American Indian Law Review

Volume 19 | Number 2

1-1-1994

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Richard S. Crump

SPECIAL FEATURE

TWENTIETH CENTURY CHEROKEE PROPERTY CLAIMS: A STUDY BASED ON THE CASE FILES OF EARL BOYD PIERCE

*Richard S. Crump**

Cherokee property issues represent some of the most protracted claims in United States history. The purpose of this article is to demonstrate the procedural process involved in pressing tribal claims before the Indian Claims Commission and in federal court. The development of the Outlet cases, the Texas Cherokee claims, and the Freedman cases will be outlined. The Arkansas riverbed litigation, still pending, will also be explored.

The historical data used in this study is primarily based on the files of Earl Boyd Pierce, who became the first full-time Cherokee tribal attorney in 1938. Pierce, Chief W.W. Keeler, and other great Cherokee warriors were responsible for organizing the Cherokee Nation's government as it exists today. This effort was made possible because of funds awarded on the basis of Cherokee property claims.

Pierce was born January 29, 1904, near Fort Gibson, Oklahoma. He was raised in what was historically known as the Cherokee Nation West Indian Territory. Pierce entered the University of Oklahoma in 1922 where he studied Cherokee history. In 1925 he entered the University of Oklahoma College of Law and focused his studies on the legal history of the Cherokee people. After graduating in 1928, Pierce settled in Muskogee, Oklahoma, and started a general practice. Over the next ten years, Pierce held a wide range of positions. From 1930 to 1933, he worked as the assistant county attorney. In 1934, he joined the federal government's Staff of the Solicitor, Department of the Interior, and by 1936, he was employed with the Department of Justice. These positions allowed Pierce to continue his Cherokee historical research.

In Washington, Pierce became friends with United States Sen. Robert Latham Owen (D.-Okla.) and Frank Boudinot, who represented the Cherokees in the early 1900s in the original Cherokee Outlet cases.[1] While working for the government in Washington, Pierce was immersed in an atmosphere that was dominated with attitudes such as those expounded by George T. Stormont. Stormont was in charge of Indian litigation at the Justice Depart-

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* Third-year student, University of Oklahoma College of Law. This paper won the Frank C. Love Memorial Scholarship, University of Oklahoma College of Law, April 15, 1994. The author expresses thanks to the Cherokee Heritage Center, Tahlequah, Okla., and James Wilcoxen, Attorney at Law, Muskogee, Okla., for their invaluable assistance.

1. In 1910, the original outlet litigation eventually resulted in a per capita payment of $133.19 to each Eastern Cherokee. *See* United States v. Eastern Cherokees, 202 U.S. 101 (1906).

ment and was noted for being no friend of the Indian.[2] Stormont's overt plan was to defeat Indian claims by delay and by meticulously searching for all possible offsets to claims in order to negate awards.[3] The resulting effect of this was to fuel Pierce and his peers to increase their efforts in asserting the Cherokee Nation's rights. Often, these efforts were funded by Pierce and his colleagues with their own money.

Pierce's education had impressed him with the fact that the Cherokee were no longer a cohesive group. They had been historically split into three political groups. The first group, known as the Old Settlers or Western Cherokee,[4] were the Cherokee who in 1817 traded a portion of their ancestral lands in the southeastern United States for property in northwest Arkansas. In 1828, the Old Settlers exchanged their Arkansas property for land located in what was to later become northeastern Oklahoma. The land in Oklahoma included the Cherokee Nation proper and the outlet to the west. The second group of Cherokee, called the Treaty Party or Political Cherokees, was composed of several thousand eastern Cherokee who complied with the 1835 Treaty of New Echota, which called for the cession of the Political Cherokees' southeastern holdings and for their removal to the west into Western Cherokee lands.[5] The Treaty Party Cherokee split from the third group, which was known as the Eastern Cherokee. The Eastern Cherokee were those people who opposed any relinquishment of their ancestral lands. They were forcibly removed along the infamous Trail of Tears during the 1830s. Disunity, which Pierce and the Cherokee leaders faced in the 1940s, was further enhanced by the fact that the long separation between the Eastern and Western Cherokee allowed these groups to develop separate political organizations. There were additional problems with discord because, in addition to the above groupings, there was further subdividing into "bands" based on various political, business, social, and religious lines.[6]

At the turn of the century, the Dawes Commission negotiated with the Cherokee for the purpose of extinguishing tribal title to their lands in what was to become the State of Oklahoma.[7] This was done by establishing a tribal roll and allotting tribal lands to individual members.[8] An effort to abolish tribal government coincided with the disbursement of tribal property.

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2. H.D. ROSENTHAL, THEIR DAY IN COURT 54-55 (1990).

3. *Id.*

4. MORRIS WARDELL, A POLITICAL HISTORY OF THE CHEROKEE NATION 1838-1907, at 5 (1977).

5. EARL BOYD PIERCE & RENNARD STRICKLAND, THE CHEROKEE PEOPLE, INDIAN TRIBAL SERIES AND THE CHEROKEE NATION 40-43 (1973); *see* RUSSELL THORNTON, THE CHEROKEES: A POPULATION HISTORY (1990) (discussing Cherokee post-Trail of Tears population distribution); WARDELL, *supra* note 4, at 8-10. The Treaty of 1835 was ratified by Congress on May 29, 1836.

6. PIERCE & STRICKLAND, *supra* note 5, at 40-43.

7. THORNTON, *supra* note 5, at 116.

8. *Id.*

"The Indian governments were declared to be non-American . . . radically wrong . . . and growing worse."[9] These efforts culminated in the Act of June 30, 1906, wherein Congress made final settlements with the Cherokee Nation and provided the details for the final disposition of the Nation's existence.[10]

The loss of their land, which was their resource base, and the lack of tribal unity led to the impoverishment of the Cherokee people. This impoverishment reached crisis proportions in the early 1930s, when the United States Senate held hearings on reported famines among Oklahoma Indians.[11] In the face of this tribal devastation, Pierce and then-Chief William Wayne Keeler played key roles in the push to reunite the Cherokee people. These men had the foresight to realize, and to teach, that access to rightful recoveries for past wrongs and to many badly needed federal programs was to be had by reuniting the Cherokee people. To help implement this reunion, these leaders embarked upon a campaign to inform and educate members of Congress, and the public at large, on current Indian economic conditions. Plans were developed for rehabilitation in all fields.[12]

H.D. Rosenthal characterizes Indian land claims as unique debts between disparate cultures.[13] Indian access to the U.S. Court of Claims required an act of Congress.[14] In 1928, the Meriam Report proclaimed that the need for an act of Congress in order to press such a claim introduced politics into law, made personalties a factor, and often resulted in the Executive Branch stifling claims for economic reasons.[15] By 1930, an average of ten years passed from the time an act was passed to the time claims were heard in court.[16] This was followed by an average of five years to final adjudication.[17]

By the mid-1940s in Washington, the number of Indian claims before Congress had also reached crisis proportions. The requirement of obtaining an act of Congress in order to press a claim took a heavy toll in both time and resources. In light of the rising number of claims, the moral wrongs that needed to be addressed, and the number of unsettled land titles, Congress passed the Indian Claims Commission Act on August 13, 1946.[18] The goal

9. WARDELL, *supra* note 4, at 314.

10. *Id.* at 334; *see* Act of June 30, 1906, ch. 3912, 34 Stat. 664.

11. RENNARD STRICKLAND, THE INDIANS IN OKLAHOMA 72-73 (1980).

12. There was a vast number of letters written by Earl Boyd Pierce during this period. He directed letters to senators, representatives, newspapers, and to individual tribal members and were always carbon-copied to Chief Keeler. Chief Keeler's files are currently located at the Cherokee Heritage Center in Tahlequah, Oklahoma, and are available to the public.

13. ROSENTHAL, *supra* note 2, at x.

14. *Id.*

15. *Id.* at 19.

16. *Id.* at 19-20.

17. *Id.*

18. Indian Claims Commission Act of 1946, ch. 959, 60 Stat. 1049. The Act, codified at 25 U.S.C. §§ 70-70v, was omitted from the Code following termination of the Commission on Sept. 30, 1978.

of this Act was to promote efficiency by establishing the Indian Claims Commission, whose sole purpose was to address Indian claims and achieve final settlement.[19]

Pierce was enthusiastic about the Claims Commission. In his 1948 Tribal Attorney's Report, Pierce stated that "after a century of frustration, Congress has opened the doors to meritorious tribal claims."[20] The primary basis for this optimism was the Act's creation of a new cause of action empowering the Indian Claims Commission to hear property claims based on unfair and dishonorable dealings. The Act defined this cause of action as follows:

> The Commission shall hear and determine the following claims against the United States on behalf of any Indian tribe, band or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska; . . . (3) claims which would result if the treaties, contracts, and agreements between the claimant and the United States were revised on the ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake, whether of law or fact, or any other ground cognizable by a court of equity; . . . (5) claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity.[21]

Format of a Claim Presented to the Commission

H.D. Rosenthal points out that land claim cases submitted to the Commission typically followed three stages.[22] The first stage was called the "Title Phase." This initial step required a determination of whether the Indians possessed title to the land in dispute. This was the most difficult phase. A definite territory had to be established as well as the historical basis of the claim which was usually founded by treaty or U.S. patent. Establishing this required expert testimony based on both fieldwork and on historical analysis. The expert's competence was subject to approval by the Claims Commissioners and all evidence was subject to similar approval as to its relevancy. The second stage in submitting a claim to the Commission was called the "Valuation-Liability Phase." After establishing title, the value of the land at issue had to be determined. Valuation was also based on expert analysis. The goal of this second phase was to determine the fair market value of the property at the time of the taking. The third and final stage in presenting a

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19. ROSENTHAL, *supra* note 2, at 47-49.

20. Earl Boyd Pierce, Cherokee Tribal Attorney's Special Report to Honorable W.W. Keeler, Principal Chief of the Cherokee Nation, and to the Cherokee Executive Committee (1948) [hereinafter 1948 Tribal Attorney's Report] (on file with the *American Indian Law Review*).

21. Indian Claims Commission Act of 1946, § 2, 60 Stat. at 1050.

22. ROSENTHAL, *supra* note 2, at 121-22.

claim to the Commission was referred to as the "Offset Phase." After a value was established, any appropriate offsets were deducted to determine the final value of the claim. Offsets were based on payments and gratuities given to the tribe by the United States after the date of the claim arose. Offsets took numerous and varied forms and their determination often added additional years to the life of a claim.

The average life span of a claim before the Indian Claims Commission was usually around ten years. A final decision did not mark the end of the litigation for the tribal attorney. Petitions had to be filed with the Indian Claims Commission in order for tribal attorneys to receive fees and reimbursement of expenses. The Commission had the discretion to order a hearing as to the reasonableness of the application. Payments of 6% to 10% were usually approved.[23] Given the long lifespan and the complexity of the litigation, this requirement of approving fees after the decision of the Commission represented a significant hurdle for the tribal attorneys, who often had to finance these efforts out of their own pockets.[24]

The Outlet Cases

In the Treaty of 1817 and the Treaty of 1819, the Cherokee exchanged approximately 4,500,000 acres in the Southeastern United States, east of the Mississippi, for land located in what was to become northwestern Arkansas.[25] In the negotiations for this exchange, representations were made on behalf of President Monroe by the Secretary of War, John C. Calhoun, that the Cherokee were to receive a game outlet to the west of their new lands. Five days before the 1819 Treaty was finalized, the United States negotiated a Treaty with Spain. This Treaty fixed the western boundary of the United States at 100 degrees west meridian.[26] In the Treaty of 1828, the Cherokee Arkansas holding was exchanged for land located in what is now northeastern Oklahoma. Expressly included in this Treaty was a perpetual outlet to the west.[27] Title to the western outlet, approximately 8,144,000 acres, was clearly granted to the Cherokee by a United States patent dated December 31,

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23. *Id.* at 140.

24. According to Dr. Rennard Strickland, there were times when Pierce nearly starved. Interview with Dr. Rennard Strickland, Professor of Law, University of Oklahoma, Norman, Okla. (Oct. 1993).

25. Eastern or Emigrant Cherokees & Western or Old Settler Cherokees v. United States, 88 Ct. Cl. 452, 454 (1939); *see also* Treaty with the Cherokee, July 8, 1817, 7 Stat. 156, *reprinted in* 2 INDIAN AFFAIRS: LAWS & TREATIES 140-44 (Charles J. Kappler ed., photo. reprint 1975) (1904) [hereinafter KAPPLER'S LAWS AND TREATIES]; Treaty with the Cherokee, Feb. 27, 1819, 7 Stat. 195, *reprinted in* KAPPLER'S LAWS & TREATIES, *supra*, at 177-81.

26. Eastern or Emigrant Cherokees & Western or Old Settler Cherokees v. United States, 88 Cl. Ct. at 455-56.

27. *Id.* at 457; *see also* Treaty with the Western Cherokee, May 6, 1828, 7 Stat. 311, *reprinted in* KAPPLER'S LAWS AND TREATIES, *supra* note 25, at 288.

1838.[28] The outlet, which was utilized by the Cherokee as ranch land, was broken up under the Treaty of 1866. The Treaty of 1866 gave the United States the authority to settle "friendly Indians" in the outlet area.[29] The remainder of the outlet land was purchased by the United States under the 1891 Cherokee Outlet Agreement which was ratified by Congress in 1893.[30] In this agreement, the Cherokee received $10,423,262.99 in exchange for the remaining outlet lands. The government then opened this land for settlement in what was to become known as the Oklahoma Land Run of 1893.

In the late 1930s, Robert Owen, Houston Teehee, and Frank Boudinot instigated *Eastern or Emigrant Cherokees and Western or Old Settler Cherokees v. United States.*[31] This lawsuit before the United States Court of Claims sought compensation for the lands west of the 100th meridian that had been promised to the Cherokee in the Treaty of 1817. These lands were located in what is now part of Texas and New Mexico. The United States Court of Claims recognized that the government had made representations to the Cherokees that they would have a perpetual outlet to the west. However, an express outlet was not granted until the United States issued the 1838 patent. In the patent, the outlet's boundary was fixed by the boundary of the United States, which extended to and stopped at the 100th meridian.[32] Therefore, the perpetual outlet stopped at the 100th meridian. The Court of Claims further held that the claim was barred by the Cherokee Outlet Agreement of 1891 wherein the Cherokee conveyed title for valid consideration.[33]

The new cause of action for title claims based on unfair and dishonorable dealings, established by the Indian Claims Commission Act of 1946, opened the door for a revival of the earlier unsuccessful outlet claim. Pierce drafted the petition to the Indian Claims Commission in the late 1940s. The arguments presented in this claim closely mirrored the arguments used in the former litigation.[34] Pierce asserted that a mistake of fact occurred because the Cherokee thought that the outlet was included in the Treaty of 1817. When the Cherokees learned that the outlet was not included in this Treaty, delegates were sent to Washington in February 1818 to demand enforcement of the Cherokee understanding of the agreement. In Washington, the Cherokee delegates were told by President Monroe that the outlet had not yet

28. Eastern or Emigrant Cherokees & Western or Old Settler Cherokees v. United States, 88 Cl. Ct. at 459.

29. *Id.* at 460; Treaty with the Cherokee, July 19, 1866, 14 Stat. 799, *reprinted in* KAPPLER'S LAWS AND TREATIES, *supra* note 25, at 942.

30. Eastern or Emigrant Cherokees & Western or Old Settler Cherokees v. United States, 88 Cl. Ct. at 461 (citing Act of Mar. 3, 1893, ch. 209, § 10, 27 Stat. 612, 640).

31. 88 Ct. Cl. 452 (1939).

32. *Id.* at 461.

33. *Id.*

34. Cherokee Nation v. United States, 2 Ind. Cl. Comm. 7 (1952).

been obtained from the Quapaw and that it would be transferred to the tribe the following summer.[35] In May 1818, John C. Calhoun, Secretary of War, wrote to General William Clarke stating that the President was anxious to provide every inducement to the Cherokee to move to the west. A second letter from Calhoun to Governor McMinn of Tennessee affirmed the President's intentions to provide the Cherokee with the outlet. In July 1821, Calhoun made a direct written promise to the chiefs of the Western Cherokees that the outlet would be delivered. Calhoun affirmed this promise in a 1823 letter to the chiefs. The Cherokees inquired in 1825 and 1827 and positive answers regarding the transfer of the outlet were received.[36]

The Treaty of 1828 acknowledged the pledge of the perpetual outlet to the west. This was the treaty that was executed when the Western Cherokee gave up their Arkansas holdings due to pressure from the westward expansion of white settlers.[37] The Treaty of 1835, which provided for the removal of the Treaty Party Cherokees to the west, also promised the perpetual western outlet.[38] The Treaty of 1846, an attempt to adjust differential treatment of the Eastern and the Western Cherokees which, arising from the forcible removals, also provided for the western outlet.[39] The final evidence offered was the unratified Treaty of July 19, 1868, which contained provisions for adjustment of claims against the United States stemming from the Treaty of 1866, which had allowed the United States to settle "friendly Indians" west of the ninety-sixth meridian.[40] In the Treaty of 1868 the executive officers acknowledged the Cherokee rights to outlet lands west of the 100th meridian.[41]

Based on these facts, five legal theories were presented: (1) the Commission had jurisdiction to hear the claim because the Indian Claims Commission Act authorized the Claims Commission to hear claims based on unfair and dishonorable dealings; (2) a breach of the fair and honorable dealings standard had been committed; (3) a huge disparity of bargaining power existed between the government and the Cherokee; (4) the United States distinctly promised the outlet to the Cherokee; and (5) a mistake of fact existed because the Cherokee thought the outlet was included in the original Treaty of 1817, a

35. Plaintiff's Request for Findings of Fact and Brief at 27, Cherokee Nation v. United States, 2 Ind. Cl. Comm. 7 (1952) (No. 2) [hereinafter Plaintiff's Request] (filed July 11, 1951).

36. *Id.* at 27-28.

37. *Id.* at 30; Treaty with the Western Cherokee, *supra* note 27.

38. Plaintiff's Request, *supra* note 35, at 32; Treaty with the Cherokee (New Echota), Dec. 29, 1835, 7 Stat. 478, *reprinted in* KAPPLER'S LAWS AND TREATIES, *supra* note 25, at 439.

39. Plaintiff's Request, *supra* note 35, at 33; Treaty with the Cherokee, Aug. 6, 1846, 9 Stat. 871, *reprinted in* KAPPLER'S LAWS AND TREATIES, *supra* note 25, at 561.

40. Plaintiff's Request, *supra* note 35, at 33; Treaty with the Cherokee, Apr. 27, 1868, 16 Stat. 727, *reprinted in* KAPPLER'S LAWS AND TREATIES, *supra* note 25, at 996 (supplemental article to Treaty of 1866); *see also* WARDELL, *supra* note 4, at 215.

41. Plaintiff's Request, *supra* note 35, at 33.

belief which was supported in all subsequent treaties and agreements through 1868.[42]

The Commission barred recovery on a number of grounds. First, the doctrine of res judicata applied because the same issue had been heard in *Eastern or Emigrant Cherokee and Western or Old Settler Cherokee v. United States*, which had denied this claim when it was raised prior to the Claims Commission Act.[43] Second, the claim lacked support by any treaty.[44] Third, the Cherokee historical evidence of statements of promises made regarding the outlet was insufficient to find an outlet had been conveyed.[45] Fourth, promises that were made regarding the outlet were completed.[46] Fifth, given the contended size of the western outlet,[47] it was unlikely that a promise granting real property would have been made in the absence of an express written agreement.[48] Sixth, the 1828 Treaty, which provided for the Cherokee removal from Arkansas, stated that the Cherokee were to enjoy the free and unmolested use of the outlet to the west. The Commission interpreted these words to mean that the title was something less than fee simple.[49] Seventh, the Cherokee expressly accepted the terms of the Treaty of 1828, which provided for an exchange of their land in Arkansas for seven million acres in Oklahoma and for free *use* of the land to the west. This exchange was accepted at the time of the agreement as complying with all previous agreements. Eighth, the Treaty of 1828 outlet was the outlet the government had promised and provided in good faith fulfillment of all agreements.[50] Ninth, even though the Tribe never had fee simple title to the outlet, the Cherokee had been paid $10,423,262.99 for it under the Outlet Agreement of 1891.[51] Simply translated, the opinion maintained that the Cherokee never owned the land to the west of the 100th meridian and they were compensated for it nonetheless.

The New Outlet Case

Pierce, his associates and predecessors, presented a good case for an unfair and dishonorable dealings claim but failed to clearly establish fee simple title in the outlet lands west of the 100th meridian. In retrospect, the effort had

42. *Id.* at 35.

43. Cherokee Nation v. United States, 2 Ind. Cl. Comm. 7, 7 (1952); *see* Eastern or Emigrant Cherokees & Western or Old Settler Cherokees v. United States, 88 Ct. Cl. 452, 452 (1939).

44. Cherokee Nation v. United States, 2 Ind. Cl. Comm. at 7.

45. *Id.*

46. *Id.*

47. The Cherokee claimed 3,630,000 acres in Oklahoma, 5,600,000 acres in New Mexico, and 2,510,000 acres in Texas. *Id.* at 24.

48. *Id.* at 28.

49. *Id.* at 34.

50. *Id.* at 30.

51. *Id.* at 34.

skipped the step that Rosenthal later called the "title phase," *supra*. Failure to meet this burden resulted in the government successfully moving for summary judgment for failure to state a claim. Pierce and the other Cherokee tribal attorneys realized this shortcoming and focused their energies on establishing exactly what the Cherokee Nation owned in 1891, when the Cherokee Outlet Agreement was made, and why the negotiations and compensation constituted unfair and dishonorable dealings. Pierce asserted that the Cherokee were compelled to sell the 8,144,682.91 acres of land to the east of the 100th meridian, under conditions of duress and for unconscionable prices. For example, the Cherokee lands sold to friendly Indians included the Osage tract which had been sold for seventy cents per acre. Several other tracts went to smaller Indian tribes and were sold for fifty cents per acre. After these outlet lands were sold to these tribes, the remaining six-million-plus acres went for $1.05 per acre.[52] This was well below the fair market value in 1891. As the new claim began to build, Pierce's enthusiasm was evident when he wrote, "This is a tremendous lawsuit . . . the people who own it so richly deserve it . . . have been waiting so long for it, and above all . . . justice . . . is involved."[53]

Petition to the Indian Claims Commission was filed in 1951 seeking relief for the unconscionable taking of the outlet lands. The claimed land was located in what is now the State of Oklahoma, between the ninety-sixth and 100th meridian, below the State of Kansas and above Washington County, Oklahoma. The nearly 300-page petition conformed to Rosenthal's format and carefully established Cherokee ownership in fee simple of the 8,144,682.91 acres in 1891. It then documented the liability of the United States and the basis of unfair dealings and concluded by presenting evidence and argument which demonstrated the actual fair market value of the land in 1891.

For the title phase of the litigation, the Cherokee produced a United States patent, filed in the General Land Office, which had been issued to the Tribe in 1838 for 14,374,135 acres. The land was clearly given as consideration for promises made in the 1828 Treaty and included the eight-million-acre outlet to the east of the 100th meridian that was "purchased" by the Cherokee in the Treaty of 1835.[54] Further support for Cherokee title was found in the Treaty of 1866, which provided for 2,121,928.74 acres of the outlet lands to be deeded in trust to the United States for the settlement of friendly Indians which included the Osage, Kansas Pawnee, Otoe, Missouria, Ponca, Nez

52. 1948 Tribal Attorney's Report, *supra* note 20. The final 1891 per acre figure for the six-million-acre tract was adjusted to $1.29 by the Claims Commission in Cherokee Nation v. United States, 9 Ind. Cl. Comm. 162, 197 (1961).

53. Earl Boyd Pierce, Special Report to the Principal Chief and the Executive Committee (Apr. 19, 1959) [hereinafter 1959 Tribal Attorney's Report] (on file with *American Indian Law Review*).

54. Cherokee Nation v. United States, 9 Ind. Cl. Comm. 162, 163 (1961).

Perce, and others. This treaty also acknowledged Cherokee ownership of the outlet and provided that the Tribe was to be compensated.[55]

The government countered by asserting that the title issue was barred by res judicata and could not be relitigated since it was held in the 1939 *Emigrant Cherokee* case that the outlet was not held in fee simple title. The government argued further that the 2,000,000 acres allotted to the "friendly Indians" had been deeded by the Cherokee to the government in trust and accordingly, the Cherokee did not have title to that land. Moreover, the Cherokee did not have fee simple title to the remaining 6,000,000 acres because that land was part of the mere "passageway to the West" to which the Cherokee held only usufructuary title.[56] The government argued that what actually had taken place was that the Cherokee were given 14,375,135 acres, seven million of which were owned in fee simple and the remainder held for tribal "use" as an outlet. The Cherokee sold 8,144,682.91 acres for $10,423.262.99. Therefore, the Cherokees had "received far *more than they were ever 'promised' by anyone.*"[57]

The Commission held that this last statement, to the effect the Cherokee received *more than they were promised*, reintroduced the issue of title.[58] The former adjudication before the Commission over the outlet lands west of the 100th meridian addressed the issue of title and held that the Cherokee held fee simple title to the outlet lands in Oklahoma that lay to the east of the 100th meridian.[59] Thus, in the case at hand, the government was barred from denying Cherokee title to this part of the outlet.

Pierce and co-counsel then directed their efforts at demonstrating the actual unfairness of the taking of the outlet land. The Fiftieth Congress had organized the commission that negotiated with the Cherokee for the 1891 Outlet Agreement.[60] The Cherokee attorneys were able to demonstrate a lack of meaningful negotiation in reaching this agreement. The chairman of the negotiation commission, General Fairchild, made one low offer of $1.25 an acre and stood behind that offer for two and one-half years.[61] Other evidence of dishonorable dealings came through an outlining of the Cherokee use of the

55. *Id.* at 164-65.

56. *Id.* at 210-32.

57. *Id.* at 215 (emphasis added) (quoting Defendant's Brief at 58, Cherokee Nation v. United States, 2 Ind. Cl. Comm 7 (1952) (No. 2)).

58. *Id.*

59. *Id.*

60. *Id.* at 162. According to the opinion of the Claims Commission, the high points of the finalized 1891 Cherokee Outlet Agreement include: (1) the United States was to render an accounting; (2) any Cherokee citizen was entitled to one-eighth of a section; (3) the Cherokee were to maintain exclusive jurisdiction over civil and criminal matters in Cherokee County; (4) the government was to pay $8,595,736.12 in excess of the $728,389.46 that was then due for other land that lay west of the Arkansas River. *Id.* at 210.

61. *Id.* at 166.

6 million acres in the outlet. The Cherokee had leased the outlet to the Cattlemen's Association in 1883. The first lease was for $100,000.00 annually and was later renewed for $200,000.00 annually. These leases received the required Department of Interior approval.[62] Fairchild had written Secretary of the Interior Noble, stating that as long as the Cherokee were receiving income from the cattle grazing leases they would never sell. This led to charges from Noble that the cattlemen were interfering with the negotiations. The leases were subsequently declared unauthorized and void.[63] These events represented a huge disparity of bargaining power. Nonetheless, upon completion of the "negotiations" for the Outlet Agreement, the Commission wrote to the President stating that the title was divested by the agreement, but the claim for increased compensation was still alive.[64] This was because the Outlet Agreement provided for an accounting which was to determine the amount of the final settlement. If the Cherokee didn't approve the figures, they had a right under the Agreement, to adjudicate the issues.[65]

The Claims Commission held that the Cherokee originally had fee simple title to the land.[66] It was also determined that depriving the Cherokee of the income they were receiving from the outlet lands, in conjunction with the unreasonable value paid, constituted a clear case of an agreement made under conditions of duress.[67]

Having cleared the hurdles relating to title and unfair dealings, the determination of the 1891 fair market value formed the next obstacle for the tribal attorneys. The government experts looked to Texas property records and concluded that the fair market value of the lands was $1.50 per acre.[68] Factors that the Claims Commission considered in its determination of market value included differences in value of farmland versus cattle grazing land, accessibility to water, and proximity to settlements. In describing the valuation phase of the claim, Pierce wrote that "we have sifted and screened

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62. *Id.* at 234. Note that the current inhabitants of the outlet seem to be largely unaware of the circumstances behind the obtaining of the outlet lands. In an feature article in the *Sunday Oklahoman* about the Cherokee Strip Centennial (a celebration of the taking of the outlet lands), the only mention of the "taking" comes from an interview with a representative of the Enid Inter-Tribal Club, who stated that "while a few Indians have protested activities commemorating the land run . . . one fact overlooked is that no one was using the land that 110,000 people tried to stake a claim on . . . [in] 1893. No one actually ever used the land, it was going to just set there." Michael McNutt, *Spectators Stake Claim in History*, SUNDAY OKLAHOMAN, Sept. 19, 1993, at A7.

63. Cherokee Nation v. United States, 9 Ind. Cl. Comm. 162, 171-72 (1961).

64. *Id.* at 180.

65. *See* United States v. Cherokee Nation, 202 U.S. 101, 102 (1906). This consolidated case concerned the accounting called for in the 1891 Cherokee Outlet Agreement and addressed the government's failure to take action following the accounting.

66. Cherokee Nation v. United States, 9 Ind. Cl. Comm. at 215.

67. *Id.* at 182-83.

68. *Id.* at 228.

thousands of pages of material in the libraries and archives of the United States and prepared 101 exhibits to support our side of the controversy."[69] Professor Elbridge A. Tucker had been hired to head the valuation research.[70] The data primarily came from documenting 2475 transfers from 1883 to 1903 which were filed in Kansas and an additional 10,544 transfers that took place throughout the rest of the outlet.[71] The Commission's assessment of this evidence led them to conclude that at the time of the transfer the outlet had a fair market value of $3.75 an acre[72] rather than the $1.50 claimed by the government. The Cherokee were entitled to recovery in the amount of $14,789,476.15.[73] This recovery was in addition to the $10,423,262.99 payment under the terms of the original 1891 Cherokee Outlet Agreement.

The richly deserved recovery was won. The payout was delayed due to both the time necessary for the determination of offsets and the requirement of an act of Congress before federal funding could be distributed.[74] Satellite litigation regarding the value of the two million acres taken for the Osage, the main group of the "friendly Indians," described in the Treaty of 1866, lasted well into the 1970s.[75] It had taken over 150 years for the Cherokee to receive reasonable compensation for the outlet lands.

The Texas Cherokee Case

At the same time he was participating in the outlet case, Pierce helped prepare the Texas Cherokee Case which was filed in 1948,[76] seeking a $2 million recovery for wrongful expulsion from and the taking of lands which the Cherokee once held in east Texas. Because of its early dismissal, this claim doesn't fit neatly into the pattern of a claim before the Commission that Rosenthal described. After the claim's dismissal, the only remaining avenue was to appeal to the sensibilities of the public at large.

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69. 1948 Tribal Attorney's Report, *supra* note 20.

70. *Id.* The Cherokee attorneys spent $6000 out of their own pockets to fund this research. In the 1950s this was enough money to buy three midrange automobiles.

71. Cherokee Nation v. United States, 9 Ind. Cl. Comm. at 221.

72. *Id.* at 235.

73. *Id.* at 231.

74. A per capita distribution was called for in the 1962 Allotment Act, 76 Stat. 776 (1962). Pierce and Chief Keeler saw to it that funds in excess of the per capita allotment were channeled into business, medical, educational and rehabilitative purposes for the benefit of the Cherokee people. PIERCE & STRICKLAND, *supra* note 5, at 43.

75. United States v. Cherokee Nation, 474 F.2d 628 (Ct. Cl. 1973). This case affirmed in part and reversed in part the Commission award of $4,268,589.00 to the Cherokee Nation in Cherokee Nation & Cherokee Freedmen v. United States, 22 Ind. Cl. Comm. 417 (1970).

76. Texas Cherokees & Assoc. Bands v. United States, 2 Ind. Cl. Comm. 516, 522 (1953).

History of the Claim

A significant number of Cherokees settled in Texas in 1820 when it was part of Mexico. The Government of Mexico recognized and allegedly invited them to do so. Sam Houston, President of what would later become the Republic of Texas, signed a treaty with the Cherokees giving them all of the land between the Trinity and Sabine Rivers and north of the San Antonio-Nacogdoches Road. In July 1839, Houston's successor, Mirabeau Bonaparte Lamar, sent an army of 2000 soldiers[77] to East Texas where the Battle of the Neches was fought. Over one hundred warriors died, five Texans were killed, and twenty-seven were wounded. The Texans gave chase, burning villages and homes on the way, until the Cherokee were driven north across the Red River.[78]

A 1957 report by then-Texas Attorney General Will Wilson indicates that Indian-Texan relations seemed to have calmed for a short period after the expulsion of the Cherokee.[79] The report, which reviews the history of Indian legislation in Texas, stated:

> During the last year of the Republic, [1844], a "Treaty of Peace, Friendship and Commerce," dated October 9, 1844, was entered into between the Republic and the Affiliated Tribes. This treaty stated that "[t]he tomahawk shall be buried, and no more blood appear in the path between them, now made white. The great spirit will look with delight upon their friendship, and will frown in anger upon their enmity."[80]

Despite this optimistic language, early Texas state laws reflect serious problems with Indian relations up through 1880. When Texas became a state in 1845, it complained to Washington of frequent raids by "wild Indians" on the Texas frontier settlements. The Texas legislature authorized volunteer forces to march against the Indian raiders. One act reflecting the attitude of the day was the Texas legislature's Joint Resolution of April 12, 1871, which gave rewards of carbines for killing Indians while repelling raids.[81]

77. Plaintiff's Petition for Determination of the Right to Compensation at 17, Texas Cherokees & Assoc. Bands v. United States, 2 Ind. Cl. Comm. 516 (No. 26) (filed Apr. 6, 1948).

78. MARY WHATLEY CLARKE, CHIEF BOWLES AND THE TEXAS CHEROKEES 111 (1971).

79. Legality of Legislative Appropriations for Benefit of Alabama Coushatta Indian Reservation in Polk County, Op. Tex. Att'y Gen. WW-43, at 4 (Mar. 5, 1957).

80. *Id.*

81. *Id.* at 5.

Identifying the Texas Cherokee

Because the Texas Cherokee had ceased to exist, Pierce's primary hurdle was to distinguish them as a viable, identifiable Indian group. This "standing" requirement had to be established before claims of title could be asserted. As in all Indian land claim issues, the Indian attorney's role as ethno-historian became paramount. A substantial collection of documentary and testimonial evidence was assembled. The testimonial evidence consisted largely of accounts by people who could recall the plight of the Texas Cherokee. For example, William Wayne Keeler, then-Principal Chief of the Cherokee Tribe, was able to testify that his ancestor William Blythe and other Texas Cherokees had engaged attorneys and attempted to press this claim in 1848.[82] Highlights of documentary evidence presented before the Claims Commission included the 1924 and the 1932 minutes of the Texas Cherokee meetings and a list of the 1500 Texas Cherokee heirs who had reported to the Cherokee Executive Committee.[83] This type of data was backed by eminent historian Emmet Starr, who testified that the Texas Cherokee were a separate and independent government that had been recognized by the government of Texas.[84] The Cherokee attorneys finally argued that the United States Government should assist the Texas Cherokee in their claim because of the fiduciary relation to the Indians that attached to the Texas Cherokee when the State became a member of the Union.[85]

The response from the United States was that the Texas Cherokees were an unidentifiable group, a loose confederacy that disbanded after expulsion from Texas.[86] It was further maintained that the group before the Commission was not a viable tribal organization but rather an organization of Indians created for the sole purpose of presenting a claim.[87] Furthermore, the lands in question never belonged to the United States and, consequently, the United States could not be charged with the "taking." The tribal attorneys countered by pointing out that the statute admitting Texas to the Union provided that the State pay all outstanding debts. The government attorneys, however, were successful in contending that the statute did not extend to the obligations of the Republic of Texas. As to the fiduciary issue, the government stated that no duty was owed to a group who had voluntarily expatriated itself. The case was dismissed.[88]

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82. Plaintiff's Brief at 11, Texas Cherokee & Assoc. Bands v. United States, 2 Ind. Cl. Comm. 516 (1953) (No. 26).

83. *Id.* at 10.

84. Texas Cherokees & Assoc. Bands v. United States, 2 Ind. Cl. Comm. at 526.

85. *Id.* at 530-31.

86. *Id.* at 526.

87. *Id.* at 529.

88. *Id.* at 533.

The opinion of the Commission, written by Commissioner O'Marr, held that there was a group identifiable as the Texas Cherokee and that they did occupy 1,640,000 acres in Texas. This group ceased to exist when they were expelled. The claim was deemed to be pressed against the wrong party because the United States did not expel the Texas Cherokee. It was the province of the State of Texas to determine the liability of the former Republic.[89]

Final Forum: Appeal to the Public

The case which had been heard by the Commission on the basis of unfair and dishonorable dealings was now without a forum. Refusing to give up, Pierce turned to the public. In his 1959 Tribal Attorney's Report, he writes, "our claim against Texas is purely a moral claim."[90] He felt that with aroused Texas public sympathy it was conceivable that Chief Keeler and the Governor would be able to meet and discuss the claim. He suggested that if the $2 million claim was impossible, then the Chief should press for an education endowment for Cherokee youth to gain access to Texas educational institutions.[91]

The primary line of communication to the public was through newspaper columns by sympathetic journalists. Favorable public sentiment was also fostered by Rep. Ed Edmondson (D.-Okla.), who introduced a "History of the Texas Cherokees" to the House Committee on Interior Affairs in 1955.[92] The Committee was considering native rights in Alaska. Edmondson argued that the history of the Texas Cherokee was pertinent because it might become the history of the Alaskan Natives if their rights were not protected at the outset. He quoted Sam Houston, saying that "[t]his is a story of basic injustice to a fine people, who were more deserving of better treatment at the hands of the white man."[93]

By 1964, a growing force of favorable social policy, coupled with persistent communication with the Texas Attorney General's office, was rewarded by the receipt of an encouraging report from Texas Assistant Attorney General Bracewell.[94] Further encouragement was to be found in a 1964 speech by Texas Attorney General Waggoner Carr at Washington-on-

89. *Id.* at 529-33.

90. 1959 Tribal Attorney's Report, *supra* note 53, at 5.

91. *Id.*

92. Rep. Ed Edmondson, Statement Before the House Committee on Interior and Insular Affairs (Feb. 15, 1955) (on file with *American Indian Law Review*).

93. *Id.* at 2-3.

94. Letter from J.S. Bracewell, Texas Assistant Attorney General, to Earl Boyd Pierce, Cherokee Nation Tribal Attorney (July 23, 1964) (discussing memorandum from Texas Attorney General Waggoner Carr to Texas Governor John Connally) (on file with Cherokee Cultural Heritage Center, Tahlequah, Okla.).

the-Brazos. In that speech, he discussed Texas independence and the battle against Mexico.[95] He criticized Mexican rule as having been despotic and said that the basis of the conflict was the need for religious freedom and overall freedom from tyranny. He also commended Sam Houston as "a man . . . who would not stand by while abuse was heaped on any human, whether Indian, Texan or Mexican . . . . The burden is no less today, individual freedom is the highest ideal."[96]

Carr's speech was given on March 2, 1964. The next day, however, he issued the final adverse opinion regarding the Cherokee claim. The gist of the opinion was that whatever claim the Cherokee might have would rest against the Republic of Texas.[97] The opinion further stated that the Texas Constitution prohibited the Texas legislature from granting public money without authorization of a preexisting law; otherwise it would constitute a gratuity which was expressly prohibited.[98]

To date, the only compensation for the "taking" of the Texas Cherokee's 1,640,000 acres, and for their forcible extraction, consists of a marker dedicated in 1971. The marker commemorates the site of the 1839 Battle of the Neches, which ended with the expulsion of the Cherokee from Texas. The marker recognizes the tragedy and the injustice but provides no tangible remedy.[99]

Docket #190 — The Cherokee Freedmen Cases

In the 1960s, Pierce and the tribal attorneys went before the Claims Commission seeking compensation from the government because of the forced allotment of property to the Cherokee Freedmen under the Treaty of 1866.[100] This claim ended with much the same result as the Texas Cherokee litigation. But this time, rather than finding lack of jurisdiction or a failure to assert title, the Claims Commission dismissed the claim of unfair and dishonorable dealings on the merits.

The Treaty of 1866 was the culmination of the post-Civil War negotiations with the Cherokee. It provided that former Cherokee slaves should have the same individual and property rights that the native Cherokee enjoyed. This resulted in a substantial loss of property for the native Cherokees. The relief

95. Texas Attorney General Waggoner Carr, Speech at Washington-on-the-Brazos (Mar. 2, 1964) (transcript available at Cherokee Heritage Center, Tahlequah, Okla.).

96. *Id.*

97. Memorandum from Texas Attorney General Waggoner Carr to Governor John Connolly 49 (Mar. 3, 1964) (on file with Cherokee Cultural Heritage Center, Tahlequah, Okla.).

98. *Id.* at 51.

99. Chief William Wayne Keeler, Marker Dedication Speech, Chandler, Tex. (May 23,'1971) (transcript available at Cherokee Cultural Heritage Center, Tahlequah, Okla.).

100. Cherokee Nation v. United States, 12 Ind. Cl. Comm. 570 (1963), *aff'd*, 180 Ct. Cl. 181 (1967).

requested by the Cherokee consisted of the value of the tribal funds and the value of the lands which had been distributed to the Freedmen as "members of the Cherokee Nation."[101] The Cherokee argued that the Treaty should have guaranteed only the equal protection and due process rights that the United States Constitution guaranteed to all freed slaves. The additional granting of property and benefits to the Cherokee Freedmen, the Cherokee argued, constituted an unconscionable taking of property.[102] Basing their arguments on extensive documentation, the Cherokee asserted virtually the same theories that had proven successful in the outlet litigation, i.e., (1) the agreement was made under conditions of duress; (2) there was a unilateral mistake of fact because the Cherokee didn't realize they were giving away property; (3) the consideration was inadequate, and; (4) the negotiations and the treaty were unfair and dishonorable.[103] The essence of the unfair and dishonorable dealings claim was twofold. First, the Cherokee had been singled out for this treatment as opposed to the general citizenry who bore no such burden for having formerly owned slaves, and secondly, it was presented as a condition precedent to the Treaty of 1866 that if the Cherokee wished to continue as a nation they must incorporate the Freedmen into the tribe.[104]

The government response to these allegations was that the Cherokee had misinterpreted their historical research. The government pointed out that at the time of the Treaty of 1866 negotiations, the Cherokee gave detailed responses that the following clauses were unacceptable: grants of land to the railroad, the institution of a territorial government, the uncompensated cession of the outlet lands, and the division of the Cherokee Nation into northern and southern groups. The government argued that the raising of these objections during formation of the agreement was evidence of free and skillful treaty negotiation and not evidence of duress, mistake, or lack of consideration.[105]

The government's next point was that the Cherokee actively participated and assisted with the compilation of the Dawes Commission Rolls during the late 1800s. These rolls counted the Freedmen as Cherokee citizens. It was never contended at that time that the Freedmen should be excluded.[106] Thus, the Cherokee should be estopped from raising the claim now. The government also argued that the Cherokees were aligned with the Confederacy during the Civil War. The Cherokee realigned with the Union because of Confederate insolvency and inability to pay under treaty terms that existed between the

101. Cherokee Nation v. United States, 180 Ct. Cl. 181 (1967) (appeal from Cherokee Nation v. United States, 12 Ind. Cl. Comm. 570 (1963)).

102. *Id.*

103. Cherokee Nation v. United States, 180 Ct. Cl. at 181.

104. Minutes of the Regular Meeting of the Executive Committee of the Cherokee Nation 4 (Apr. 4, 1954) (on file with the *American Indian Law Review*).

105. Cherokee Nation v. United States, 12 Ind. Cl. Comm. at 616-17.

106. *Id.* at 629.

Cherokee and the Confederacy.[107] The president of the postwar U.S. Peace Commission declared that all Indian tribes who had made treaties and fought for the Confederacy were to forfeit all annuities and lands.[108] The President of the United States refused to enforce this declaration against the Cherokee. In the instant case, the government argued that if unfair and dishonorable dealings had been involved, this would not have been the case.[109] The Claims Commission dismissed the case. This decision was affirmed on appeal.[110]

Freedmen Intervention

In the early 1960s, the ancestors of the Freedmen filed for relief before the Indian Claims Commission seeking recovery for losses caused when the Dawes Commission denied the Freedmen enrollment for allotment purposes.[111] The claim was dismissed on the grounds that the cause of action amounted to a series of individual claims rather than a claim by an identifiable group.[112] However, the question was left open as to whether the Freedmen, who were on the Kern-Clifton Roll but were later removed from the Dawes Roll, could maintain a cause of action.[113] An intervention by the descendants of the people who were removed from the Dawes Roll was permitted in Docket No. 173-A,[114] which was the litigation concerning the two-million-acre Osage tract that had been allotted to the "friendly Indians" in the Treaty of 1866. The Freedmen Intervention added to the Cherokee tribal attorneys' burdens. In addition to concentrating their offensive against the government for the wrongful taking of the two million acres, they were forced to mount a defensive front against the ancestors of the Freedmen.

The Freedmen filed a motion for summary judgement calling for 5.65% plus interest of all sums awarded and to be awarded to the Cherokees in Dockets #173 and #173-A (all of the outlet cases).[115] Five issues were raised in response to the Freedmen's motion for summary judgement. Pierce and co-counsel first argued that the Kern-Clifton Roll was infected by mistake or fraud; the Dawes Commission was designed to weed out such error and to

107. *Id.* at 632.

108. *Id.* at 633-34.

109. *Id.* at 634-35.

110. *Id.* at 640.

111. Cherokee Freedmen v. United States, 10 Ind. Cl. Comm. 109, 127 (1961), *aff'd sub nom* Cherokee Freedmen & Cherokee Freedmen's Ass'n v. United States, 161 Ct. Cl. 787, 790 (1963).

112. *Id.*

113. *Id.*

114. Freedmen Intervention, Cherokee Nation v. United States, 22 Ind. Cl. Comm. 417 (1970) (No. 173-A) (1970). The petition was first filed in 1962, and the Freedmen Intervention was filed in 1967.

115. Cherokee Freedmen v. United States, 195 Ct. Cl. 39, 40-43 (1971). This case joined Docket No. 173-A and Docket No. 123.

establish a correct roll for the Cherokee Nation. The latter fully performed this function and the appellants had no right to consider themselves part of the Cherokee Nation.[116] Second, the Freedmen's claim was barred by res judicata because this was the same issue which had been settled in Docket #123, wherein Freedmen claims were dismissed. Third, the claim was barred by the 1895 holding in *Whitmire v. Cherokee Nation*.[117] In *Whitmire*, the court held that the benefits of the 1866 Treaty extended only to those Freedmen who had returned to the Cherokee Nation within six months of the enactment of the Treaty.[118] Fourth, the original outlet fund distribution ($8,595,736.00) had been ordered to be distributed without discrimination between the Cherokee and Freedmen in the first *Whitmire* case. The *Whitmire* Court ordered a roll of the Freedmen which came to be known as the Kern-Clifton Roll. The Supreme Court, in the second *Whitmire* case, seemed unwilling to accept the accuracy of the Kern-Clifton Roll.[119] Pierce and co-counsel reasoned that the inference to be formed from this was that the Supreme Court viewed the Kern-Clifton Roll as a temporary device designed to assist in distributing the funds at hand and that there were no further-reaching effects to be gleaned from these rolls.[120] Finally, it was argued that the Indian Claims Commission was without jurisdiction because the issue involved a suit against the Cherokee Nation and the Indian Claims Commission Act did not authorize suits against tribes.[121]

The Commission held for the Cherokee and stated that even though the Freedmen were an identifiable group, the Commission lacked jurisdiction of the claim.[122] This decision was affirmed on appeal with the finding that Congress determines disputes concerning membership and composition of groups entitled to such awards.[123] The Claims Commission assured the Freedmen appellants that the judgement dismissing their claim did not prohibit them from pressing the matter before other branches of the government.

The Arkansas Riverbed Cases

In the latter half of the 1960s, Pierce, Paul Niebell, Andrew Wilcoxen, and others focused their attention on the Arkansas riverbed claim, wherein the Cherokee, Choctaw, and Chickasaw Nations of Oklahoma (the Nations)

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116. *Id.* at 47.

117. 30 Ct. Cl. 138 (1895).

118. Plaintiff's Response to the Freedmen's Motion for Summary Judgement at 27, Cherokee Freedmen v. United States, 10 Ind. Cl. Comm. 109 (1971) (No. 123) (filed June 9, 1969) [hereinafter Plaintiff's Response].

119. Cherokee Nation v. Moses Whitmire, 223 U.S. 108, 111-12 (1912).

120. Plaintiff's Response, *supra* note 118, at 28-29.

121. *Id.* at 39.

122. *Cherokee Freedmen*, 195 Ct. Cl. at 42 (citing Cherokee Freedmen v. United States, 161 Ct. Cl. 787 (1963)).

123. *Id.* at 39.

claimed that along a ninety-six-mile stretch of the Arkansas River, Oklahoma state engineers altered the natural channel; destroyed sand and gravel assets; rendered oil, gas, and coal deposits inaccessible; constructed dams; and generated electric power for profit. This land had been promised to the Indian tribes forever and was taken by the United States, the trustee who made the promises. The Cherokee initially sued Oklahoma, and the holders of leases granted by Oklahoma, for an injunction and an accounting.[124] Oklahoma counterclaimed to quiet title. The Choctaws and Chickasaws (herein referred to as the Choctaw) intervened, also asserting ownership and rights to the riverbed.[125] The riverbed dispute can be distinguished from the former Cherokee claims because this was initially a claim against the State of Oklahoma. This posturing placed the litigation in federal district court rather than before the Indian Claims Commission. Today, nearly thirty years later, establishment of title to the riverbed is still in contention.

Title Phase in Federal Court

The Cherokee and Choctaw primarily relied on the Treaties of New Echota (Cherokee Treaty of 1835) and Dancing Rabbit Creek (Choctaw Treaty of 1830)[126] as having passed title to the riverbed to the Nations. The purpose of the Treaty of Dancing Rabbit Creek was to induce the Choctaw Tribe to move across the Mississippi to land in what is currently the southern third of the State of Oklahoma.[127] The Cherokee Treaty of New Echota provided for land in what is now northeastern Oklahoma and the outlet to the west. Title to the latter was given in exchange for the Eastern Cherokee holdings in the southeast United States.[128] In both treaties, the United States promised that no part of the new lands would be included in any state or territory.[129] The Nations argued that because they gave up the beds of rivers in the Deep South, it followed that the United States intended that the Tribes should possess the riverbeds in the new areas granted to them.[130] A plain language argument was also supportive. The treaties used phrases such as "to the Arkansas River," and "down the Arkansas" in describing the lands that were conveyed.[131]

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124. Cherokee Nation v. Oklahoma, 402 F.2d 739, 742 (10th Cir. 1968).

125. *Id.*

126. Treaty with the Cherokee (New Echota), Dec. 29, 1835, 7 Stat. 478, *reprinted in* KAPPLER'S LAWS & TREATIES, *supra* note 25, at 439-49; Treaty with the Choctaw (Dancing Rabbit Creek), 7 Stat. 333, *reprinted in* KAPPLER'S LAWS & TREATIES, *supra* note 25, at 310-19; *see* Cherokee Nation v. Oklahoma, 402 F.2d at 743.

127. Choctaw Nation v. Oklahoma, 397 U.S. 620, 626 (1970).

128. Cherokee Nation v. Oklahoma, 402 F.2d at 742.

129. *Id.* at 743.

130. *Id.* at 746.

131. *Id.* at 747.

The trial court was not impressed, and the court of appeals affirmed, holding that although Indian treaties were to be liberally construed in favor of the unlettered Indians, land does not pass by implication:[132]

> In the final analysis, the claim of the Indians rests on inference and implication. Nothing in the treaties, statutes, and conveyances establishes an intent by the United States, as trustee for states to be formed, to convey away property held for the benefit of the new states. . . . [These] lands were undeveloped and virtually unknown. To say that Congress then intended to convey the riverbeds, which over a hundred years later would become valuable because of underlying mineral deposits, is to ignore realities.[133]

The court of appeals supported its decision by relying on the fact that the Supreme Court had previously held that former English possessions in America were claimed by right of discovery and that the Indians were the temporary occupiers of land which was disposable by the Crown. The Crown's title later passed to the United States and Indian lands were then subject to disposition under the Constitution.[134] Moreover, *Pollard v. Hagan* deemed that the Constitution did not pass title of the beds of navigable streams to the United States but gave title to the several states.[135] Since Oklahoma was admitted to the Union in 1907 under an enabling act which provided that Oklahoma should be admitted on an equal footing with the original states, *Pollard* applied to Oklahoma.[136] Finally, it was declared that the lower court's holding against the Cherokee was supported by the doctrine of latches. In other words, the claim was barred because it was raised nearly sixty years after statehood.[137]

In 1970, the court of appeals decision was reversed and remanded by the Supreme Court.[138] Pierce and co-counsel, in a battle that Pierce described as a "real cliff-hanger,"[139] successfully argued that: (1) the Cherokee were granted title to a vast tract of land and the natural reading and inference from

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132. *Id.*

133. *Id.* at 748.

134. *Id.* at 745.

135. *Id.* at 744 (citing Pollard v. Hagan, 44 U.S. (3 How.) 212, 230 (1845) (holding that navigable waters shall forever remain public highways)).

136. *Id.* at 743-44.

137. *Id.* The question was first raised in 1908, at which time the Commissioner of Indian Affairs proclaimed that the riverbed belonged to the State of Oklahoma. PIERCE & STRICKLAND, *supra* note 5, at 68.

138. Choctaw Nation v. Oklahoma, 397 U.S. 620 (1970).

139. Letter from Earl Boyd Pierce to Chief William Wayne Keeler (Mar. 7, 1970) (on file with Cherokee Cultural Heritage Center, Tahlequah, Okla.). Pierce credited Paul Niebell with saving the day and stated that the Oklahoma Attorney General seemed to be supportive of the Cherokee position.

these grants was that all land within the boundaries was conveyed; (2) there were no express exclusions of the riverbeds in these conveyances as there were to other land within the grants; (3) a reservation of the riverbed would have meant that the Cherokee were not entitled to enter and take sand and gravel or other minerals from the shallow parts; and (4) the respective treaties promised the Indians *complete* sovereignty over their new lands.[140]

The Court cited the fact that the United States conveyed the new lands in the west with the promise that

> no part of the land granted to them shall ever be embraced in any Territory or State. In light of this promise, it is only by the purest of legal fictions that there can be found even a semblance of an understanding . . . that the United States retained title in order to grant it to some future State.[141]

The Court concluded that it was unlikely that the petitioners would have considered themselves precluded from ownership of the riverbed and it was unlikely that the United States intended otherwise.[142]

The Court's decision seemed to clearly establish Indian title to the riverbed. In 1972, attention was focused on the amounts that Oklahoma had received from leasing the riverbed and value of the minerals taken. The Supreme Court remanded the case for the determination of the distribution of these assets among the competing tribes. On remand, Oklahoma again attacked Indian title arguing that the district court was misinterpreting the Supreme Court's decision regarding the title to the riverbed. The State claimed that the Supreme Court opinion addressed not present title, but past conveyance.[143] The district court was not persuaded and proclaimed that the Cherokee owned the northern portion of the bed between the Grand and the Canadian Rivers and between the Canadian River and the eastern Oklahoma state border, while the Choctaws owned the southern half of the bed. Oklahoma was to account for all monies received from the riverbed leases and deposit it with the district court. The lessees were to account for and deposit all monies owed, and the leases were canceled. The money on deposit was to be divided equally between the Cherokee, Choctaw, and Chickasaw.[144] This decision was affirmed on appeal and remanded for determination of damages.

On remand to determine the damage issue, the Choctaws argued that they were entitled to the value of the minerals taken from the riverbed. The State's lessees sought return of the rental monies paid to the State, and the State argued that damages should be limited to those recoverable in a trespass

140. Choctaw Nation v. Oklahoma, 397 U.S. at 634-35.
141. *Id.*
142. *Id.*
143. Choctaw Nation v. Oklahoma, 490 F.2d 521, 522 (10th Cir. 1974).
144. Cherokee Nation v. Oklahoma, 461 F.2d 674, 677 (10th Cir. 1972).

action.[145] The trial court kept the litigation focused on the leases and ordered them canceled. Oklahoma was ordered to pay into the registry all sums received as lessor, and those sums were to be distributed to the tribes.[146] The appellate court affirmed this decision on appeal and remanded the matter back to the trial court to determine the amount of damages.[147] It was held that Oklahoma would pay $786,541.67. Requested offsets of $59,125.05, which were primarily administrative expenses, were denied.[148]

Further complications arose when the court of appeals reversed the judgement regarding the apportionment of the river and the distribution of funds on the grounds that the court lacked jurisdiction over controversies between Indian tribes.[149] The United States Supreme Court denied certiorari.[150] The Tenth Circuit holding forced the Cherokee attorneys to appeal to Congress for a legal forum, which was granted late in 1973.[151]

In 1975, the federal district court, under the 1973 Act, focused on the sole issue of whether the Cherokee Nation owned the northern half of the Arkansas riverbed.[152] The Choctaw Treaty predated the Cherokee Treaty: the Choctaw argued that these treaties granted them the entire eastern portion of the Arkansas River from the Canadian River confluence to the Oklahoma-Arkansas border. Confusing language in the Treaty of New Echota granted the southern border of the Cherokee territory to the Cherokee from a point on the Canadian River "thence down the Canadian to the Arkansas; thence down the Arkansas to that point on the Arkansas where the eastern Choctaw boundary strikes said river . . . ."[153] The Cherokee attorneys argued that this conveyance granted the northern half of the Arkansas River from the Canadian River to the eastern border of Oklahoma. The court concurred and held that the northern portion of the Arkansas River belonged to the Cherokee and the southern half belonged to the Choctaw and Chickasaw.[154] This decision was in accordance with common law doctrine regarding land conveyances that have a body of water distinguished as a "boundary." This doctrine states that title goes to the center of the stream unless there is clear intention to the contrary.[155]

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145. Choctaw Nation v. Oklahoma, 490 F.2d at 522-23.
146. *Id.*
147. Cherokee Nation v. Oklahoma, 461 F.2d at 677.
148. *Id.*
149. *Id.* at 682.
150. Oklahoma v. Cherokee Nation, 409 U.S. 1039 (1972).
151. Choctaw-Chickasaw-Cherokee Boundary Dispute Act, Pub. L. No. 93-195, 87 Stat. 769 (1973).
152. Choctaw Nation v. Cherokee Nation, 393 F. Supp. 224, 226-28 (E.D. Okla. 1975).
153. *Id.* at 228 (citing Treaty of New Echota, *supra* note 38).
154. *Id.* at 246.
155. *Id.* at 224.

Satellite litigation ensued which complicated the Nations' efforts at settlement. In 1976, Mobil Oil (one of the Oklahoma lessees) joined the Oklahoma Tax Commission and filed a motion to modify the court's order requiring the lessees to account for royalties due under the leases to the State.[156] The Oklahoma Tax Commission and Mobil sought to withhold Oklahoma's gross production tax from the royalty payments due under the district court's order. In an example of reasoning that Lewis Carroll would have enjoyed, the State and the oil company argued that Congress had proclaimed all lands belonging to the Civilized Tribes were to be allotted to tribal members or sold. The riverbed was not specifically allocated; thus, Congress must have intended that it be sold. This sale never occurred. If either event had happened, the riverbed would have been taxable today because lands that were sold to non-Indians were immediately taxable while allotted lands were taxable only after the expiration of various congressional restrictions. Because all of these restrictions had since expired, the State argued, Congress must have intended that the riverbed should be taxable.[157] The court rejected this congressional intent argument, holding that title to unallotted, unsold land is held by the United States in trust.[158] Furthermore, the 1819 decision of *M'Culloch v. Maryland* established that property held by the United States cannot be taxed without its consent and since the United States gave no consent to be taxed, Oklahoma was not permitted to impose its gross production tax.[159]

In 1970, it seemed as though Indian title to the river had been clearly established by the courts in the tribal litigation against the State of Oklahoma.[160] While the title subissues concerning the division of the riverbed among the various tribes were being litigated, Pierce and his associates began to turn their attention to the fact that two hydroelectric power dams had been built in conjunction with the McClellan-Kerr Arkansas River Navigation Project, authorized by a 1946 Act of Congress. This constituted a major "taking without just compensation" of tribal property by the United States. Losses were attributable both to flooding caused by dam construction and to the straightening and dredging of the river channel for the navigation project. These construction projects resulted in the loss of arable lands and caused mineral loss and loss of mineral access.

In a 1973 memorandum to G.W. West, Director of the Arkansas River McClellan-Kerr Navigation Project,[161] Pierce laid out the initial issues in the

156. Cherokee Nation v. Oklahoma, 416 F. Supp. 838 (E.D. Okla. 1976).

157. *Id.* at 839.

158. Unalloted lands are held in trust by the United States under the Act of Apr. 26, 1906, ch. 1876, 34 Stat. 137.

159. *Id.* (citing M'Culloch v. Maryland, 17 U.S. (4 Wheat) 316 (1819)).

160. Choctaw Nation v. Oklahoma, 397 U.S. 620 (1970).

161. Memorandum from Earl Boyd Pierce to G.W. West, Arkansas River McClellan-Kerr Navigation Project Director (May 1973) (on file with Cherokee Heritage Center, Tahlequah,

valuation of this claim, when he requested estimates for: (1) damages to mineral rights including the increased costs of future exploration and marketing; (2) damages from the inundation of land acreage; and (3) damages for the "taking" of the Webbers Falls Dam site. This valuation effort touched the tip of an iceberg. What might have evolved into a Claims Commission hearing type of "valuation phase" was taken out of the control of the tribal attorneys. In former times, such as in the outlet case, or in the case of the Texas Cherokees, Pierce and his associates were able to direct and coordinate the research that took place. In the riverbed valuation, Congress, recognizing liability for the taking, appropriated funds to the B.I.A. to make these determinations.[162] Pierce's frustration with the pace of this valuation was evident in a memorandum written to Cherokee Tribal Attorney Andrew Wilcoxen entitled, "Memorandum Written in Despair." Pierce stated that "if it takes another five years to get the riverbed appraised, Congress may be out of money."[163]

The 1975 holding in *Choctaw Nation v. Cherokee Nation*[164] split the river lengthwise at the centerline and led the Tribes to enter into a revenue-sharing agreement the following year. This enabled them to join forces in pressing the claim against the government for losses due to the McClellan-Kerr Navigation Project. That same year, the Secretary of the Interior invited the Tribes to negotiate a settlement for these losses.[165]

In 1977, House Bill 4377 and Senate Bill 660 were introduced in Congress in order to authorize the purchase of the Arkansas riverbed lands from the Indians.[166] Despite previous favorable representations, the Department of the Interior opposed these bills and was successful in having them tabled.

In 1978, an $8.5 million settlement was proposed by the Assistant Secretary for Indian Affairs. This was supported by the Tribes and by the Carter administration.[167] The proposal was blocked by the Department of Justice, which argued that the doctrine of navigational servitude controlled.[168] Navigational servitude is a constitutional power, stemming from the Commerce Clause, which gives the federal government absolute power over

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Okla.).

162. Congress allotted $440,000.00 to this appraisal project. PIERCE & STRICKLAND, *supra* note 5, at 71.

163. Memorandum from Earl Boyd Pierce to Andrew Wilcoxen (Jan. 16, 1973) (on file with Cherokee Cultural Heritage Center, Tahlequah, Okla.).

164. 393 F. Supp. 224 (E.D. Okla. 1975).

165. Draft of Cherokee, Choctaw, and Chickasaw Nations Arkansas Riverbed Claims Settlement Act (Aug. 30, 1993) [hereinafter Draft of Riverbed Claims Settlement Act] (on file with the *American Indian Law Review*).

166. H.R. 4377, 95th Cong., 1st Sess. (1977); S. 660, 95th Cong., 1st Sess. (1977).

167. H.R. REP. NO. 773, 102d Cong., 2d Sess., pt. 1, at 3-4 (1992); *see also Cherokee Nation to Return to Court to Seek Riverbed Claims*, TAHLEQUAH DAILY PRESS (Tahlequah, Okla.), Aug. 11, 1992, at 4.

168. H.R. REP. NO. 773, *supra* note 167, at 3-4.

navigable waters. The Department of Interior argued that no remittance was due because the United States has always been the rightful owner of the riverbed.[169] The *Tulsa World* stated that the Supreme Court, in determining that the Tribes were the rightful owners of the riverbed, "acted more from emotion and understandable sympathy for downtrodden Indian citizens than from legal reasoning or from fundamental principals of property ownership."[170] Nevertheless, the newspaper asked why the government would not obey the law and pay the debt. The article concluded that it was "time to quit hedging and repeating old arguments. It is time to pay off."[171]

In 1982, the Nations were successful in persuading Congress to pass Public Law 97-385, which granted jurisdiction to the United States District Court for the Eastern District of Oklahoma to hear any claim which the Nations may have against the United States for damages to tribal assets arising from the Arkansas Navigational Project.[172] These damages were to include the value of sand, gravel, coal, and other resources, plus the value of losses caused by dam sites and powerheads constructed on the Arkansas River without consent from the Nations. The statute applied to lands held in fee simple and granted by treaty and by U.S. patent.[173]

Under the 1982 Act, the Cherokees again turned to the courts for relief. Andrew Wilcoxen was able to successfully argue that the decision in *Choctaw Nation* created a "unique situation" whereby the Arkansas was a private waterway belonging exclusively to the Nations.[174] On appeal, it was held that while the United States had a navigational servitude in the Arkansas, this fact was insufficient to protect the government from liability.[175] In 1987, the Supreme Court, per Justice Rehnquist, disagreed and held that the government's authorization of the navigation project was an example of a valid exercise of congressional Commerce Clause power which put the government in a unique position in connection with navigable waters.[176] When Congress exercises this legitimate power, "the damage sustained by the owner of the property does not result from a "taking" . . . within the meaning of the Fifth

169. *Id.* at 4.

170. *Pay the Cherokees*, TULSA WORLD, Mar. 9, 1979, at 10A (referring to Choctaw Nation v. Oklahoma, 397 U.S. 620 (1970)).

171. *Id.*

172. Act of Dec. 23, 1982, Pub. L. No. 97-385, 96 Stat. 1944, 1944-45.

173. The litigation surrounding the valuation and recovery for the "taking" of the riverbed lasted beyond Earl Boyd Pierce's lifetime and has yet to be settled to this day. Pierce's co-counsel, Andrew Wilcoxen, continued the effort on behalf of the Cherokee. Today Andrew Wilcoxen's son, James, is pressing the claim.

174. United States v. Cherokee Nation, 480 U.S. 700, 702 (1987).

175. *Id.* at 703.

176. *Id.*

Amendment, but from the lawful exercise of a power to which the interests of riparian owners have always been subject."[177]

The Supreme Court's decision was limited to the "takings" issue. Fortunately, this left the door open for the tribal attorneys to focus on a fair and honorable dealings claim based on a breach of fiduciary responsibility. In 1989, the Cherokee filed suit. The district court separated the issues of fair and honorable dealings from the issue of damages and granted a motion for summary judgement for the United States on the former, holding that the Cherokee Nation's claim was too general: liability needed to be specifically established under treaty, statute or agreement.[178]

The Cherokee appealed, arguing that the district court erred in failing to find a fiduciary relationship. The entire history of the Cherokee was offered as relevant evidence.[179] The Tribe argued that the series of Cherokee treaties over time demonstrated that the United States had almost completely taken over the management of the affairs and property of the Tribe. The effect of this government action was to establish a special relationship.[180] The court of appeals refused to consider the historical evidence, holding that since the claimed losses stemmed from damage caused by the construction of the navigation system, it would only hear matters regarding the government's conduct in connection with the navigation system.[181] The court of appeals went on to find that the government's conduct was justified under the constitutional power of navigational servitude.[182]

The court of appeals also rejected the tribal attorneys' interpretation of Public Law 97-385, the Act which granted jurisdiction to the court to hear the claims arising from the navigation project. The Cherokee advocates asserted that the Act acknowledged the government's debt. The court disagreed, holding that the Act did not impose liability on the United States but merely charged the courts to determine what compensation was appropriate and if the claim could prevail at all.[183]

The Tribe's position was summed up by former Cherokee Chief Ross Swimmer in a letter written to Sen. Don Nickles (R.-Okla.) two weeks after the court's decision.[184] Chief Swimmer stated that his understanding of Public Law 97-385 was that jurisdiction was granted to the courts to determine whether liability would be decided on the basis of a takings claim or on a fair and honorable dealings claim. Chief Swimmer argued that the

177. *Id.* at 704.

178. Cherokee Nation v. United States, 948 F.2d 635 (10th Cir. 1991).

179. Cherokee Nation v. United States, 937 F.2d 1539, 1542 (10th Cir. 1991).

180. *Id.* at 1543.

181. *Id.* at 1543 n.4.

182. *Id.* at 1544 n.5.

183. *Id.* at 1547.

184. Letter from Former Cherokee Chief Ross Swimmer to U.S. Sen. Don Nickles (July 23, 1991) (on file with *American Indian Law Review*).

will of Congress had been thwarted by this ruling. On May 18, 1992, the Supreme Court denied writ of certiorari.

At the same time that this litigation was winding up, the Nations directed their efforts toward Congress with House Bill 4209 and its companion bill, Senate Bill 2750.[185] These bills were an amendment to Public Law 97-385. The purpose was to set aside the issue of liability and clarify congressional intent for compensation to the tribes for the taking of the riverbed. The House Judiciary Subcommittee held a hearing on April 1, 1992. The bills' proponents included Rep. Mike Synar (D.-Okla.), Cherokee Chief Wilma Mankiller, Former Chief Ross Swimmer, Gov. Bill Anoatubby of the Chickasaw Nation and Greg Pyle, Assistant Chief of the Choctaw Nation.[186] Wilma Mankiller presented the statement on behalf of the Nations. After outlining the relevant history of the Nations and the basis of fair and honorable dealings claim, she argued that the courts have misapplied case law and have used legal defenses to block purely moral claims.[187] She then referred to instances where the government has compensated non-Indians who were in similar situations.[188] In conclusion, she cited a memorandum from the Department of the Interior's Solicitor which supported the Nations' position:

> I firmly believe that, had the Supreme Court's pronouncement in *Cherokee Nation v. Oklahoma*, 397 U.S. 620 (1970), preceded congressional consideration of the construction of the McClellan-Kerr navigation system, the Secretary of the Interior's trust obligation to protect the property interests of Indian tribes would have compelled a request for legislation to compensate the Choctaw, Chickasaw and Cherokee Nations for the destruction of their property interests in the Arkansas riverbed. The fact that the McClellan-Kerr Project has been constructed and operating for the last 25 years does not make the enactment of such legislative request any less compelling at this time.[189]

The Department of Interior was conspicuously absent from this hearing. The Department's input consisted of a one-page note stating that Interior was sympathetic to the Nations' efforts to settle this longstanding matter, however,

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185. H.R. REP. NO. 773, *supra* note 167, at 2.

186. *Id.* at 5.

187. Statement of the Cherokee, Choctaw, and Chickasaw Nations to the Subcommittee on Administrative Law and Governmental Relations on H.R. 4209, at 4 (Apr. 1, 1992) (on file with *American Indian Law Review*).

188. *Id.* at 8-9 (citing United States v. Willow River Power Co., 324 U.S. 499 (1945); Burkhardt v. United States, 84 F. Supp. 553 (Cl. Ct. 1949); Confederated Tribes of the Colville Reservation v. United States, 43 Ind. Cl. Comm. 505 (1978).

189. *Id.* at 10 (citing Memorandum from the Solicitor of the U.S. Department of the Interior to the Secretary of the Interior (Mar. 15, 1979)).

because litigation was ongoing, the matter was entirely in the hands of the Department of Justice.[190]

The Department of Justice was represented at the hearing by Myles E. Flint. His testimony skirted the history of the claim and the issue of the United States as trustee. He argued that the claim was time-barred. The 1946 Indian Claims Commission Act created a 1951 deadline for filing claims before the Commission.[191] Flint further asserted that given the doctrine of navigational servitude, any compensation would result in an unjustified gratuity. He also argued that House Bill 4209 circumvented and thus undermined the judicial function. This circumvention of the judicial system would create adverse precedent. Finally, he claimed that the bill authorizing direct payment to the Nations, was in violation of the Budget Enforcement Act.[192]

The Nations' response to the Department of Justice was that the claim was not time-barred because it was not possible to raise the claim by 1951. The Indian Claims Commission Act only authorized damage claims; there was no authorization in the Act to quiet title. Thus, the Nations had to overcome Oklahoma's sovereign immunity before they could bring a claim before the Indian Claims Commission. Since the Commission didn't have the authority to hear a quiet title action against the State of Oklahoma this forum was of no use to the tribes on this issue. Title to the riverbed wasn't cleared until 1966 when Oklahoma voluntarily waived it fifteen years after the deadline.[193]

The Nations met Flint's argument that the bill circumvents and thus denigrates the judicial function, by asserting that House Bill 4209 did not circumvent the authority of the courts because Article 1, Section 8 of the U.S. Constitution authorized Congress to pay the debts of the United States. Furthermore, the potential for adverse precedent was overstated because the Nations were the only tribes that had never been compensated for the use and occupation of their lands by a navigation and power project. As to the issue of compliance with the Budget Enforcement Act, the tribes argued that this was a mere drafting matter. The Nations intended full compliance and proposed that during final drafting of the bill, that the subcommittee should add the necessity for Budget Enforcement Act compliance.

On April 29, 1992, the subcommittee held a markup session and recommended passage of House Bill 4209. On July 1, 1992, the bill was favorably recommended to the House by voice vote.[194] House Bill 4209 passed the

190. Letter from Wilma Mankiller, Principal Chief of the Cherokee Nation, to Barney Frank, Chairman of the Subcommittee on Administrative Law and Governmental Relations (Apr. 15, 1992) (on file with *American Indian Law Review*). This letter was written in response to the Committee's request for information arising from the April 1, 1992, hearing on House Bill 4209.

191. *Id.* (citing Indian Claims Commission Act of 1946, ch. 959, 60 Stat. 1049).

192. *Id.*

193. *Id.*

194. H.R. REP. NO. 773, *supra* note 167, at 5.

House on August 4. The *Tahlequah Press* hailed this victory, stating that the Tribes had not lost faith in their claims based on treaty promises of fee simple title which predated the servitude.[195] Quoting Wilma Mankiller, the newspaper article stated that the Senate was expected to complete its work on the bill and present it to the President before Congress adjourned in 1992.[196] In the Senate, the bill fell one vote short of passage.[197]

During this period, the Tribes had also been pursuing relief through the United States Claims Court. Suits were filed asserting that the government had mismanaged tribal property in breach of its fiduciary duty.[198] This duty stemmed from the Act of April 26, 1906, which declared that unallotted tribal lands were held in trust by the government.[199] The Tribes' complaints essentially alleged a breach of fiduciary duty to survey the land, a breach of duty in the issuance of leases for oil, sand and mineral exploration, a breach of duty to issue leases for rangeland and timber resources, and unauthorized use of tribal property by the United States.[200]

The government was able to successfully argue that these mismanagement claims needed to be pled with particularity in order to state a cause of action. The court, in order to provide guidance for future litigation and possibly to encourage settlement, instructed the tribes to specify by legal description which lands were subject to the alleged breaches of trust; specify the alleged trespassing parties who caused harm to each parcel identified in each legal description; identify the leases and lands that were involved in the allegations of mismanagement; and identify when the claims first accrued.[201]

By 1992, the Cherokee had filed a total of four amended complaints. The Choctaw and Chickasaw had filed two amended complaints. The government continued to successfully argue that these claims were improperly pled because they lacked specificity. Amidst a backdrop of tribal accusations of dilatory tactics, the parties finally agreed that the government would file a motion for summary judgment.[202] This filing would spell out what the government required in the pleadings and would move the litigation forward.

In the motion for summary judgment, the United States maintained that the claims were time-barred because the plaintiffs were on notice of the existence

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195. *Cherokee Nation to Return to Court to Seek Riverbed Claims*, *supra* note 167, at 4.

196. *Id.*

197. Letter from Attorney James G. Wilcoxen to Ms. Kate Boyce, of Patten, Boggs, and Blow Economics Group (Dec. 15, 1993) (on file with *American Indian Law Review*).

198. Defendant's Motion for Summary Judgement at 4-5, Cherokee Nation v. United States, 26 Cl. Ct. 215 (1992) (No. 218-892) and Choctaw Nation v. United States, 25 Cl. Ct. 363 (1992) (No. 630-892) [hereinafter Defendant's Motion] (citing Cherokee Nation v. United States, 21 Cl. Ct. 565 (1990)).

199. Act of Apr. 26, 1906, ch. 1876, 34 Stat. 137.

200. Cherokee Nation v. United States, 21 Cl. Ct. at 571.

201. Defendant's Motion, *supra* note 198, at 6 (quoting Order of Oct. 29, 1991).

202. *Id.* at 8-9.

of their cause of action for more than the six-year statute of limitation period.[203] This notice was provided by public advertising of the leases which were awarded on the basis of competitive bidding. Copies of these advertisements were sent to the Tribes at that time.[204] Evidence of notice was also claimed by the fact that the Tribes participated in the condemnation proceedings when lands were acquired for the Mayo lock and dam project and for the Robert S. Kerr lock and dam project. Because most of the lock and dam project lands were acquired in the 1950s and 1960s, the government also relied on the Quiet Title Act, which barred civil action on real property after twelve years.[205]

As to the breach of trust argument, the government again submitted that the Tribes had the burden of identifying particular statutes, regulations, executive orders or constitutional provisions which establish a duty. The burden was on the tribe to show that this duty had been breached.[206] The government asserted that the Tribes' complaint simply recited a "plethora"[207] of federal lease management statutes. The government concluded by arguing that these leases were reasonable because they were open to competitive bidding.

While the motion for summary judgment is pending, the Tribes have been pressing the Department of Interior to proceed with preparation for the extensive quiet title litigation needed in order to clear the Nations' ownership and to enable identification of trespassers along the ninety-six miles of the riverbed. This will potentially result in a massive amount of litigation. Interior has investigated titles for the first eight miles of the River and found that there were 1200 potential defendants who could assert title to lands and mineral rights. After sending notice to each of the 1200, it was determined that approximately 25% disclaimed interest. Applying the data gained from these eight miles, the Department of Interior estimated that there will be a total of approximately 7200 defendants in 600 to 800 separate lawsuits.[208]

Attention has also been directed at Congress in an effort to avoid the cost of more litigation. With the new administration, it was hoped that a revised bill would have a stronger chance for success.[209] The draft for the revised bill called for all claims for the "taking" and for the mismanagement of resources to be extinguished and fully compensated, title to be quieted in

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203. *Id.* at 30-31.

204. *Id.* at 12.

205. 28 U.S.C. § 2409 (1988).

206. Defendant's Motion, *supra* note 198, at 31.

207. *Id.* at 32.

208. Letter from Emmett M. Rice, Assistant Regional Solicitor for the Department of the Interior, Southwest Region, Tulsa, Okla., to Tina Jordan, Executive Director of the Arkansas Riverbed Authority (Sept. 7, 1993) (on file with *American Indian Law Review*).

209. Letter from Cherokee Principal Chief Wilma Mankiller to Deputy Chief John Ketcher and Cherokee Tribal Council (Aug. 5, 1993) (on file with *American Indian Law Review*).

favor of the government, and funds to be allocated for acquiring trust land within the Nations' traditional land base.[210] Within the Tribes there was some internal opposition to the granting of title to the riverbeds to the United States. Renowned Cherokee advocate Paul Niebell argued that it was not in the best interest of the Cherokee Nation to sell the Tribe's fee simple title in an effort to settle the claims. He felt that, over time, a navigable outlet would prove to be a far more valuable asset.[211]

Senator Nickles of Oklahoma discussed the new bill during the Senate's consideration of the Catawba Indian Tribe land claims settlement. He referred to the 1992 bill (House Bill 4209) and informed his colleagues that this had been redrafted and that it was the Nations' intent to reintroduce it in the form of a settlement bill which was similar to the Catawba Bill.[212] Sen. Strom Thurmond (R.-S.C.) and Sen. Daniel Inouye (D.-Haw.) gave encouraging responses and recommended that, because of former opposition, the Oklahoma senators should consult with the Department of Justice prior to introduction.[213]

On October 20, 1993, a meeting was held with the Department of the Interior to discuss the revised draft of the bill and to find out what Interior had heard from the Justice Department on the proposed bill.[214] The prime issue for Interior was how to deal with the trespassers who held invalid title to land and subsurface rights. The Nations' leverage here was that Interior would be relieved of its trust responsibility to initiate the possible 600 to 800 quiet title actions if it agreed to settle. A second issue that arose at the meeting regarding the bill concerned a question posed by the Office of Management and Budget: should not the State of Oklahoma set up a settlement fund, since private trespassers would be a primary beneficiary of the buyout portion of the bill? The Nations' representatives argued that this was a moot point because the State was not involved. The affected private individuals inherited a problem caused by the federal government's mistake

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210. *Id.*; *see also* Draft of Riverbed Claims Settlement Act, *supra* note 165.

211. Letter from Paul Niebell to James Wilcoxen (Apr. 6, 1993) (on file with *American Indian Law Review*).

212. Catawba Indian Tribe of South Carolina Land Claims Settlement Act of 1993, Pub. L. No. 103-116, 107 Stat. 1118 (codified at 25 U.S.C. 941 (Supp. V 1993)). During the hearings, Sen. John McCain (R.-Ariz.) argued that during the past 20 years the Congress has consistently adhered to the policy of encouraging negotiated settlements with tribal governments. Senator McCain stated that such settlements promote good will, relieve the need for more litigation and uncertainty, and right the terrible injustices that arose from over 200 years of treaties that were made and broken at will (the Catawba Indians' claim was also based on breach of fiduciary duty). *S. 1156, Catawba Indian Tribe of South Carolina Land Claims Settlement Act of 1993*, 103d Cong., 1st Sess. S10977, S10978 (1993) (statement of Sen. McCain).

213. *S. 1156, Catawba Indian Tribe of South Carolina Land Claims Settlement Act of 1993*, *supra* note 212.

214. Cherokee Nation Memorandum from David A. Mullon Jr. to Principal Chief Wilma Mankiller (Oct. 21, 1993) (on file with *American Indian Law Review*).

in the early part of this century. All agreed that this was a problem for the Department of Interior, not for the Nations.

The Department of Justice made it clear that it would oppose any award for the taking of the riverbed, arguing that no legal basis existed for an award and any award would amount to a mere gratuity. Dan Consenstein of the Department of the Interior put forth the proposition that it might improve the Nations' position to try to shift their claims away from the Justice Department and focus on the actions of the Department of the Interior. This might enable the Nations to dodge the Justice Department's objections, and possibly allow Justice to save face. In order to accomplish this, Consenstein suggested that the Nations redefine the time frame of the mismanagement claim and assert that the mismanagement began in the early part of the century when Interior's solicitor erroneously concluded that the riverbed passed to Oklahoma under equal footing. This would center the claim on Interior's actions and push the mismanagement argument back to a much earlier date, thereby enhancing interest and amounts of uncollected oil revenues. Consentstein also suggested shifting the blame for lack of hydropower compensation to the Department of Interior's failure to demand compensation for the use of the Nations' water rights. What was not clarified at the meeting was whether the Office of Management and Budget would accept these tactics and whether the Department of Justice was behind this suggestion.[215]

After eight months of negotiations with the Department of Interior and the Department of Justice, both departments brought the process to a standstill by deciding to undertake independent appraisals of the damages and land values. Massive research had already been undertaken by the Tribes in order to appraise the value of the riverbeds, the sand and gravel deposits, the land claims, the oil and gas rights, and for the "taking" of hydroelectric power. Cherokee Principal Chief Wilma Mankiller contacted the Secretary of Interior and argued that enough appraisal work had been done and that no one ever believed that the federal government would pay to the penny. She also pointed to the savings the United States could gain from being relieved from the estimated 600 to 800 trespass and quiet title actions that would form a part of this independent appraisal. Finally, she pointed to the fact that Interior did not delay the Catawba Settlement by demanding a federal appraisal to compare with the Catawba Tribe's own valuation of damages.[216]

The fact remains that there are still sixty-eight miles of the riverbed that have yet to be appraised by the government. This appraisal must be completed before the 600 to 800 quiet title actions can be filed. On June 2, 1994, Wilma Mankiller requested Senators Boren and Nickles to urge the Interior Appropriations Subcommittee to include $400,000 in its 1995

215. *Id.*

216. Letter from Principal Chief Wilma Mankiller to Bruce Babbitt, Secretary of the Interior (May 16, 1994) (on file with *American Indian Law Review*).

allotment bill for completion of the surveying work and $200,000 for the Arkansas Riverbed Authority to complete the title work on the remaining riverbed area.[217] These amounts were allotted and the work is continuing.

The Department of the Interior has indicated that if the Nations wish to appeal to Congress, the Department will refrain from objecting as long as the relief requested for the loss caused by the McClellan-Kerr Project is limited to approximately five million dollars.[218] The Justice Department has remained steadfast in its refusal to recognize liability. The Nations' total loss of riverbed revenue based on royalty values of sand and gravel assets, subsurface gas production, and the rental value of agricultural lands since 1908 has been estimated by the Benham Engineering Group in Tulsa, Oklahoma, in conjunction with the Patton, Boggs, and Blow Economics Group of Washington, D.C. The total loss is placed at $174,016,258.[219]

Rep. Synar and Sen. David Boren (D.-Okla.) formulated plans to introduce settlement legislation on May 27, 1994, seeking $120 million as compensation for the tribes.[220] This effort never went beyond the planning stage. Synar's reelection bid was unsuccessful and Boren resigned from the Senate in 1994. The prospect of 600 to 800 lawsuits will probably be the hook that eventually reopens meaningful negotiation. By all appearances, that event will be put off until every mile of the riverbed is surveyed and abstracted, and the Departments of Interior and Justice agree with the conclusions.

Conclusion

In the earlier days of Indian land claims in the twentieth century, the constant battle, for Pierce and other Indian law attorneys, was the negative social opinion towards the "avaricious Indian attorney."[221] In the House debates over the Indian Claims Commission Act, Rep. Thomas O'Malley (D.-Wis.) claimed that the Act was the creation of Indian attorneys. "'If we cannot defeat this bill we must amend it so the claimant cannot go back 150 years to Manhattan Island and have some shyster lawyer dig up a descendant of some blanket Indian and make a million dollar claim against the government'. . . . Applause followed this stirring oration."[222] Such public perception was responsible for and supported many of the unfavorable dispositions that were

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217. Letter from Principal Chief Wilma Mankiller to U.S. Sen. David Boren and U.S. Sen. Don Nickles (June 2, 1994) (on file with *American Indian Law Review*).

218. Letter from Attorney James Wilcoxen to Ms. Kate Boyce (July 13, 1994) (on file with *American Indian Law Review*); Interview with James Wilcoxen (Oct. 26, 1994).

219. Benham Group of Tulsa & Patton, Boggs & Blow Economics Group of Washington, D.C., Arkansas Riverbed Property Valuation Report (Jan. 1994) (on file with *American Indian Law Review*).

220. Letter from Wilma Mankiller to Bruce Babbitt, *supra* note 216.

221. ROSENTHAL, *supra* note 2, at 24-26.

222. *Id.* at 66-67.

frequent in the early days of the Indian Claims Commission. By 1956, there were fifty-three dismissals and only seven awards.[223] The tribal attorney's burden was further increased because attorney agreements for representation were subject to the supervision of the Commissioner of Indian Affairs and the Secretary of the Interior. No contracts for representation between an attorney and a tribe could be made without the Secretary's approval. Once a case before the Commission reached a final decision, tribal attorneys had to apply for fees and expenses. These petitions had to be filed with the Indian Claims Commission, the Commissioner of Indian Affairs, and they had to be served on the United States Attorney General. The Commission had the power to hold hearings to determine the validity of the petitions for fees and the payments were not to exceed 10%.[224]

Today, attorneys practicing Indian law seem to have gained the stature they deserve, but the opposition against reimbursement for past wrongs is as formidable as ever. It would appear from the current status of the Arkansas riverbed claim that the pre-Indian Claims Commission Justice Department policy of defeating claims by delay is still in effect.[225] It is also arguable that the history of the riverbed claim demonstrates a retreat from the fair and honorable dealings standard which the United States set for itself in the 1946 Indian Claims Commission Act.

223. *Id.* at 153.

224. *Id.* at 23.

225. *Id.* at 54-55. George T. Stormont was in charge of Indian litigation at the Department of Justice.