deleted from the exhibit, inasmuch as those words did not appear on the original plat.

14. Continuously since the enactment of Ark. Stat. Ann. § 5-101 (Repl. 1976) in 1905, the State of Arkansas has exercised sovereignty, dominion and control, and exclusive criminal and civil jurisdiction over the disputed tract.

15. Upon the issuance of patents from the Choctaw and Chickasaw Nations to the lots contained within the disputed tract to private persons, as evidenced by Exhibits C-1 through C-24, the tax-exempt status of such lands ceased. From and after such dates, Sebastian County, Arkansas, has continuously levied and collected real prop-

erty taxes on said lots within the disputed tract, with the exception of such parts thereof as may thereafter have acquired a tax-exempt status under Arkansas law. LeFlore County, Oklahoma, has never levied or collected real property taxes on said lots within the disputed tract.

16. A part of the disputed tract here in question is now the Fort Smith National Historic Site.

17. Maps produced by the Arkansas State Highway and Transportation Department, Division of Planning and Research, in cooperation with the U. S. Department of Transportation and the Federal Highway Administration, and by the Oklahoma Department of Transportation, Planning Division, in cooperation with the U. S. Department of Transportation and the Federal Highway Administration, depict the boundary line between Sebastian County, Arkansas, and LeFlore County, Oklahoma, in such a way that the disputed tract is shown to lie entirely within the State of Arkansas.

IV. There are no issues of fact remaining to be litigated upon a trial.

V. Plaintiff and Defendant hereby stipulate to the authenticity, genuineness, due execution and admissibility of all the hereinafter-listed exhibits by either party.

(A) Plaintiff's List of Numbered Exhibits.

Exhibit 'A'	Map - West Fort Smith, Choctaw Nation Indian Territory
Exhibit 'B'	Compared Copy of Original Field Notes of Townships 8 and 9 North, Range 32 West, Book No. 1736C, pages 166, 167, 184, 185, 186, 191, 195, 196, 197, 201, 202 Prepared by William Clarkson, Jr.

Exhibit 'C' Patents from the Choctaw and Chickasaw Nations Covering Blocks 1-13, inclusive, West Fort Smith:

C-1 Block 13, Lots 1, 2, 3, 4, 5, 6 and 9.
Patent to Isaac S. Lowrey, June 11, 1906.

C-2 Block 1, Lots 3, 4, 5, 6 and 7.
Patent to Arkansas Granite Brick Company, Inc.,
July 24, 1908.

C-3 Block 3, Lots 3, 4, 7, 8, 9, 10, 15, 16, 17, 18 and 19.
Patent to Ida L. Foucar and Mark S. Cohn
July 24, 1908.

C-4 Block 4, Lots 1, 2, 3, 4, 11, 12, 14, 15 and 16
Patent to Ida L. Foucar and Mark S. Cohn
July 22, 1908.

C-5 Block 6, Lots 2, 3 and 4
Patent to Ida L. Foucar and Mark S. Cohn
July 24, 1908.

C-6 Block 5, Lot 1
Patent to Ida L. Foucar
July 24, 1908.

C-7 Block 6, Lots 1 and 7
Patent to George W. Harper and Constant P. Wilson
July 24, 1908.

C-8 Block 6, Lots 8, 9, 10, 11, 12 and 13
Patent to Ketcham Iron Company
July 24, 1908.

C-9 Block 7, Lots 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14 and 15
Patent to James Bower and Mark S. Cohn
July 24, 1908.

C-10 Block 8, Lots 4 and 5
Patent to James Bower and Mark S. Cohn
July 24, 1908.

C-11 Block 9, Lots 2, 4 and 5
Patent to James Bower and Mark S. Cohn
July 24, 1908.

C-12 Block 10, Lots 4, 5 and 6
Patent to James Bower and Mark S. Cohn
July 24, 1908.

C-13 Block 1, Lots 1 and 2
Patent to Fort Smith Sash and Door Company, Inc.
July 24, 1908.

C-14 Block 3, Lots 1, 2, 5, 6, 11 and 12
Patent to Ida L. Foucar and Mark S. Cohn
November 21, 1908.

C-15 Block 3, Lots 13 and 14
Patent to Ketchum Iron Company, Inc.
November 21, 1908.

C-16 Block 4, Lots 6, 7, 9 and 10
Patent to Ketchum Iron Company, Inc.
November 21, 1908.

C-17 Block 6, Lots 5, 6, 14 and 15
Patent to Ketchum Iron Company, Inc.
November 21, 1908.

C-18 Block 7, Lots 1, 2 and 3
Patent to William J. Johnston
November 21, 1908.

C-19 Block 8, Lots 1, 2, 3, 6, 7 and 8
Patent to James Bower and Mark S. Cohn
November 21, 1908.

C-20 Block 9, Lots 1, 3, 6, 7 and 8
Patent to James Bower and Mark S. Cohn
November 21, 1908.

C-21 Block 10, Lots 1, 2, 3, 7 and 8
Patent to James Bower and Mark S. Cohn
November 21, 1908.

C-22 Block 11, Lots 1, 2, 3, 4, 5, 6, 7 and 8
Patent to William J. Johnston
November 21, 1908.

C-23 Block 12, Lots 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17 and 18
Patent to John W. Underwood
November 21, 1908.

C-24 Block 2, Lot 1; Block 4, Lots 5, 8 and 13; Block 5, Lots 2, 3 and 4
Patent to Ida L. Foucar and Mark S. Cohn
May 9, 1910.

Exhibit 'D' TREATIES AND ACTS

D-1 Treaty with the Choctaw, 1820
"Treaty of Doak Stand"
7 Stat. 210 (October 18, 1820)

D-2 Treaty with the Choctaw, 1825
7 Stat. 234 (January 20, 1825)

D-3 Treaty with the Western Cherokee, 1828
7 Stat. 311

D-4 Treaty with the Choctaw, 1830
"Treaty of Dancing Rabbit Creek"
7 Stat. 333 (September 17, 1830)

D-5 Treaty with the Choctaw and Chickasaw, 1855
11 Stat. 611 (March 4, 1856)

D-6 Treaty with the Choctaw and Chickasaw, 1866
14 Stat. 769 (April 28, 1866)

D-7 An Act for the Protection of the People of Indian Territory, etc.
30 Stat. 495 (June 28, 1898)

D-8 An Act to Ratify and Confirm an Agreement With the Choctaw and Chickasaw Tribes, etc.
32 Stat. 641 (July 1, 1902)

D-9 An Act to Extend the Western Boundary Line of the State of Arkansas
33 Stat. 714 (February 10, 1905)

D-10 An Act to Provide for the Final Disposition of the Affairs of The Five Civilized Tribes in Indian Territory, etc.
34 Stat. 137 (April 26, 1906)

(B) Defendant's List of Numbered Exhibits

Exhibit A Treaty with the Choctaw, 1786
"Treaty of Hopewell"
(7 Stat. 21)

Exhibit B Legislation creating Dawes' Commission, 1893
(27 Stat. at 645-646)

Exhibit C Legislation making Indians in Indian Territory citizens of the United States, 1901
(31 Stat. 1477; 24 Stat. 388)

Exhibit D Reports of the House and Senate preceding enactment of legislation authorizing the extension of the western boundary line of Arkansas, 1905

Exhibit E — Legislation by the General Assembly of Arkansas to extend the western boundary line of the State, 1905
[Ark. Stat. Ann. §5-101 (Repl. 1976)]

Exhibit F — Legislation providing for the creation of the State of Oklahoma, 1906
(34 Stat. 267)

Exhibit G — Sebastian County, Arkansas, tax records for West Fort Smith for the years 1908-1909

Exhibit H — Legislation by the General Assembly of Arkansas requiring the Attorney General to make biennial reports to the Governor and General Assembly, 1911
[Ark. Stat. Ann. §12-705 (Repl. 1968)]

Exhibit I — Copy of title page and pp. 17-18 of the Arkansas Attorney General's biennial report for 1910-1912

Exhibit J — Legislation "authorizing the establishment of the Fort Smith National History Site, in the State of Arkansas", 1961
(Public Law 87-215)

Exhibit K — Map of "Existing Conditions, Fort Smith National Historic Site, Arkansas," produced by the United States Department of the Interior - National Park Service

Exhibit L — Map of "Existing Management Zoning, Fort Smith National Historic Site, Arkansas," produced by the United States Department of the Interior - National Park Service

Exhibit M — Map of "Landownership, Fort Smith National Historic Site, Arkansas," produced

by the United States Department of the Interior - National Park Service

Exhibit N — General Highway Map of Sebastian County, Arkansas, prepared by the Arkansas State Highway and Transportation Department, Division of Planning and Research, in cooperation with the U. S. Department of Transportation, Federal Highway Administration

Exhibit O — General Highway Map of LeFlore County, Oklahoma, prepared by the Oklahoma Department of Transportation, Planning Division, in cooperation with the U. S. Department of Transportation, Federal Highway Administration

VI. The following issues of law, and no others, remain to be litigated upon the trial:

(A) Did the Congress of the United States have the unilateral authority to transfer, without the consent of the Choctaw and Chickasaw Nations of Indians, a portion of the lands of the said Choctaw and Chickasaw Nations of Indians into the jurisdiction of the State of Arkansas.

(B) Whether the State of Oklahoma, upon admission to the Union of States on November 16, 1907, pursuant to the Act of Congress, June 16, 1906, (Enabling Act), succeeded to the territory defined as being within the sovereign jurisdictional limits of the Choctaw and Chickasaw Nations of Indians so as to prohibit any change in the jurisdiction encompassed within the said State of Oklahoma without the necessity of complying with Article IV, Section 3, Para. 1, of the Constitution of the United States.

(C) Whether the continuous exercise of sovereignty and jurisdiction by the State of Arkansas from 1905 to the present day, more than 72 years of which was without complaint on the part of the State of Oklahoma, operates as an acquiescence in the boundaries as established by the Acts of Congress and the General Assembly of the State of Arkansas so as to preclude the State of Oklahoma from now challenging said boundary line.

VII. The foregoing admissions have been made by the parties, and the parties having specified the foregoing issues of law remaining to be litigated, this Order shall supplement the pleadings and govern the course of the trial of this case, unless modified to prevent manifest injustice, or to implement Rule 26(e), F.R.Civ.P.

Dated this 11th day of December, 1979.

SPECIAL MASTER'S EXHIBIT 2

COMES NOW the State of Oklahoma, Plaintiff in the above styled original action presently pending before the United States Supreme Court and before the Honorable William H. Becker serving by appointment as Special Master to the United States Supreme Court, and moves the Special Master to take judicial notice of certain historical facts. This motion is made on authority of Federal Rules of Evidence, Rule 201. The historical facts of which Plaintiff would request the Special Master to take judicial notice and the reference sources for such historical facts are as follows:

1. All were part [sic] of the present states of Arkansas and Oklahoma were required [sic] by the United States as part of the Louisiana Purchase of 1803. Morris, Goins and McReynolds, *Historical Atlas of Oklahoma,* University of Oklahoma Press, Norman, Oklahoma, 1976, Plat 15.

2. The location of boundaries to the Cherokee lands in Arkansas and Oklahoma under the Treaties of 1817 and 1819. Morris, Goins and McReynolds, *Historical Atlas of Oklahoma,* University of Oklahoma Press, Norman, Oklahoma, 1976, Plat 22.

3. Locations of boundaries to the Choctaw lands in Arkansas and Oklahoma under the Treaty of Doak's Stand of 1820. Morris, Goins and McReynolds, *Historical Atlas of Oklahoma,* University of Oklahoma Press, Norman, Oklahoma, 1976, Plat 21.

4. The first comprehensive federal Indian policy was that of "removal" and the territories embraced by all of present day Oklahoma and part of present day Arkansas were utilized in effectuating that policy. Felix S. Cohen,

Handbook of Federal Indian Law, University of New Mexico Press, Albuquerque, New Mexico, 1971, pp. 53-62.

5. Indian tribes native to the southern most tier of states were pressured to give up their lands east of the Mississippi in return for lands west of the Mississippi in what are now portions of the states of Oklahoma and Arkansas. Felix S. Cohen, *Handbook of Federal Indian Law,* University of New Mexico Press, Albuquerque, New Mexico, 1971, pp. 53-62.

6. Land transactions between the federal government and the Five Civilized Tribes were in most instances a sale in exchange of lands. Felix S. Cohen, *Handbook of Federal Indian Law,* University of New Mexico Press, Albuquerque, New Mexico, 1971, pp. 56, 295 and 296.

7. Although first efforts at removal were voluntary, these efforts were mostly unsuccessful. Felix S. Cohen, *Handbook of Federal Indian Law,* University of New Mexico Press, Albuquerque, New Mexico, 1971, pp. 54-62.

8. A large number of Choctaws refused to participate in the voluntary removal programs. Felix S. Cohen, *Handbooks* [sic] *of Federal Indian Law,* University of New Mexico Press, Albuquerque, New Mexico, 1971, pp. 57 and 58.

9. Many Choctaws and Chickasaws were sympathetic to the Confederacy and after the Civil War, a new treaty of peace between the United States and the Choctaw and Chickasaw tribes was negotiated. Felix S. Cohen, *Handbook of Federal Indian Law,* University of New Mexico Press, Albuquerque, New Mexico, 1971, p. 65.

10. Congress, in particular the House of Representatives, forced a change in the method of regulating Indian affairs from the treaty negotiation process to agreements enacted into law by Congress. Felix S. Cohen, *Handbook*

of Federal Indian Law, University of New Mexico Press, Albuquerque, New Mexico, 1971, pp. 66, 67, 78 and 79.

11. A new national Indian policy of "assimilation" was developed, the goal of which was to convert Indians into farmers with the expectation that this would "civilize" the Indians and make possible their assimilation into non-Indian culture. Felix S. Cohen, *Handbook of Federal Indian Law,* University of New Mexico Press, Albuquerque, New Mexico, 1971, pp. 206 and 210.

12. The process of "allotment" of Indian lands was intended to accomplish assimilation and to free "surplus" lands for non-Indian settlement. Felix S. Cohen, *Handbook of Federal Indian Law,* University of New Mexico Press, Albuquerque, New Mexico, 1971, p. 216.

13. Allotment of Indian lands came late to the Five Civilized Tribes located in Oklahoma. Felix S. Cohen, *Handbook of Federal Indian Law,* University of New Mexico Press, Albuquerque, New Mexico, 1971, p. 427.

14. The Organic Act of 1890 was, at least in part, a Congressional response to the pressures to open Indian lands for settlement and to create governmental institutions for the non-Indian settlers. Felix S. Cohen, *Handbook of Federal Indian Laws,* University of New Mexico Press, Albuquerque, New Mexico, 1971, p. 428.

In conjunction with this Motion and as an aid to the Special Master and counsel for the State of Arkansas, there is transmitted with this Motion and the copy hereof which goes to counsel for the State of Arkansas, a copy of the following historical reference sources:

Morris, Goins and McReynolds, *Historical Atlas of Oklahoma,* University of Oklahoma Press, Norman, Oklahoma, 1976.

Felix S. Cohen, *Handbook of Federal Indian Law*, University of New Mexico, Albuquerque, New Mexico, 1971.

The Plaintiff, State of Oklahoma, would respectfully request the Special Master to take judicial notice of the foregoing historical facts as herein more fully set forth.