

# Supreme Court of the United States

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OCT 23 1969

OCTOBER TERM, 1969

In the Matter of:

----- X		Docket No.
THE CHOCTAW NATION AND THE	:	
CHICKASAW NATION,	:	No. 41
Petitioners;	:	
vs.	:	
STATE OF OKLAHOMA, et al.	:	
Respondents.	:	
THE CHEROKEE NATION OR TRIBE OF	:	
INDIANS IN OKLAHOMA,	:	No. 59
Petitioner;	:	
vs.	:	
STATE OF OKLAHOMA, et al.	:	
Respondents.	:	
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Place Washington, D. C.  
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1969

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THE CHOCTAW NATION AND THE  
CHICKASAW NATION,

Petitioners;

vs.

No. 41

STATE OF OKLAHOMA, et al.,

Respondents.

-----x

THE CHEROKEE NATION OR TRIBE OF  
INDIANS IN OKLAHOMA,

Petitioner;

vs.

No. 59

STATE OF OKLAHOMA, et al.,

Respondents.

-----x

Washington, D. C.

October 22, 1969

The above-entitled matter came on for argument at

1:32 p.m.

BEFORE:

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

1 APPEARANCES:

2 LON KILE, Esq.  
3 Box 726  
4 Hugo, Oklahoma  
5 Counsel for Petitioners The Choctaw and  
6 Chickasaw Nations

7 PEYTON FORD, Esq.  
8 1000 Connecticut Avenue, N.W.  
9 Washington, D. C.  
10 Counsel for Petitioner The Cherokee Nation or  
11 Tribe of Indians in Oklahoma

12 LOUIS F. CLAIBORNE, Esq.  
13 Assistant to the Solicitor General  
14 Department of Justice  
15 Washington, D. C. 20530  
16 For the United States as Amicus Curiae

17 M. DARWIN KIRK, Esq.  
18 P. O. Box 1439  
19 Tulsa, Oklahoma 74101  
20 Counsel for Respondents

21 - - -



1 the navigable streams within their limits and that afterwards,  
2 as each State entered the Union, it entered on an equal footing  
3 with the original 13 colonies and, thus, said the State, when  
4 Oklahoma became a State in 1907, it succeeded to the title that  
5 the United States had in the navigable portion of the rivers  
6 within its borders and that it owns the avulsed beds and the  
7 soil and minerals underlying the navigable portion of the  
8 Arkansas River within its borders under the equal footing doc-  
9 trine.

10 Q Mr. Kile, is there anyplace a map or sketch or  
11 drawing of what we are talking about? I find on page 89A of  
12 the appendix what is denominated Exhibit B, which I have a little  
13 trouble understanding.

14 A The brief of the Choctaw and Chickasaw Nations  
15 has a map. It is page 25, Your Honor, of the brief of the  
16 Choctaw and Chickasaw Nations.

17 Q I believe we have some maps for distribution  
18 here; is that correct?

19 A Yes, Your Honor.

20 Q And on what page of your brief?

21 A Page 25, Your Honor, of the Choctaw and Chicka-  
22 saw Nations brief.

23 Q Would you give us some idea of how we could make  
24 use of this? Can you relate the factual background of the map  
25 which has been distributed to us?

1           A     Yes, Your Honor. The significance of this map,  
2 which actually was prepared by Mr. Ford in connection with his  
3 argument, and he will follow me on this, the shaded portion in  
4 Arkansas was the lands originally allotted to the Cherokee  
5 Indians. They moved there from Georgia in 1817.

6           Then it shows the area ceded to the Cherokees later  
7 by their treaties of 1828 and 1835.

8           The map that is on page 25 of our brief may be a  
9 little more helpful to the Court in following the argument. The  
10 map on page 25 of our brief shows the lands allotted to the  
11 Cherokees and shows the lands allotted to the Choctaws. It  
12 shows the confluence of the Grand River with the Arkansas, and  
13 it is that portion of the Arkansas that lays below the conflu-  
14 ence of the Grand River that is the subject matter of this  
15 lawsuit.

16           Q     From Fort Gibson southeast.

17           A     Yes, Your Honor. As an aid to the Court, we  
18 colored that just slightly heavier so it would be easier to  
19 identify, but we so stated in our brief so it wouldn't be con-  
20 sidered misleading.

21           The Indian Tribes contend that through a series of  
22 treaties commencing in 1820 and grants continuing through 1842,  
23 the United States ceded to the Indian Tribes the bed of all of  
24 the streams within what is now the portion of Oklahoma that is  
25 involved.

1           They say the United States did that for these reasons:  
2 The explosive development of the cotton economy around 1800  
3 resulted in great pressures by the white planters upon the  
4 Federal Government to move the Indians out of the Southern States.  
5 At the same time, the white planters were bringing great pres-  
6 sures to bear upon the Federal Government, the governments of  
7 the Southern States themselves systematically harassed the  
8 Indians for the purpose of making their life in the Southern  
9 States unendurable.

10           By way of example, Georgia tore up the Federal treaties  
11 with the Cherokees and annexed the territories of the Cherokees  
12 and the Creek Nation within its territory. Samuel Rooster,  
13 the principal figure in the celebrated case of Rooster versus  
14 Georgia, was a Presbyterian minister sentenced to four years at  
15 hard labor in a penitentiary in Georgia because he dared to  
16 live on Cherokee lands without getting permission of the  
17 Governor of Georgia.

18           Alabama likewise tore up the Federal treaties with  
19 the Choctaws. Mississippi, by way of example, made it a peni-  
20 tentiary offense for any Indian to exercise the office of Chief,  
21 Mingo, Head Man or other post established by tribal customs.

22           The Louisiana Purchase of 1803 provided a good place  
23 to move the Southern Indians if they could be induced to move  
24 there. As a part of its efforts to persuade the Indians to  
25 give up their ancestral homes in the Southern States and move

1 to the wild lands west of the Mississippi, the Federal Govern-  
2 mnt constantly reminded them that it could not protect them  
3 either from the white people in the South, or from the govern-  
4 ments of the Southern States, and just as constantly it pledged  
5 to these Indian Tribes if they would give up their ancestral  
6 homes in the Southern States, that the lands to be ceded to them  
7 west of the Mississippi would never be embraced in any State  
8 or Territory.

9           The Southern Indians did move west of the Mississippi.  
10 They did give up their ancestral homes in the Southern States,  
11 but they did not do that because they were getting more land.  
12 They did not do that because they were getting better land.  
13 They did not do that because they were going to live under better  
14 conditions on the wild lands west of the Mississippi than they  
15 were in their ancestral homes.

16           They did it for one reason, and for one reason alone:  
17 Their reliance upon the promises of the United States, given  
18 to them in their negotiations with the United States, and re-  
19 flected in their treaties with the United States that if they  
20 would move out of the Southern States onto the wild lands west  
21 of the Mississippi, the land ceded to them would never be em-  
22 braced in any State or Territory.

23           That pledge was not only reflected in the negotiations  
24 leading up to the treaties; it was reflected in the treaties  
25 themselves, and as a further assurance, the United States gave

1 to the Southern Tribes, and it gave this to no other Tribe in  
2 the United States, a fee simple title to the lands west of the  
3 Mississippi.

4 Q What date was that?

5 A The treaty with the --

6 Q I mean the fee simple title.

7 A The fee simple title, 1835 for the Cherokees;  
8 1842 for the Choctaws.

9 It is well established by Shively versus Bowlby and  
10 other decisions of this Court that while the United States holds  
11 land in territorial status, Congress has the power to make  
12 grants of land below high water marks of navigable waters in  
13 order to carry out a public purpose appropriate to the objects  
14 for which the United States holds the territory.

15 There is just one question in this case, if it please  
16 the Court, and that case is correctly stated by respondents at  
17 page 9 of their brief. The respondents say, and we agree,  
18 the question to be resolved is simple and direct: Did the  
19 United States convey or agree to convey the river bed to the  
20 Cherokees or the Choctaws? There is no other question. There  
21 is no other issue before the Court.

22 Q I take it that the Choctaws were on one side of  
23 the river and the Cherokees on the other.

24 A Yes, Your Honor.

25 Q Let's assume that in 1936, the question had come

1 up with respect to -- the Cherokees were first, weren't they?

2 A No, sir. The Choctaws were first in Oklahoma.

3 The Cherokees were first west of the Mississippi River.

4 Q Who got the first grant here in Oklahoma?

5 A The Choctaws.

6 Q Well, immediately after that, if the issue came  
7 up as to the ownership of the Arkansas river bed, would you say  
8 the Choctaws owned the whole bed of the Arkansas River from  
9 being granted land on the bank of the Arkansas River?

10 A It was not granted land on the bank of the  
11 Arkansas, Your Honor.

12 Q What was it granted?

13 A It was granted the bed of the Arkansas.

14 Q You mean the Choctaws were granted the bed of  
15 the Arkansas River?

16 A Yes, sir.

17 Q Then what did the Cherokees have to get?

18 A There is a dispute between the Choctaws and the  
19 Cherokees as to whether the Choctaws own it all or the Cherokees  
20 own half of it.

21 Q You are saying that at least the grant to the  
22 Cherokees and the Choctaws of land adjoining the river carried  
23 with it title to the river bed, at least to the middle?

24 A No, sir; I am not saying it exactly that way.

25 The treaty said "down the Arkansas, up the Arkansas, where the

1 Arkansas border crosses the Arkansas River." Then we say, "How  
2 shall that be construed? Shall it be construed as up the  
3 Arkansas means that you go up it to where it becomes non-  
4 navigable on one side, and then you go down it to where it is  
5 navigable?"

6 Q Either the United States had the river bed left  
7 to give some of it to the Cherokees after having given land to  
8 the Choctaws, or it didn't; one or the other. Did it convey  
9 away all the river bed to the Choctaws?

10 A Yes, sir. That would be our position. When the  
11 matter is re-heard in the lower courts later if we prevail here.

12 Q If you were representing the Cherokees alone, I  
13 suppose you would say that that language didn't convey the whole  
14 river bed away.

15 A Since I represent the Choctaws, I would not want  
16 to have to say what I would say if I were representing --

17 Q You deny that the Cherokees have any interest  
18 in the river bed, then?

19 A Yes, Your Honor. We say that either --

20 Q Because you got title to it first under the  
21 same language, although the United States then tried to give it  
22 away again, to the Cherokees.

23 A Well, we don't think they tried to give it away.

24 Q They tried to convey it away.

25 A They refer to it in some of their treaties with

1 the Cherokees. I am not begging the question.

2 Q In the same way they dealt with it with the  
3 Choctaws.

4 A Yes, sir. And we say they didn't have anything  
5 to give at that time. They had already ceded it.

6 So that brings us, I think, to this point: --

7 Q Is the center of your dispute, then, as to  
8 whether the State of Oklahoma or the Indians own the bed of  
9 the stream?

10 A Yes, sir.

11 Q If it is decided that the Indians own the bed of  
12 the stream, then there is a further dispute, which was not  
13 reached by the District Court, between the two Indian nations,  
14 or the two Indian Tribes.

15 A Yes, sir; that is entirely it.

16 Q That is not an issue here before us.

17 A No, sir; it is not.

18 Q It is an issue in the sense that in order to  
19 settle the dispute between the tribes, you would still be deal-  
20 ing with the same language that we would be dealing with here.

21 A No, sir. No, sir.

22 Q Why not? I suppose the Choctaws would rely on  
23 the words of this grant, "down the Arkansas River", carried  
24 title to the bed and, therefore, the United States didn't have  
25 anything more to give away.

1           A     That is right, sir. Yes, sir.

2           Q     But if "down the Arkansas" means along the  
3 Arkansas, have you lost your case?

4           A     No, sir; I do not think so, because we come to  
5 this question, then: First, how shall that language be con-  
6 strued? What shall "down the Arkansas" -- because that is the  
7 critical thing, you see; but when you deal with Indian nations,  
8 and Indian Tribes and treaties, you have to give the construc-  
9 tion that is the most favorable to the Indian nation. Indeed,  
10 the treaty with the Choctaws specifically provided by Article  
11 24 that if any reasonable doubt existed, it must be construed  
12 most favorably to the Choctaws.

13                 So speaking generically now as the Indian Tribes, we  
14 say this: How shall "down the Arkansas" be construed? Well,  
15 the Court must say it must be construed most favorably to the  
16 Indian Tribes. Then what is the most favorable construction?  
17 Down the width of the Arkansas, not down one bank or the other  
18 bank of the Arkansas. We deal with that in our briefs. Perhaps  
19 that short statement is an over-simplification.

20           Q     There are some problems with that when you and  
21 the Cherokees come to settle your problem, if that ever comes  
22 about.

23           A     Yes, sir. We will probably knock heads on that.

24           Q     Must not a court reaching that problem also bear  
25 in mind the historical background coming from the colonial times

1 of reservation of the title to the bed of all navigable waters?  
2 Isn't that part of the total equation?

3 A Yes, sir; and I think Your Honor reached the  
4 real crux of this case by that inquiry.

5 When the United States held territorial lands, it held  
6 the beds of the navigable rivers for the benefit of a future  
7 State. But the United States during territorial status had full  
8 authority to convey the river bed for purposes that were appro-  
9 priate to the objects for which it was held. There have been  
10 any number of decisions on that.

11 So then this point comes up: Why would the United  
12 States have held this bed back in 1820? What would it have  
13 wanted to hold the bed of the Arkansas, give everything all  
14 around it, but withhold not the whole Arkansas, but just the  
15 navigable portion of it? Would it be holding it for a future  
16 State?

17 They promised the Indians time after time that this  
18 area would never be embraced in any State or Territory. They  
19 not only promised it to them, they put it in their treaties.  
20 They, therefore, could not have been, in 1820, contemplating  
21 that they were reserving the navigable portion of the Arkansas  
22 for the benefit of a future State.

23 Would it have been reserving it for the minerals that  
24 were in it? It gave the Indian Tribes all the minerals that  
25 lay above the navigable portion. Why would it hold it for the

1 navigable portion? Why would it want the avulsed beds in 1820?  
2 Why would it want the avulsed beds of the Arkansas when it was  
3 giving all the lands on both sides to the Indian Tribes.

4 Q If we accept your argument, Mr. Kile, would that  
5 mean that if the Indian Tribes controlled both banks and the  
6 bed, forgetting for a moment which tribe claimed which part,  
7 they could exact a toll, for example, for boats using that  
8 navigable stream?

9 A No, sir, because under the commerce clause to the  
10 Constitution, the United States always has and controls the  
11 navigation of all the navigable waters in the United States.

12 Q If we apply literally your argument to what the  
13 Indians had a reason to believe, the Indians may have thought  
14 they were going to have control of that navigable stream under  
15 the language of that treaty, as I read it.

16 A No, sir. The language of the treaties -- and we  
17 mention that in our brief -- reserved the navigation easement,  
18 and it does so in a rather specific way. It says that United  
19 States, that the Choctaws shall have the right to use it just  
20 like any other people have. In the treaty with the Cherokees,  
21 they specifically provided that the United States would have the  
22 right to use the river to supply its forts, its post offices,  
23 and its post roads.

24 So all the United States did, and the United States  
25 did that in its treaties with the Indians, and we point that

1 out in our brief, that they reserved a navigation easement.  
2 They have always exercised it. They exercised it long after  
3 the Indians moved to Oklahoma. They exercised it, in fact,  
4 until the railroads came.

5 Q What about other citizens, other than the United  
6 States? Would they be able to use that navigable water freely?

7 A Yes, sir; subject to the regulations of the  
8 United States.

9 Q But not subject to any limitation by the Indian  
10 Tribes?

11 A No, sir. The Indian Tribes could not impose any  
12 limitation on it.

13 My time is rather brief, but I should like to call  
14 the Court's attention to the reliance in three cases that  
15 Oklahoma relies on. Two of them were decisions of the Supreme  
16 Court of Oklahoma, and in none of these decisions, I would say,  
17 were the Indian Tribes represented, or was the Government repre-  
18 sented on behalf of the Indian Tribes in any of these cases,  
19 nor were these treaties brought to the attention of the Court.

20 The two Oklahoma decisions are predicated upon the  
21 belief of the Supreme Court of Oklahoma, and the stated belief  
22 of the State of Oklahoma, that the bed of the river was being  
23 held for the benefit of a future State. If it was the intention  
24 of the United States and the Indian Tribes in the early 1800's  
25 that this area would never be embraced in any State, then the

1 premise upon which the decisions of the Supreme Court of Okla-  
2 homa are bottomed are false.

3           There is one case, and counsel for Oklahoma must com-  
4 ment on it at great length, and he must try to show that it is  
5 related to the facts in this case, and I challenge him that he  
6 will not be able to do so, and that is United States versus  
7 Holt State Bank, which is a decision of this Court.

8           Holt State Bank arose in Minnesota, when the Chippewa's  
9 ceded their aboriginal lands to the United States, reserving to  
10 themselves a right of occupancy within a certain area. The  
11 Chippewas were the granting party. They were the moving party,  
12 and that distinguishes and interdicts the application of Holt  
13 State Bank to this case, because in our case the United States was  
14 the granting party.

15           In Holt State Bank, this Court said of the Chippewas,  
16 if they had wanted to keep the bed of Mud Lake, they should have  
17 made some provision for it in their cession to the United States.  
18 But when the teaching of United States versus Holt State Bank  
19 is applied to the facts in our case, then we submit that this  
20 Court would have said, had the United States, being the granting  
21 party, wanted to reserve the bed of the Arkansas River, then it  
22 should have excepted it from its grant.

23           We say to the Court that there was no grant moving  
24 from the United States to the Chippewas in Holt State Bank.  
25 We say that it was a cession by the Chippewas to the United

1 States.

2 I notice at page 34 of the respondents' brief that  
3 they say that the petitioners and amicus curiae, that they find  
4 in our briefs persistent misunderstandings and misconstructions  
5 of the holding of this Court in Holt State Bank. But on the  
6 same page --

7 Q What page?

8 A Page 34 of Oklahoma's brief. In the first sen-  
9 tence on that page, they say that in Holt State Bank the United  
10 States had granted an area by treaties to the Chippewas.

11 On page 36 they again say that the United States was  
12 the granting party, and on page 37 they say that the title was  
13 vested in the Chippewas when, in fact, the title was always  
14 vested in the United States. The Chippewas had only a right  
15 of occupancy.

16 This Court said on the last page of its decision in  
17 Holt State Bank, or rather, with the minute that is left to me,  
18 "Most of the reservation," said this Court in Holt State Bank,  
19 "including the part in the vicinity of Mud Lake, was relinquished  
20 and ceded by the Chippewas. The cession became effective  
21 through the President's approval March 4, 1890." On the last  
22 page of the Court's decision, this Court said "The reservation  
23 came into being through a succession of treaties with the  
24 Chippewas whereby they ceded to the United States their abori-  
25 ginal right of occupancy to the surrounding lands. There was

1 no formal setting apart of what was not ceded. The effect of  
2 what was done was to reserve in a general way for the continued  
3 occupation of the Indians what remained of their aboriginal  
4 territory, and thus it came to be known and recognized as a  
5 reservation."

6 That fact is the distinguishing fact which interdicts  
7 the application of Holt State Bank to this case, but if the  
8 Court were applying the rule, the teachings of Holt State Bank,  
9 in this case it would have said this, I believe: The United  
10 States was the granting party, and had it wanted to reserve the  
11 bed of the Arkansas River, the navigable portion of the bed of  
12 the Arkansas River, it should have done so in its grant. The  
13 fact that it agreed with the Indians that this area would never  
14 be embraced within any future State or Territory evinced the  
15 intent to depart from the established purpose of reserving the  
16 beds of navigable streams for the benefit of future States.

17 We respectfully submit that the United States had  
18 nothing but a navigation easement on the Arkansas, Oklahoma  
19 became a State, and Oklahoma, therefore, took no interest in  
20 the bed of the Arkansas River by reason of its being admitted  
21 to the Union.

22 MR. CHIEF JUSTICE BURGER: Mr. Ford?  
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ARGUMENT OF PEYTON FORD, ESQ.  
ON BEHALF OF  
PETITIONER THE CHEROKEE NATION OR TRIBE OF INDIANS IN OKLAHOMA

MR. FORD: If the Court please, I appear on behalf of the Cherokees. I hope to avoid any inter se conflict between the tribes. All that I would say to that question, very briefly, is (1) we received the first patent to these lands in 1838, signed by President Van Buren, and in that we are given that land "thence down the Canadian River on the north to its junction with the Arkansas River, and thence down the main channel of the Arkansas." That is all we claim is the following of the river.

In that connection, I might briefly show this map to Your Honors. If you will notice, between the 95th and 96th Parallel, on lands marked "The Cherokees" -- I don't know what that section is -- that the Arkansas River runs completely through the lands of the Cherokees, that is, it is bordered on both sides by the grant to the Cherokees in the Treaty of New Echota in 1835 and the later patent of 1838. It is after it comes to that line that there is a border between the Cherokees and the Choctaws.

That map was inserted for one other purpose, too. If you will look on appendix page Roman xiii of the respondents' brief, they have reproduced a map by Mr. Royce, who is an authority, perhaps the authority. It is Appendix 7, Roman xiii of the respondents' brief. Justice Douglas has it.

1           They have a facsimile of the map reproduced in which  
2 you will notice to the north bank of the Arkansas there is a  
3 very fine, black line that runs from 6, 5, 4, 7 is the bottom,  
4 which would appear to indicate that that is the grant to the  
5 north bank of the Arkansas and that the Cherokees, or the Indian  
6 Tribes, went no further.

7           We have reproduced an exact reproduction of Royce's  
8 map which indicates merely a change in the color of the line  
9 for the river on that part of the Arkansas where the Cherokee  
10 lands meet the Arkansas at the 95th Parallel, approximately.  
11 In other words, that is the mere color of the line of the river.

12           Their map would indicate -- and I just don't want  
13 the Court misled -- that the dark line would be the boundary  
14 of the grant to the Cherokees.

15           I would like briefly to give a little background of  
16 the Cherokee Nation. Prior to the Revolution, its principal  
17 lands were North Carolina, Virginia, Georgia, that consisted  
18 of approximately some 80 million acres. They absolute dominion  
19 over this. Following the Revolution, there was a Treaty of  
20 Hopewell entered into in 1785 where the Cherokees then swore  
21 allegiance to the U.S. and the U.S. Government, in turn, agreed  
22 to protect the Tribe and recognized its sovereignty to all of  
23 those lands.

24           It was not too long after that that the conflict began  
25 between the white settlers and the Cherokees, the Choctaws, the

1 Chickasaws and the Creeks. The Southern Indians became five  
2 civilized Tribes. They were forced from North Carolina and  
3 Virginia, principally, into Georgia. At that time, Georgia  
4 passed laws, in effect, providing that they could enjoy no  
5 rights; that if any white man was found upon their land, they  
6 had to have permission of the State of Georgia.

7           Following this, Marshall's opinion in Rooster came  
8 down in which he clearly recognized the sovereignty of the  
9 Tribes and set aside all those Georgia edicts and fined him  
10 with some certainty, saying that the Cherokees had sovereignty  
11 over their tribal lands, that they had control of the traffic  
12 over the Tennessee River, that they enjoyed all the rights of  
13 the river, and that the white man would have to get their per-  
14 mission, in effect, to use the river.

15           Even in the face of the Court's recognition of these  
16 rights, and certainly the Cherokees were not going to accept  
17 less if they went West than what they had in Georgia, and even  
18 after Marshall spoke, the courts and the Executive continued  
19 complete harassment of all these Southern Indian Tribes.

20           First the Cherokees moved to Arkansas in 1817, which  
21 became known as the Old Settlers. That was an exchange of land,  
22 to move to Arkansas. But Arkansas was not satisfied with the  
23 Indians. There was again the conflict between the whites and  
24 the Indians. So following that there was a treaty executed  
25 in 1828 between the Cherokees and the Government, after the

1 Arkansas whites had again insisted that they move further West,  
2 and this treaty, in effect, without detail, moved the Old  
3 Settler ~~Cherokees~~ into the lands west of Arkansas which became  
4 Indian territory, along with the other Indians that were further  
5 East in Georgia.

6 Generally, the treaty granted the same rights as all  
7 these treaties, 1817, 1828 and 1825. It provided that this  
8 land was to be, as Mr. Kile said, their permanent home. It  
9 was never to be encroached upon by any territory or State. It  
10 granted further, which one Indian Commissioner, in their  
11 speeches trying to get them to sign the Treaty of New Echota,  
12 which followed the Treaty of Dancing Rabbit, which was the  
13 treaty with the Choctaws, that this was an awful good thing;  
14 they were getting fee simple title. As he expressed it, they  
15 were getting white man's title for the first time, and this was  
16 the only title ever issued to any Indians and they were confined  
17 to the five civilized tribes that ultimately settled in Indian  
18 territory. The rest of the titles were aboriginal titles  
19 which gave them the right of reservation occupancy, and so forth.

20 How they could be given a clearer promise, or how they  
21 could be given more complete jurisdiction over their territory,  
22 is beyond me.

23 They agreed to possess to the Cherokees some 7,000,000  
24 acres of land within this grant, which had started out with  
25 80 million, so it is not exactly an excessive grant. They also

1 agreed by the treaties to issue the patent I have previously  
2 referred to, the patent granting this land in fee simple. They  
3 gave them white man's title. It was described by meets and  
4 bounds. It encompassed a whole grant.

5 Certainly the United States didn't intend to exclude  
6 the meandering stream running through this grant unless it had  
7 chosen to say so. These people knew how to draft instruments.  
8 They excluded Fort Gibson. They excluded post roads. They  
9 excluded certain salt plains that would be available to all  
10 Indian tribes.

11 With that base history, I would like to go back for  
12 a minute to this Pollard case, which is --

13 Q Before you finish your history, could you indi-  
14 cate what happened later, Mr. Ford? Did there come a time  
15 when the Tribe was dissolved -- I don't know whether that is  
16 the right word or not -- is it still an enrolled Tribe?

17 A Yes, sir.

18 Q Was there some --

19 A I might answer you shortly this way: In 1898  
20 and 1902 there were the so-called Curtis Acts passed, and in  
21 1906, I guess you would say the enabling act was passed, but  
22 those Acts of Congress at that time made allotments to the  
23 given Indians.

24 Q All the Indian lands except what we are talking  
25 about here, I suppose, were allotted.

1           A     Except tribal lands, which included certain  
2 townships, schools, and other lands that are owned in common  
3 by the Tribe outside of the river.

4           Q     But individual Indians were allotted parts of  
5 what had been the tribal lands.

6           A     Yes, sir.

7           Q     Are the Indians still -- they were free to  
8 transfer those lands individually, I suppose?

9           A     There is a long history of treaties of the  
10 alienation of what a full blood --

11          Q     After allotment.

12          A     Still after allotment there was some question  
13 on it.

14          Q     How many Cherokees are there still there in  
15 the Tribe?

16          A     There are approximately 42,000, and of these  
17 there are some 7,000 full bloods who speak the native language.  
18 Many of them don't speak English. If you take the descendants  
19 of them, they run about 100,000. There were approximately nine  
20 judicial districts under their tribal government, I mean when  
21 they had enjoyed absolute sovereignty.

22          Q     Do most of the 42,000 live on tribal lands or  
23 on their individually owned lands?

24          A     Now they live on their individually owned lands.

25          Q     Subject to the ordinary jurisdiction of the State?

1 A And subject to certain jurisdictions --

2 Q When they live outside --

3 A They still enjoy sovereignty under the Acts  
4 passed by Congress. There is a provision in the Act that if  
5 there is a river or any commonly held lands, as long as they  
6 cease to be a Tribe, shall revert to the United States.

7 Q Those are the commonly held lands. When you are  
8 living on your own land, I suppose you are subject to ordinary  
9 State laws.

10 A Yes.

11 Q That fee simple title is in the individual Indian.

12 A Yes, sir.

13 Q Subject to the jurisdiction of the State.

14 A Yes, and subject to certain tribal jurisdiction.

15 There is still the Tribal Council, a Chief. The Council is  
16 made up of the former old judicial districts before statehood.

17 Q Do they run their own schools?

18 A Yes, some of them.

19 Q But they can go to State schools if they want to.

20 A Yes, sir; and they enter as a Tribe into construc-  
21 tion of common efforts, encouraging industry. There is a Tribe,  
22 for instance, working now through the Tribal Council of the  
23 Tribe, the general counsel of the Tribe, which is Mr. Pierce,  
24 on the improvement of all the housing, and the public housing  
25 provisions, and I might add, in concluding at this point, that

1 this action was first brought by Mr. Pierce as general counsel  
2 for the Cherokees and it was after this that the Choctaws were  
3 permitted to intervene in the action. We brought an action for  
4 an accounting in Oklahoma, a counterclaim to the suit to quiet  
5 title.

6 Q Do the Cherokees have some schools which they  
7 themselves finance?

8 A Yes.

9 Q As a Tribe, out of tribal funds?

10 A Yes, and vocational. All the tribal funds that  
11 came down in the so-called outlet case have been devoted to  
12 the common efforts of the tribe, and the funds that we hope to  
13 receive, if there be any, in the auditing, will be so devoted.

14 MR. CHIEF JUSTICE BURGER: Thank you, Mr. Ford.

15 Mr. Claiborne?

16 ARGUMENT OF LOUIS F. CLAIBORNE, ESQ.  
17 ON BEHALF OF  
18 THE UNITED STATES AS AMICUS CURIAE

19 MR. CLAIBORNE: Mr. Chief Justice, and may it please  
20 the Court: I hesitate to detain the Court much longer in these  
21 cases arguing on the same side, but perhaps I can perform some  
22 service to the Court as an amicus curiae if I attempt to very  
23 briefly summarize and perhaps simplify the issues as we see  
24 them.

25 The first fact which we would stress in this case  
is that here we have clear-cut conveyances of large tracts of

1 lands to these three Indian Tribes, the Choctaws and the Chicka-  
2 saws together and the Cherokees separately. The sequence of  
3 those grants seems to us of no great importance. It happens  
4 that from the point of view of the treaties, the Choctaws come  
5 first and the Cherokees second. From the point of view of the  
6 patents, it is the other way around.

7           The important thing, however, is that there were  
8 grants in fee simple to these tribes of very large tracts  
9 adjacent one to the other, and between them entirely surrounding  
10 and encompassing the navigable portion of the Arkansas River.

11           The fact that there is a conveyance in fee simple  
12 immediately distinguishes the Holt State Bank case, which is  
13 invoked by the State of Oklahoma. There there was no conveyance  
14 whatever, nor was there even a setting aside of the portion of  
15 the aboriginal lands of the Chippewas which was reserved to  
16 the tribe. Those reserved lands were lands which, under the  
17 decisions of this Court, the United States always had the title  
18 to; the Indians simply had the right of occupancy. Therefore,  
19 the United States always owned the beds of the navigable rivers  
20 and of Mud Lake which was at issue in the Holt State Bank case,  
21 and there was no transaction which ever changed that situation,  
22 whereas here there is.

23           The United States cedes these tracts to the Indian  
24 Tribes and the burden, it seems to us, is on the other side to  
25 show why the beds of the river did not go with the grants.

1 Q Would you be making the same argument if the  
2 lands had all been on one side of the river?

3 A I think we could make the same argument, Mr.  
4 Justice White. I think it helps us here that the river is  
5 entirely enveloped in Indian lands.

6 Q How about those areas where one tribe owns land  
7 on one side of the river and the other side of the river is not  
8 Indian land.

9 A There is no such situation with respect to the  
10 navigable portion of the Arkansas in this case.

11 Q It would be just the navigable portion.

12 A The navigable portion. Perhaps the physical  
13 situation ought to be clarified once again.

14 Referring to page 25 of the brief filed on behalf of  
15 the Choctaw Nation, which is a rather small, white brief, is a  
16 very simplified map which, it seems to me, presents the situa-  
17 tion as clearly as it can be.

18 You notice there is a triangle. At the top of the  
19 triangle is Fort Gibson. On the right-hand side of that triangle  
20 is a portion of the Arkansas River. On the left-hand side of  
21 that triangle, coming down, is a more or less straight line  
22 which represents the western edge of the Cherokee grant, and at  
23 the south is a portion of the Canadian River.

24 That triangle is part of the Cherokee grant. So is,  
25 of course, the portion indicated as --

1 Q What about the Creek-Seminole claim here?

2 A The Creek-Seminole claim begins west of that  
3 so-called straight line.

4 Q So the Cherokees have land on one side of the  
5 Arkansas River and the Creek-Seminoles on the other.

6 A No, Justice White. That triangle belongs to the  
7 Cherokees; therefore, the Cherokees have land on both sides of  
8 the Arkansas River. That triangle south of Fort Gibson is  
9 Cherokee land, as is what is north and east of that.

10 Q Do the Creek-Seminoles own land bordering the  
11 Arkansas River?

12 A The non-navigable portion of the Arkansas River,  
13 but none which is relevant to the portion of the river which is  
14 in controversy here.

15 But the fact that this portion of the Arkansas River  
16 between Fort Gibson and the confluence with the Canadian River  
17 is entirely within the Cherokee grant tends to simplify the  
18 matter in that here, at least, we need not talk about which  
19 grant came first, and whether the United States reserved to it-  
20 self the portion that was not yet granted to an Indian Tribe.  
21 Yet the State of Oklahoma is making the same argument here as  
22 it does further east.

23 Q From the confluence of the Canadian River and  
24 the Arkansas River, then along the Arkansas River as it flows  
25 southeasterly, that river is the boundary between the Choctaw

1 and Cherokee grants; is that correct?

2 A That is correct, Mr. Justice Stewart.

3 Q And we are talking in totality of a segment of  
4 the river that extends about 60 miles or so; is that right? It  
5 looks like it on the scale.

6 A That would seem to be right. In other words,  
7 from Fort Gibson to the --

8 Q We are talking about the bed under that river  
9 for about 50 or 60 miles.

10 A That is correct. I would say that whether or  
11 not at the time of the first grant any of the bed was granted,  
12 or whether all of it was granted in that first grant, and the  
13 second grant only came to the river's edge, or the other way  
14 around, is a debate as to the two tribes that need not concern  
15 this Court. It is not presented here and it would, of course,  
16 be reached in the event the Indians were to prevail here.

17 I should say that the Cherokees only claim to the  
18 thread where the river is the boundary between them; whereas,  
19 the Choctaws claim the whole of the bed. But we certainly take  
20 no position as to who is right or wrong in that debate, nor  
21 should this Court at this time concern itself with that intra-  
22 mural --

23 Q Except as Mr. Justice White's questions seem to  
24 point out, the fact that there are two grants does go to the  
25 issues before the Court here in this case.

1           A     Mr. Justice Stewart, of course, only as to the  
2 portion east of the confluence of the Arkansas and Canadian  
3 Rivers, and as to that it seems to us that to the extent that  
4 the bed had not been included in the first grant, it must have  
5 been included in the second; to the extent that it was already  
6 fully included in the first, it could, of course, not be in-  
7 cluded in the second.

8           The language in these two grants is not identical  
9 and there is simply in each a reference to the river as a  
10 boundary without indicating, it seems to us, in any clear way,  
11 whether it goes to the thread, to the other bank, or stops at  
12 the --

13           Q     Mr. Claiborne, was there any finding anywhere  
14 in this litigation as to what the call in the patent meant  
15 "down the Arkansas River"? Was there a finding that it meant  
16 along the bank of the Arkansas River?

17           A     I think not, Mr. Justice White.

18           Q     Has there ever been a construction of that  
19 language?

20           A     I don't think the disposition of this case in  
21 either of the courts below turned on that technical reading of  
22 the patent.

23           Q     I suppose theoretically, at least, even if the  
24 Court of Appeals was wrong on the grounds it used to dispose  
25 of this case, there could still be an argument that, after all,

1 the patent only granted lands to the bank of the river.

2 A I can't say there couldn't be such an argument,  
3 Mr. Justice White.

4 Q Was it ever raised in the case? It certainly is  
5 in the briefs now.

6 A I think it is raised, certainly, in a much more  
7 full fledged way now in the briefs on the merits in this Court  
8 than it ever was before.

9 Q You don't particularly think that you have to  
10 respond to it? Certainly you don't want to, I gather.

11 A It seems to me evident that one cannot resolve  
12 the controversy simply by looking no further than the language  
13 of the conveyances. One must construe them, because they are  
14 ambiguous, in terms of the apparent intent of the conveyor and  
15 the recipient, and it is on that basis that the Court of Appeals  
16 disposed of this case, and to that extent we agree that is the  
17 correct basis.

18 Q Would it not depend in part on the status of the  
19 vendor's title at the time, too?

20 A There is no law, Mr. Chief Justice, that the  
21 vendor, the United States, had full, unencumbered title.

22 Q Let me put it this way: What the vendor conveyed  
23 out at the time he had this full title, if he conveyed out to  
24 the banks only on the first transfer you have one result, and  
25 if he conveyed to the other bank, you have another result; isn't

1 that right?

2 A Quite so, but it is our intent to show that the  
3 realities then prevailing would indicate that these conveyances  
4 ought to be construed so as to include and not exclude the bed  
5 of the Arkansas River in these large grants to Indian Tribes  
6 in what was then thought to be forever more Indian territory.

7 Q In both grants; is that it?

8 A In one or both; or in both grants taken together.

9 We must remember that these grants were both contem-  
10 plated at the time either one was finalized because they both  
11 had prior histories and prior treaties. They simply, without  
12 finalizing it, made indications that these lands would become  
13 available to one tribe or the other.

14 MR. CHIEF JUSTICE BURGER: I think we are ready to  
15 terminate, Mr. Claiborne. We will finish up with you in the  
16 morning. You will have nine minutes left.

17 (Whereupon, at 2:30 p.m., the argument in the above-  
18 entitled matter recessed, to reconvene at 10 a.m., Thursday,  
19 October 23, 1969.)  
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