

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 85-1940

TITLE UNITED STATES, Petitioner V. CHEROKEE NATION OF
OKLAHOMA

PLACE Washington, D. C.

DATE February 23, 1987

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1 IN THE SUPREME COURT OF THE UNITED STATES

2 -----x
3 UNITED STATES, :

4 Petitioner, :

5 V. :

No. 85-1940

6 CHEROKEE NATION OF OKLAHOMA :

7 -----x

8 Washington, D.C.

9 Monday, February 23, 1987

10 The above-entitled matter came on for oral
11 argument before the Supreme Court of the United States
12 at 1:38 o'clock p.m.

13 APPEARANCES:

14 JEFFREY P. MINEAR, ESQ., Assistant to the Solicitor

15 General, Department of Justice, Washington, D.C.; on
16 behalf of the petitioner.

17 JAMES WILCOXEN, ESQ., Muskogee, Oklahoma; on behalf of
18 the respondent.

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1 PROCEEDINGS

2 CHIEF JUSTICE REHNQUIST: We will hear
3 arguments next in No. 85-1940, United States versus
4 Cherokee Nation of Oklahoma.

5 Mr. Minear, you may proceed whenever you are
6 ready.

7 ORAL ARGUMENT OF JEFFREY P. MINEAR, ESQ.,
8 ON BEHALF OF THE PETITIONER

9 MR. MINEAR: Thank you, Mr. Chief Justice, and
10 may it please the Court, in 1970, this Court decided the
11 case of Choctaw Nation versus Oklahoma. That decision
12 effectively held that the Cherokee Nation owns an
13 87-mile portion of the bed of the Arkansas River. The
14 Cherokee Nation has since sued the United States,
15 claiming that the federal government's navigational
16 improvements on the Arkansas River have damaged the
17 tribe's riverbed properties.

18 The question in this case is whether the
19 tribe's claims are barred by the United States'
20 navigational servitude which permits the government to
21 improve navigable waters free from demands for just
22 compensation.

23 The government's brief describes the long
24 history of federal navigation improvements on the
25 Arkansas River and the genesis of the present dispute.

1 Turning directly to the legal question at issue, I will
2 first address the characteristics of the navigational
3 servitude and then explain why the servitude is fully
4 applicable in this case.

5 It has been well settled since this Court's
6 historic decision in *Gibbons v. Ogden* that the commerce
7 clause gives Congress broad power to regulate and
8 improve navigable water for the public benefit. This
9 Court, construing that authority in light of history and
10 the needs of interstate commerce, has developed the
11 concept of the navigational servitude.

12 This concept has played a vital role in the
13 commercial unification of the country. The navigational
14 servitude expresses a general understanding that the
15 determination whether federal navigation improvements
16 have taken property within the meaning of the Fifth
17 Amendment must take into account the overarching public
18 interest in free navigation.

19 It recognizes the historic fact that navigable
20 waters are especially valuable as a conduit for trade,
21 and that for this purpose they should be treated as
22 public property of the nation, to be used for the common
23 benefit of all of the nation's constituents, and of
24 particular relevance in the present case, the
25 navigational servitude lays down a firm rule that the

1 United States is not required to pay compensation for
2 damage to in-stream property resulting from federal
3 navigation improvements to naturally navigable rivers.

4 This Court has repeatedly stated that the
5 owner of land beneath navigable waters has a qualified
6 title, not at its absolute disposal, but to be held at
7 all times subordinate to such use as may be consistent
8 with or demanded by the public right of navigation.
9 This Court has recognized that principle in a number of
10 cases, but perhaps the best example is Lewis Bluepoint
11 Oyster Company versus Briggs. In Lewis the plaintiff
12 cultivated oysters on land beneath New York's Great
13 South Bay that was originally conveyed into private
14 hands through a royal patent during the colonial period.

15 The United States dredged the bay to improve
16 navigation, destroying the plaintiff's oyster beds.
17 This Court rejected the plaintiff's demand for
18 compensation stating that by necessary implication from
19 the dominant right of navigation, title to submerged
20 land is acquired and held subject to the power of
21 Congress to deepen the water over such lands or to use
22 them for any structure which the interest of navigation
23 may require.

24 As Lewis indicates, it has long been settled
25 that the United States is not constitutionally obligated

1 to pay compensation when federal navigation improvements
2 impair property within the bed of a naturally navigable
3 body of water. The same principle is applicable here.
4 Indeed, when this Court confirmed the Cherokee Nation's
5 riverbed rights in the Choctaw Nation decision, it
6 specifically recognized the tribe was subject to the
7 United States navigational servitude.

8 The Cherokee Nation nevertheless contends that
9 it should be exempt from the servitude, but there is no
10 basis for creating such an exemption. The tribe is a
11 part of the United States and is subject just like any
12 of the nation's other constituents to the national
13 government's commerce clause powers. The Cherokee
14 Nation argued in the District Court that the tribe's
15 quasi-sovereign status provides a basis for an
16 exemption. We disagree. Even the states which exercise
17 the full measure of sovereignty allowable under the
18 Constitution are subject to the servitude. Indian
19 tribes, which have only limited sovereignty but the
20 sufferance of Congress, are not entitled to broader
21 rights than the states possess.

22 The Cherokee National also claims an exemption
23 on the ground that it received its title through a
24 treaty with and patent from the United States. However,
25 that fact does not provide the basis for an exemption.

1 The tribe, like any owner of land beneath navigable
2 waters, took its riverbed interest subject to the
3 federal government's dominant power under the commerce
4 clause to regulate and promote navigation.

5 The United States did not waive its
6 navigational servitude in the treaty or patent, nor was
7 it obligated to make an express reservation of that
8 sovereign power. The retention of sovereign authority
9 is implicit in all government agreements unless
10 surrendered in unmistakable terms. Indeed, as the Lewis
11 case demonstrates, even persons who hold property rights
12 that predate the Union are subject to the servitude.

13 The tribe suggests that it should be exempt
14 from the servitude because it received fee simple title
15 to the riverbed. However, the Court's confirmation of
16 the tribe's title in Choctaw Nation was premised in part
17 on the fact that the United States implicitly retained a
18 navigational servitude, and in any event this Court has
19 specifically rejected the contention that fee interests
20 are exempt from the government's long-standing power
21 over navigable waters.

22 The tribe also claims an exemption from the
23 servitude based on the United States trust obligations
24 to the tribe. The tribe's right to compensation,
25 however, depends on whether it has a compensable

1 property right in the bed of a naturally navigable body
2 of water. It is well settled under this Court's
3 precedents that no such rights can exist here. As this
4 Court has stated, the application of the navigational
5 servitude is not an invasion of any private property
6 rights in the streams or the lands underlying it for the
7 damage sustained does not result from the taking of
8 property within the meaning of the Fifth Amendment but
9 from the lawful exercise of a power to which the
10 interests of the property owners have always been
11 subject.

12 The United States trust responsibility may in
13 some circumstances create an obligation to administer
14 whatever property rights that tribe might possess but it
15 cannot create a property right where none would
16 otherwise exist.

17 At bottom we are dealing here with a doctrine
18 that is clear and well settled. The United States owes
19 no compensation to any party when the government's
20 navigational improvements impair the private use of
21 lands within the bed of a naturally navigable river.
22 That doctrine imposes a common burden on all of the
23 nation's constituents for the common good. It cannot
24 admit a special exception for the Cherokee Tribe. There
25 is no plausible ground for exempting the tribe uniquely

1 among all of the elements that comprise a national union
2 from an otherwise uniform and unifying national rule.
3 There are many good reasons why the tribes' request for
4 an exemption should be denied. The tribe's demand for
5 compensation, if allowed, could amount to a
6 multi-million dollar toll on commerce along the Arkansas
7 River, providing a windfall to the tribe at the public
8 expense. Furthermore, the recognition of an exception
9 here would be truly remarkable because the Cherokee
10 Nations have been among the historic beneficiaries of
11 navigation improvements on the Arkansas River.

12 Perhaps most troubling, the creation of an
13 exception in this case may encourage other parties to
14 sue the government, demanding compensation for in-stream
15 damages that were previously considered noncompensable.
16 This Court should be reluctant to disturb a long-settled
17 constitutional doctrine that has engendered a century of
18 investment-backed reliance. That is particularly true
19 here where Congress itself has examined the tribe's
20 claim and declined to provide special compensation.

21 For all of these reasons we suggest that the
22 decision below should be reversed. Thank you, Your
23 Honors.

24 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
25 Minear.

1 We will hear now from you, Mr. Wilcoxon.

2 ORAL ARGUMENT OF JAMES WILCOXEN, ESQ.,

3 ON BEHALF OF THE RESPONDENT

4 MR. WILCOXEN: Thank you, Mr. Chief Justice,
5 and may it please the Court. When the United States
6 argues that the navigational servitude and its general
7 rule of no compensation prevents the Cherokee nation
8 from having a compensable interest in the Arkansas
9 riverbed it is limited to previous cases which have no
10 relation to the facts and circumstances in this present
11 unique case.

12 When the treaties and patent granting the
13 Cherokee Nation fee simple title to over 14 million
14 acres of land in what is now the State of Oklahoma, I
15 believe that Congress intended to give the Cherokees
16 everything it had to give. There is no limitation in
17 words granting fee simple title to a permanent home
18 forever that shall in no future time without their
19 consent be included within the territorial limits or
20 jurisdiction of any state or territory.

21 Of course, this is not to say that the
22 Cherokees were no longer subject to the Constitution of
23 the United States but it is to say that whatever rights
24 were created must be determined from the unique
25 historical circumstances of this case and no other.

1 More precisely, while the Cherokee nation is subject to
2 the broad commerce clause power to regulate navigation,
3 the question of whether the exercise of that power
4 affects a taking of property protected by the Fifth
5 Amendment is another matter.

6 QUESTION: That may be true, Mr. Wilcoxon, but
7 your opponent suggests that our cases are virtually
8 larded with statements that the exercise of the
9 navigational servitude is not a taking of property even
10 from people because they had no compensable interest.
11 It was always subject to this servitude.

12 MR. WILCOXEN: That is correct, Your Honor,
13 Chief Justice Rehnquist, but the cases relied upon by
14 the United States are cases where riparian owners have
15 acquired whatever rights that the States got and it was
16 intended in those situations and always was intended
17 that those grants be subject to the public right of
18 passage.

19 I think that Congress's intent in this case
20 was when it gave a direct patent to the Cherokee Nation
21 was that this be the private domain of the Cherokee
22 Nation and that there was no public right of passage.

23 QUESTION: Why should it be different in this
24 one case of a patent to the Cherokee Nation as opposed
25 to all of the streambeds that have gone to the states

1 under the equal footing doctrine?

2 MR. WILCOXEN: I am sorry, Your Honor?

3 QUESTION: Well, countless streambeds have
4 gone to the states of the Union upon their admission on
5 the basis of the equal footing doctrine, so that there
6 are numerous states that are situated similarly to the
7 Cherokee Tribe here. Why should the Cherokee Tribe be
8 unique as opposed to the states?

9 MR. WILCOXEN: Well, Your Honor, I would say
10 that the equal footing doctrine would not apply as a
11 limitation to the Cherokee Nation.

12 QUESTION: I am not suggesting it did, but the
13 equal footing doctrine, our cases have held, give the
14 states fee title to land underlying riverbeds certainly
15 every bit as much as the Cherokee got. So why shouldn't
16 they be treated the same for purposes of the
17 navigational servitude?

18 MR. WILCOXEN: Because I think it was clearly
19 intended as this country grew westward that those
20 navigable lands be and remain public highways, and I
21 think that the intent in the grant, the patent to the
22 Cherokee Nation was that it be a private domain for the
23 Cherokee people and was not intended to be a technical
24 title. The cases mention a bare technical title that a
25 riparian owner might acquire from the state.

1 QUESTION: I am not talking about a riparian
2 owner. A riparian owner is a person who owns land along
3 the bed of the banks of a stream. I am talking about
4 states which own the bed of a stream, just as the
5 Cherokees do here.

6 MR. WILCOXEN: Well, that is a good question,
7 Your Honor. My answer would be that I believe that
8 Congress intended in this particular case when it
9 uniquely granted fee simple title to the bed and banks
10 of the navigable waterway that it be and remain a
11 public -- I mean, I am sorry, a private domain for the
12 Cherokee Nation, and that when, to further answer your
13 question, and that when Oklahoma Statehood took place
14 that property passed into trust with the specific
15 provision that the lands would not become public lands
16 nor property of the United States, but would be held in
17 trust for the use and benefits of the Indians.

18 QUESTION: But that doesn't mean that it isn't
19 subject to navigational servitude, though.

20 MR. WILCOXEN: Well, Justice O'Connor, I don't
21 see how --

22 QUESTION: It just doesn't follow, does it?

23 MR. WILCOXEN: To me I don't see how the
24 United States can maintain its trust responsibility to
25 the tribe especially in the face of an express provision

1 of trust and take and use this property for a very
2 public purpose, and that is to build a navigation way in
3 the face of the plain provisions of the Act of 1906.

4 Congress intended to move the Cherokees so far
5 west as to eliminate the conflict between white settlers
6 and the tribe. The tribe, reluctant to move, demanded
7 fee title. It was the first and one of few to get it.
8 In 1838, the Cherokees' absolute ownership rights to the
9 entire tract, including the riverbed, vested. As the
10 Court of Appeals recognized, vested property rights
11 secured by a treaty are protected by the Fifth
12 Amendment.

13 The plain purposes of the treaties and patent
14 was to remove and exclude the Cherokees from the ruinous
15 effects of the intruding public. They were specifically
16 promised protection against interruption and intrusion
17 from citizens of the United States who might attempt to
18 settle within the Cherokee Nation without their
19 consent.

20 They would be removed by order of the
21 President. The treaties also recognized the sovereign
22 right of the Cherokee Nation to make and enact all laws
23 deemed necessary for the protection of their persons and
24 property. Cherokee law did prohibit travel in or
25 settlement by intruders and provided for the forfeiture

1 of all improvements made by intruders unlawfully
2 residing in the Cherokee domain.

3 Lists of names of intruders were routinely
4 submitted to the chief so that they could in turn be
5 submitted to federal officials for their expulsion. No
6 traders could come into the Cherokee Nation without a
7 federal license. The trade and intercourse Acts of the
8 time provided for the removal and forfeiture of all
9 merchandise of unlicensed traders. Cherokee law
10 likewise prohibited traders from coming into the
11 Cherokee Nation without a license.

12 My point here is that clearly the Cherokee
13 Nation was a private nation within a nation, and it was
14 not open to the public right of passage.

15 QUESTION: Well, it is one thing, though, for
16 the Cherokee Nation to be able to exclude traders and
17 people like that. It is another thing to be able to
18 exclude the United States.

19 MR. WILCOXEN: Your Honor, I am not trying to
20 say that the Cherokee Nation is excluding the United
21 States. What I am saying is that when the United States
22 exercises its power to regulate navigation in such a way
23 that it takes property vested in the Cherokee Nation,
24 that it can create a situation where there has been a
25 compensable taking.

1 The navigational servitude has generally been
2 applied without compensation to those cases involving
3 riparian owners who have acquired title from the state
4 pursuant to local rules of property construction. There
5 is no question that where the equal footing doctrine
6 reserved title for a future state, that navigational
7 servitude applies. In this case, however, the Cherokee
8 Nation was uniquely conveyed title to a great tract of
9 land of which the bed and banks of the Arkansas are only
10 a fraction.

11 The United States states that there is nothing
12 unusual with respect to the navigational servitude about
13 fee simple ownership of riverbed interests, citing cases
14 where states or individuals through states acquired
15 title. First of all, it is very unusual that the
16 Cherokee Nation was granted fee title to navigable
17 lands. Second, I think this ignores the intent behind
18 the grant. State lands were always intended to be
19 public and individual owners took accordingly.

20 Cherokee land was intended to be private. The
21 Cherokee Nation was not a mere riparian owner but a
22 sovereign nation in many respects. It was promised
23 freedom from state or territorial jurisdiction and the
24 right of self-government.

25 The Cherokee title as granted was not a

1 qualified one certainly when viewed from the plain
2 meaning of the treaties and patent. These private
3 rights were created without any place for public
4 intervention. No state was contemplated in 1838. The
5 entire area within the Cherokee domain including the
6 riverbed constituted the private property of the
7 Cherokee Nation.

8 The right to develop their property is a
9 vested property right. As this Court has already
10 recognized, neither Congress intended nor the Cherokees
11 understood that they be precluded from developing their
12 mineral rights. After repeated betrayals, a forced
13 removal, and a unique fee patent to their new private
14 home, I would submit that the Cherokees have a
15 reasonable investment-backed expectation to use their
16 property free from public interference.

17 Congress intended to preserve a way of life.
18 In their eastern lands the Cherokees used the streams
19 and rivers as avenues of transportation for food, for
20 irrigation, and other purposes. They were not nomadic
21 but settled in towns and villages along the rivers.
22 Also it is clear that the Cherokees made money from the
23 use of the rivers. In both the eastern and western
24 homes, the Cherokees regulated public ferries crossing
25 the many streams and rivers. Cherokee law provided for

1 taxation, licensing, and manner of use.

2 The United States argues that this Court has
3 never deviated from the fundamental constitutional
4 principle that the United States owes no compensation
5 when the government's navigational improvements impair
6 private interest in navigable waters. The United States
7 cites a long line of cases where the noncompensable loss
8 was related either directly or indirectly to the
9 riparian owner's access to or use of navigable waters.

10 As the Court of Appeals correctly held, a
11 determination of what is compensable or not compensable
12 should have nothing to do with the use of navigable
13 waters. It is the character of the invasion that is
14 determinative. In this case there is not a mere
15 insubstantial evaluation, but millions of tons of sand
16 and gravel have been dredged away or rendered
17 inaccessible by rivetment construction.

18 Three dam sites have been taken, two of which
19 are generating electricity with no benefit to the
20 tribe.

21 QUESTION: But that is true in any number of
22 the other navigational servitude cases. You know,
23 valuable rights were taken in Chandler, Dunbar and
24 Willow River, in Lewis Bluepoint Oyster, and it was held
25 they weren't compensable. There was no question that

1 the damages were substantial if they could have been
2 allowed.

3 MR. WILCOXEN: But I think in those cases,
4 Your Honor, those individuals took with the expectation
5 that their property would be shared with the public
6 right.

7 QUESTION: Everybody takes with the
8 expectation that the government will exercise its
9 navigational servitude.

10 MR. WILCOXEN: I don't think --

11 QUESTION: Our cases have said that.

12 MR. WILCOXEN: That is correct, Your Honor,
13 but this is a unique case where the Cherokees had a
14 separate domain, and I don't think it was the intent of
15 Congress that their lands be shared with the public.
16 The takings clause requires an examination of whether
17 the restriction on private property forces some people
18 alone to bear public burdens which in all justice and
19 fairness should be borne by the public at large.

20 The Cherokee Nation's private property should
21 not be destroyed and used by the United States for
22 public purposes without compensation. They should not
23 have to bear the public burden of sacrificing private
24 property solemnly guaranteed forever. Upon
25 extinguishment of their national title at Oklahoma

1 Statehood Congress again promised that their land would
2 not become public land nor property of the United
3 States.

4 I would submit that the Cherokee property does
5 have the force of law behind it to the extent that this
6 Court can compel the United States to keep from using
7 its property without making compensation. The
8 reasonable investment-backed expectation of private use
9 in this Cherokee case cannot be measured in terms of
10 dollars. The Cherokees lost over 4,000 lives and their
11 property in the east during the forced removal to gain
12 their privacy in the west.

13 In this case the trust relationship must also
14 be considered. From the earliest Cherokee decision this
15 Court has recognized the special relationship between
16 the United States and Indian tribes. In the face of
17 this duty, the United States now argues that the
18 fiduciary relationship is not relevant to this
19 controversy and that the cases cited by the Cherokee
20 Nation were decided on traditional legal standards
21 notwithstanding the trust powers of the United States.

22 The Cherokee Nation believes the United
23 States' emphasis is misplaced. Cherokee property rights
24 were established long ago by treaty and patents. The
25 trust relationship does establish an independent

1 standard of responsibility requiring that treaties and
2 agreements between a nation and its dependent subjects
3 be enforced with greater rigor than those with foreign
4 nations or private parties unprotected by a special
5 guardianship relationship.

6 QUESTION: If the Corps of Engineers wants to
7 do something about flood control within the reservation
8 or within that stretch of the river they are going to
9 have to -- if they are going to take any of the banks or
10 anything like that, straighten out the river, they are
11 going to have to pay.

12 MR. WILCOXEN: That would be our position,
13 Justice White. Yes.

14 QUESTION: And so it depends on the -- they
15 are going to have to pay or get the consent of the tribe
16 in order to protect people below.

17 MR. WILCOXEN: I am not saying that the tribe
18 could prevent the Corps of Engineers from using the
19 property.

20 QUESTION: No. They can prevent them
21 without -- unless they pay.

22 MR. WILCOXEN: That's correct. I am saying
23 that if the Corps of Engineers takes and uses this
24 vested property in such a way that it destroys valuable
25 deposits, then it must pay for it.

1 QUESTION: Why Isn't the logic of your
2 argument that there should be no power in the federal
3 government to alter these streams to improve navigation
4 at all? A deal is a deal. We gave these streams to the
5 Cherokee, and the Corps of Engineers shouldn't be able
6 to go in at all. Why doesn't that follow?

7 QUESTION: Why should it be subject to eminent
8 domain?

9 QUESTION: I mean, you know, the Cherokees
10 say, our deal was, we wanted new lands that were our
11 lands.

12 MR. WILCOXEN: That's correct, Your Honor.

13 QUESTION: Now all of a sudden you are
14 changing this treaty and you are making it, you know,
15 money instead of lands. We didn't want money. We
16 wanted lands.

17 MR. WILCOXEN: Well, in the past this Court
18 has held that the Cherokee Nation is subject to this
19 country's power of eminent domain.

20 QUESTION: I know we have, but that -- I am
21 talking about the logic of your argument. Isn't the
22 logic of your argument not just that the government must
23 pay for the exercise of its navigational authority, but
24 that it has no navigational authority whatever?

25 MR. WILCOXEN: I think that's correct, Your

1 Honor. The Court, recognizing Cherokee --

2 QUESTION: The logic coming the other way is
3 that if the Cherokee Nation is subject to eminent
4 domain, it is subject to the navigational servitude.

5 MR. WILCOXEN: I would say, Your Honor, in
6 answer to that that it would not be fair in the face of
7 the plain promises made in the treaties and the way the
8 Indians would have understood them to invoke the
9 servitude in such a way that it takes property from the
10 tribes without compensation.

11 QUESTION: Wasn't it conceded in the Choctaw
12 Nation case that the government retained a navigational
13 servitude in the river?

14 MR. WILCOXEN: Yes, Your Honor, it was stated
15 in the Choctaw Nation case that the United States had
16 all it was concerned with in retaining its navigational
17 easement pursuant to its constitutional power to
18 regulate navigation.

19 Your Honor, we are not attempting to deny the
20 United States the power to regulate navigation but it is
21 the effect of the exercise of that power --

22 QUESTION: You are certainly disavowing that
23 concession today.

24 MR. WILCOXEN: Excuse me?

25 QUESTION: You are disavowing that concession

1 today, clearly.

2 MR. WILCOXEN: Well --

3 QUESTION: Not really. You are just saying it
4 is an illogical one.

5 MR. WILCOXEN: I am saying that to the extent
6 that it would divest property interests of the Cherokee
7 Nation that they thought that they had, that
8 compensation is due.

9 The Court of Appeals, recognizing that
10 Cherokee property rights are constitutionally protected,
11 directed its opinion to this Court's decision in United
12 States versus Creek Nation. While Congress is vested
13 with the power to manage and control tribal property
14 that power does not extend so far as to allow the
15 government to give tribal lands to others or use it for
16 its own purposes without rendering or assuming an
17 obligation to render just compensation.

18 To do otherwise would not be an active
19 management but one of confiscation. Congress's power to
20 manage and control tribal trust property is not absolute
21 but is subject to pertinent constitutional restrictions,
22 including the Fifth Amendment. Furthermore, the duty to
23 manage and control cannot be preempted and subsumed by
24 the navigational servitude. Congress's fiduciary
25 responsibility to protect tribal property rights is no

1 less compelling in the face of the navigational
2 servitude.

3 The power to regulate tribal affairs and the
4 navigational servitude spring from the same commerce
5 clause. Regulation does not include confiscation.
6 Congress cannot completely ignore one duty on the one
7 hand to advance another. Likewise, it cannot
8 simultaneously act as trustee for the benefit of the
9 Cherokee Nation and promote and protect its property
10 interests on the one hand and on the other hand invoke
11 its power to regulate navigation when to do so would
12 take tribal property and use it for a public purpose.

13 In any given situation in which Congress has
14 acted it must act in one capacity or the other. It is
15 the good faith effort on the part of Congress to give
16 the Indians the full value of their land that identifies
17 the exercise by Congress of its authority to manage
18 property of the Indian wards for their benefit. Without
19 that effort, Congress could exercise sovereign power to
20 regulate navigation, thereby destroying tribal property
21 and using it for its own purposes without assuming an
22 obligation to compensate the tribe.

23 In this case, Congress cannot be presumed to
24 have exercised its navigational servitude with no intent
25 to compensate the Cherokees. The Court of Appeals noted

1 that special circumstances surrounding the grant to the
2 Cherokee Nation, particularly the series of broken
3 treaties culminating in a new set of treaties and patent
4 uniquely granting fee title to the Cherokee Nations, to
5 their lands in the west, and promising freedom from
6 state and territorial jurisdiction.

7 In the face of these circumstances, the Court
8 of Appeals found that it must adhere to the principle
9 that treaty rights will not be deemed abrogated or
10 modified absent a clear expression of Congressional
11 purpose. The intention to abrogate or modify a treaty
12 is not to be lightly imputed to Congress. In neither
13 the Flood Control Act of 1944 nor the Rivers and Harbors
14 Act of 1946 was any provision made for the payment of
15 compensation to the Cherokee Nation for the loss of its
16 property, but more importantly, the Acts of Congress do
17 not express an intent to deprive the Cherokee Nation of
18 its trust property without compensation.

19 In 1906, this riverbed property, remaining
20 unallotted, passed into trust with the provision that it
21 shall not become public land nor property of the United
22 States but shall be held in trust for the use and
23 benefit of the Indians.

24 After Oklahoma Statehood, the Secretary of
25 Interior and the Oklahoma State Supreme Court

1 erroneously concluded that the property had passed to
2 the State of Oklahoma, and this misbelief persisted
3 until this Court's decision in Choctaw Nation versus
4 U.S., 397 US 620, in 1970.

5 When Congress authorized construction of the
6 navigation project it made no authorization to take
7 tribal property. Congressional Intent should not be
8 implied to the detriment of the Cherokee Nation. When
9 the United States took this property for the
10 McClellan-Kerr project without payment, it violated the
11 terms of its trust provision to hold the property for
12 the use and benefit of the tribe.

13 There is nothing in the navigational servitude
14 which absolutely binds Congress to an intent to take
15 property without compensation. It is clearly not a
16 blanket exception to the Fifth Amendment. The
17 navigational servitude is not absolute. Absent a clear
18 expression of Congressional Intent to take tribal trust
19 property without compensation, I would say there is a
20 well-founded doubt that should be resolved in favor of
21 the tribe.

22 QUESTION: Well, the question is really
23 whether there is property to be taken. I mean, it isn't
24 whether they are taking it without compensation. It is
25 whether there is property to be taken in the first

1 place. Did the tribe ever get the right to have the
2 beds free from the federal government's navigational
3 interest which applies everywhere else?

4 MR. WILCOXEN: That is correct, Justice
5 Scalia.

6 QUESTION: Now, it seems to me that the
7 problem you confront is that in all other instances it
8 is -- in all other instance it is assumed that when the
9 federal government conveys property, even when it
10 conveys fee title, it does not convey that little bit
11 that consists of its right to deepen the bed of the
12 stream or otherwise improve navigation. Why should one
13 feel differently in this case?

14 You can't cite a single other case where the
15 United States has conveyed land where it has not
16 implicitly, without saying so, reserved that particular
17 right so that that piece of property is not conveyed.
18 Why should we think it has been conveyed here?

19 MR. WILCOXEN: But this truly is a unique case
20 that they granted an Indian tribe fee simple title to
21 navigable lands, to lands below a navigable river.

22 QUESTION: It isn't unique at all. Under the
23 equal footing doctrine, by the very act of admitting
24 states to the Union, they get precisely the fee simple
25 title to the bed of a river that you are talking about.

1 MR. WILCOXEN: That is correct, Chief Justice
2 Rehnquist, but it is clearly intended under those
3 circumstances that those be and remain public highways.

4 QUESTION: Why is it intended there and not in
5 this case?

6 MR. WILCOXEN: Because the Cherokee Nation was
7 set aside in a separate domain. They had just suffered
8 the ruinous effects of intrusion from white settlers.

9 QUESTION: Well, you know, I dare say everyone
10 who gets a patent from the United States thinks and does
11 get fee simple, if that is what the patent says, with
12 all the bundle of rights that includes and yet every
13 other patent is subject to the navigational servitude,
14 and you are insisting that this somehow stands by
15 itself.

16 MR. WILCOXEN: Well, I am saying, Your Honor,
17 that there are circumstances in which there can be
18 created compensable property rights, and I think that
19 the Cherokee Nation in the face of its history has a
20 compensable property interest in the riverbed.

21 QUESTION: In a way there is even less reason
22 to think that the federal government was giving it all
23 away here, that navigational servitude that it holds.
24 If I am correct the plans for making improvements on the
25 river were in existence. The Corps of Engineers was

1 already looking jealously at this particular river
2 before the treaty was entered into. Isn't that so?

3 MR. WILCOXEN: There were some appropriations
4 to study the river and to remove snags in the river, but
5 I must say, Your Honor, that that primarily took place
6 below Fort Smith, while some of that did come into this
7 area, but I don't think that the removal of those snags
8 for the primary purpose of allowing navigation to Fort
9 Gibson to supply the fort and even to allow trading with
10 the Cherokee Nation obviates the fact that there was
11 clearly intended to set aside a private domain for the
12 Cherokee Nation.

13 I don't think that that is sufficient an
14 expression of intent to open up a public highway.
15 Otherwise, settlers could have just simply come up the
16 river with no impunity, and that was not the case.

17 QUESTION: In expelling or keeping the
18 settlers out the tribe had the support of the United
19 States, did it not?

20 MR. WILCOXEN: Yes, Your Honor, it does.

21 QUESTION: Well, now, here the United States
22 is on the other side, and so the question is, how much
23 of that muscle was the tribe's and how much of it was
24 the United States'.

25 MR. WILCOXEN: Well, both entities had their

1 own provisions to keep the intruders out. To the extent
2 that that was divided, I can't say. But both tribal law
3 and the trade and intercourse Acts prohibited traders
4 from coming into the Cherokee Nation. Tribal law
5 clearly prohibited anybody from coming into the Cherokee
6 Nation, and the treaty itself, the Treaty of 1835,
7 clearly provides that settlers will be removed by order
8 of the President of the United States.

9 QUESTION: What if the United States had
10 wanted to march a troop of cavalry through the
11 reservation. Do you think the Cherokee Tribe could have
12 kept them out?

13 MR. WILCOXEN: Well, whether or not the United
14 States marched cavalry through the Cherokee Nation, I
15 think that would be an entirely separate situation than
16 if 200 American citizens just simply wanted to come and
17 sojourn on the Cherokee Nation.

18 QUESTION: I am sure it would be. I think the
19 former question and not the latter is the one that is
20 relevant to your case.

21 MR. WILCOXEN: We think that Congress intended
22 that the Cherokees have every reasonable beneficial
23 economic value which can be derived from the riverbed,
24 including water power. The value in the flow of the
25 stream can be granted or retained as the government

1 chooses. As recognized by Chief Justice Harlan Stone,
2 then Attorney General, in 34 Attorney General Opinion
3 171, as a practical matter property rights include any
4 right to hidden or latent resources of the land, such as
5 minerals or water power, even though the Indians had no
6 knowledge of this in their natural state.

7 Finally, it must be understood that the
8 Cherokee Nation does not intend to debilitate the United
9 States or to prevent the United States from the exercise
10 of its power to regulate navigation, but as this Court
11 noted in the Kaiser Aetna decision, 444 US, the
12 regulation of navigation and whether or not that
13 regulation constitutes a Fifth Amendment taking are two
14 entirely separate questions.

15 Thank you.

16 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
17 Wilcoxon.

18 Mr. Minear, do you have something more?

19 ORAL ARGUMENT OF JEFFREY P. MINEAR, ESQ.,

20 ON BEHALF OF THE PETITIONER - REBUTTAL

21 MR. MINEAR: Thank you, Mr. Chief Justice.

22 I believe this case can be reduced to one
23 essential question, and that is whether the tribe is a
24 part of the national Union. We submit that it is, and
25 that the decision below should therefore be reversed.

1 Thank you, Your Honor.

2 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
3 Minear.

4 The case is submitted.

5 (Whereupon, at 2:15 o'clock p.m., the case in
6 the above-entitled matter was submitted.)
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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

#85-1940 - UNITED STATES, Petitioner V. CHEROKEE NATION OF OKLAHOMA

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BY Paul A. Richardson

(REPORTER)