

Testimony of Ross O. Swimmer
Former Principal Chief
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Testimony on H.R. 1421 to amend the Water Resources Development Act of 1986 to clarify the role of the Cherokee Nation of Oklahoma with regard to the maintenance of the W.D. Mayo Lock and Dam in Oklahoma.

Good morning. Thank you for the opportunity to testify before this Committee regarding the development of a hydroelectric facility by the Cherokee Nation to be located at Lock and Dam 14, known as the W.D. Mayo Lock and Dam on the Arkansas River in the Cherokee Nation.

In 1970, the United States Supreme Court ruled that the Cherokee Nation, Chickasaw Nation and Choctaw Nation owned the bed and banks of the Arkansas River from Ft. Smith, Arkansas west and north to Muskogee, Oklahoma. Previously, it was believed that the State of Oklahoma held title as a result of a letter sent by the Secretary of the Interior soon after Oklahoma statehood, stating his belief that the State had title as a result of the "equal footing" doctrine applicable when Oklahoma gained statehood. Under this doctrine, it was understood that new states to the Union received title to the bed of navigable waterways in their state.

Following the victory in the Supreme Court, a later decision by the U.S. District Court determined that the Cherokee Nation owned the north half of the river from Ft. Smith to the confluence of the Canadian River and the entire river from the Canadian to the town of Muskogee.

In the 1950's, the United States Corps of Engineers (USACE) received Congressional approval and appropriations to construct what is known as the McClellan-Kerr navigation system along the Arkansas River. The project begins in Tulsa, Oklahoma and follows the Arkansas River south until it reaches the Mississippi River in Louisiana thereby enabling barge shipping from Tulsa to the Gulf of Mexico. Of course, unknown to USACE at the time, was the fact that the three Indian Tribes owned the land where the system of locks and dams was built that enabled the navigation by barge of the River. In addition to the locks and dams that were built, USACE also added hydroelectric generation components at the Robert S. Kerr and Webbers Falls lock and dams. Only the W.D. Mayo lock and dam in Oklahoma did not have a hydroelectric facility added beside it.

After the court case against the State of Oklahoma was finally over and the location of tribal ownership established, the three Indian Nations asked that the River be appraised. The Bureau of Indian Affairs commenced an appraisal of all the known assets located in or on the River. These included the dam sites, electric generation, sand and gravel, rights-of-way, oil and gas production and the land itself. The appraised value of the River was estimated to be \$177 million. At that point, the three Tribes began negotiations with the United States based on the

government's use of the River assets and the apparent taking of land that belonged to the three Tribes by the United States for the construction of the navigation system. Approximately, 25 years later a settlement was entered into between the United States and the three Tribes. However, in 1981, the Cherokee Nation, as part of its settlement negotiations, asked Congress for the exclusive right to build a hydroelectric facility on its land at the W.D. Mayo lock and dam so that the Nation could receive some benefit from the ownership of its land. As a result, in 1986, as part of the Water Resource Development Act of 1986, Section 1117 was added that gave this right to the Cherokee Nation.

The 1986 Act provided that the Cherokee Nation shall have an exclusive right to be the developer of the hydroelectric facility at the W.D. Mayo lock and dam. However, it also required that when the construction was completed, the facility would have to be transferred to USACE which would then manage, operate and maintain the facility and that Southwestern Power Administration (SWPA) would have to market the power from the facility so that the debt for construction would be paid and the Nation would receive a return on its investment and a royalty for all power sales from the facility. Unfortunately, the value of the potential power sales was not enough to cover the cost of the project, much less pay the Nation a royalty or return on its investment. While the Congress believed it was providing some compensation to the Cherokee Nation for its ownership of the River, it never materialized.

Thirty years later has made quite a difference in the energy markets. The price of energy is significantly higher, "open access" has changed the dynamics of federal hydro power marketing and transmission, and the Cherokee Nation has access to capital that was not available then. However, to move the project forward requires some changes to the legislation that was enacted in 1986. First is the ownership. In the 1986 act, the ownership must be transferred from the Cherokee Nation to USACE after construction. Presumably, this was necessary so that USACE could operate and maintain the project. This is not necessary today. The Cherokee Nation needs to own the project after it's built in order to obtain financing, and will pay all costs of engineering, construction, operation, and maintenance of the project, thus relieving the United States of any financial burden for the project. In addition, it is no longer necessary that Southwestern Power Administration market the power from the facility. This also will become the responsibility of the Cherokee Nation and, again, the Nation will compensate the United States for any costs incurred in the transmission by SWPA, or other costs associated with the power marketing.

The intent of H.R. 1421 is simple. Under these amendments, not only would the Cherokee Nation design and build the project, it would also retain ownership of the project and market the power produced from the project. In addition, there would be no cost to the government for the design, build, management and operation of the project as all costs would be paid by the Cherokee Nation, including any expenses of USACE or SWPA in the development and licensing of the project. The project will employ between 150 and 200 workers during construction, generate 30 megawatts of renewable energy, have very little impact on the environment, create a recreation area nearby, support economic development opportunities

for other businesses in the area during construction and enhance USACE's ability to manage the flow of the river better.

The Cherokee Nation understands that amendments to previous WRDA bills are normally processed through subsequent WRDA bills. For three years, the Nation has attempted to obtain these simple amendments, but no WRDA bill has been enacted. The Nation has also been asked if it can proceed with the project using the 1986 authorization. Attached to our testimony is an email from the regional office of USACE that explains why the project cannot go forward without these amendments. In addition, if the 1986 authorization were used, USACE would have the burden of obtaining appropriations for the operation and maintenance of the project. The proposed amendments eliminate that requirement since the Cherokee Nation would be paying all the costs for the project.

The Nation believes that it has a limited time to move this project forward due to financing costs and the escalating cost of building the project and purchasing the turbines. Cherokee also recognizes that renewable energy, increasing employment and economic development in Indian country are critical needs at this time, and that these needs can greatly be advanced if these amendments are enacted.

On behalf of the Cherokee Nation and its Principal Chief, Chad Smith, I ask for your support of this legislation and that it be moved as quickly as possible through the House processes and to the Senate for final enactment. Thank you for your consideration.