TESTIMONY
CHEROKEE NATION PRINCIPAL CHIEF CHAD SMITH
H.R. 3534, THE CHEROKEE, CHOCTAW AND CHICKASAW CLAIMS SETTLEMENT ACT OF 2001,
BEFORE THE HOUSE COMMITTEE ON RESOURCES

Mr. Chairman and members of the Committee:

Let me begin by thanking you, Chairman Hansen and the other members of the Committee, for the opportunity to testify today in support of this bill, H.R. 3534. I would also like to thank the members of the Oklahoma congressional delegation who sponsored the bill, Representatives Brad Carson, Wes Watkins and Steve Largent, as well as Representative Dale Kildee of the Committee, who has always been a friend of the Cherokees and other Indian tribes in the United States.

My name is Chad Smith, and I am the Principal Chief of the Cherokee Nation, the second largest federally-recognized Indian tribe in the United States. Cherokee Nation is located in northeastern Oklahoma, and we share a common boundary along the Arkansas River, from the point of confluence of the Canadian River to the Arkansas state line, with two other great Indian nations, the Choctaw and Chickasaw Nations. The River is not only our common boundary, but it is also a wonderful and valuable resource that the three Nations share.

As the members of this Committee no doubt know, the Cherokee, Choctaw and Chickasaw Nations have not always been in Oklahoma, and I am sure that you know that how we came to be in Oklahoma is by no means a happy story. Although culturally and linguistically the Cherokee people are very different from the Choctaw and Chickasaw people, the members of our three Nations, along with our neighbors the Creeks and Seminoles, were all forcibly uprooted from our aboriginal homelands in what is now the southeast United States about 140 years ago and marched over the Trail of Tears to lands west of the Mississippi in the Indian Territory. The story of how that came to be, how the Government of the United States swept us up from our homelands east of the Mississippi River and deposited us in a completely unfamiliar country is the sad part of our histories that the three Nations share along with our brothers the Creeks and Seminoles. It is also the story of how we came to own the bed and banks of the Arkansas River within the State of Oklahoma.

It should come as no surprise that the events of Indian removal were an integral part of the legal history of tribal ownership of the bed and banks of the Arkansas River in Oklahoma, because the Indian removal was accomplished only in part through force; it was facilitated by treaties of territorial cession—cessions by the Indian Nations and cessions by the United States. I will attempt to give the Committee an overview of that legal history and then explain why this is a good bill, one that Congress should pass into law.

The Cherokee Nation executed treaties both with Britain and, after Independence, with the United States. Our first treaty with the U.S. was the Treaty of Hopewell, on November 28, 1785, which purported to set out the boundaries of the Cherokee Nation. A mere 36 days later, also at Hopewell, the Choctaw Nation executed its own treaty with the United States, one similar to that of the Cherokees. In these treaties and a few others that soon followed, the Cherokees and Choctaws were placed under the protection of the United States; their rights to the exclusive use and occupancy of lands not cede were “solemnly” assured by the United States[1] and assured of our right to pursue our own ways and govern ourselves under our own

system of laws.

Despite solemn guarantees of protection by the United States expressed in treaty, waves land-hungry non-Indian settlers began invading the Cherokee Nation, occupying and "improving" lands owned by the Nation and used communally by its citizens for centuries. Less than 20 years after the signing of the Hopewell treaties, the United States Government first conceived of a new Indian policy—the first of a long series of federal policies that would have devastating effects on Indian people everywhere—that would eventually come to be known as "Indian removal," whereby it was determined that the best way to protect Indians from the consequences of the invasions of white settlers would be to move them *en masse* to the remote country west of the Mississippi River that had just been acquired in the Louisiana Purchase.[2]

In 1817 and 1820, respectively, the Cherokee Nation and the Choctaw Nation executed treaties with the United States agreeing to cede portions of their lands east of the Mississippi River in exchange for large tracts of land in the Arkansas Territory. Although some Cherokees, who came to be known as "Old Settlers," did move soon thereafter to the Arkansas Territory, before the Government could follow through with removal it discovered that it had miscalculated the rate of westward expansion, for the lands in Arkansas the U.S. had promised to the Indian Nations had already been occupied by non-Indian settlers. The two Nations were then forced to relinquish their lands in the Arkansas Territory and to accept instead lands farther west in the "Indian Territory." This time, the United States assured them, their lands would, "under the most solemn guarantee of the United States, be, and remain, theirs *forever*." [3]

The failure of the Arkansas removal program did little to inspire confidence among Cherokees and Choctaws that the Federal Government had the political will to protect them from non-Indian settlement in the promised lands of the Indian Territory. Those who had not already moved to the Arkansas Territory became more determined than ever to remain in their aboriginal homelands in the east. At the same time, however, pressure was building in the states of Georgia and Mississippi for Congress to rid them of their Indians, and laws were passed in the state legislatures purporting to extend state jurisdiction into the Indian Country. Then, in 1830, Congress passed the Indian Removal Act.[4]

Although the Cherokees successfully challenged the validity of the state laws asserting jurisdiction over Cherokee territory in now famous court cases that are part of foundation of modern federal Indian law,[5] the Indian Nations received no support whatsoever from the Andrew Jackson administration as political pressure for Indian removal continued to grow.

Eventually the Indian Nations decided that removal was inevitable, that they should make the best deal they could with the United States while there was still time to do so. The Choctaw Nation signed the Treaty of Dancing Rabbit Creek[6], another removal treaty, on September 27, 1830; in it they agreed to move to new lands west of the Arkansas Territory. Similarly, on December 29, 1835, the Cherokees ended their resistance to removal by executing the Treaty of New Echota[7], and those Cherokees who had not moved earlier to the Arkansas Territory "agreed" to move to lands in the Indian Territory ceded to them by the United States.[8] Later, by treaty with the United States, the Chickasaw Nation was granted a 1/4 interest in the lands of the Choctaws west of the Mississippi in the Indian Territory.[9]

In their removal treaties, the Indian Nations were to be given their lands in the Indian Territory by way of patents executed by the President of the United States granting title to the property in fee simple. The Indians were assured that they would be free to govern themselves and never again be moved, and that their domains would never be embraced within the limits of any state or territory.[10]

The years following the Trail of Tears were a time of great turmoil in the Cherokee Nation, when internecine fighting among Cherokee factions erupted over the actions of the so-called "Treaty Party,"who were alleged to have acted illegally in ceding tribal land in the removal process. Some members of the Treaty Party, including Elias Boudinot, were executed for what they did. This turmoil, though it happened long ago, reflects the strength of attachment of Cherokee people to their tribal lands and explains their strong bias against relinquishing title to those lands except when absolutely necessary.

Although peace was eventually restored in the Cherokee Nation in the mid-1840s, in part through the efforts of the Government,[11] it was not a long-lasting peace. The Civil War brought political and economic destruction and chaos to the Indian Territory. The membership of the Cherokee Nation, not unlike that of the other four Nations, was divided between the Union and the Confederacy, but for their unfortunate choices in taking sides in the War the Indian Nations were rewarded with yet another generous round of punitive treaties.[12] Despite the many onerous provisions in these treaties, however, they did expressly reaffirm all not inconsistent obligations of prior treaties.[13]

Other provisions in the 1866 treaties with the five Nations contemplated the creation of an Indian state from the Indian Territory, to be governed by an inter-tribal council consisting of representatives of the Indian Nations[14]. This idea would never become a reality: once again, political pressure began building to do away with the tribal governments in the Indian Territory. Congress eventually succumbed to this pressure and, in 1893, created the Commission to the Five Civilized Tribes.[15] The purpose of the Commission was to negotiate allotment agreements with the five Nations and thereby pave the way to the dissolution of the tribal governments. It is important to note here that the reason allotment agreements were necessary was that *the United States did not hold title to the lands of the Cherokee, Choctaw, Chickasaw, Creek and Seminole Nations—their tribal lands had been ceded to them by patents of the United States—so that the U.S. was not in a position to convey title to allotted lands*. This legal fact would eventually play an important role in how the Cherokees, Choctaws and Chickasaws came to own the bed of the Arkansas River.

The Indian Nations resisted allotment as long as possible. They continuously rebuffed the Commission in its efforts to negotiate allotment. Then Congress passed the Curtis Act of 1898[16], legislation that in effect put an ultimatum to the Indian Nations—allot your lands by agreement or they will be allotted by force of law. Within four years passage of the Curtis Act, all five

Indian Nations had executed allotment agreements, and their tribal lands were soon allotted in severalty.

In 1906, Congress passed a law[17] that was intended to begin the process of winding up the affairs and existence of the five Nations. Although the 1906 Act clearly *contemplated* the *eventual* dissolution of the

governments of the five Indian Nations, neither it nor any other act of Congress ever accomplished that end[18]. Section 27 of the 1906 Act did, however, expressly provide that any tribal lands remaining after allotment would be held thereafter in trust for the Indians—another important legal fact in the history of our Nations' ownership of the bed of the Arkansas River.

At the time of allotment through statehood in 1907, the Department of Interior assumed that the United States owned the bed and banks (to the highwater mark) of the Arkansas River, with the consequence that the bed of the River was never allotted. Until 1970, in fact the Department and the Federal Government persisted in the belief and an erroneous legal opinion that title to the riverbed went to the State of Oklahoma upon statehood under the "Equal Footing Doctrine," whereby title to the beds of a navigable stream is passed to the state whose borders encompass it upon admission of that state into the Union[19].

The Cherokee, Choctaw and Chickasaw Nations disagreed with the Government's position. Instead, these Nations contended that when the United States ceded lands to them pursuant to their respective removal treaties and the federal land patents executed by the President, the United States granted *all* of its interest in the bed and banks of the Arkansas River, along with the other lands described in those treaties and patents, to the three Indian Nations, so that at the time of Oklahoma statehood the U.S. was possessed of no title to transfer to Oklahoma under the Equal Footing Doctrine. The Indian Nations followed this with an argument that by operation of section 27 of the 1906 Act, these unallotted riverbed lands went to the United States *in trust* for the Indian Nations.

In 1966, the Cherokee Nation took these very arguments to the United States District Court for the Eastern District of Oklahoma in a lawsuit naming the state of Oklahoma and various oil and gas companies with riverbed leases from the state. Subsequently, the Choctaw and Chickasaw Nations intervened in the action. The Indian Nations lost at the trial court and again on appeal to the Tenth Circuit[20]. The Supreme Court accepted review of the case on *certiorari* and reversed[21]. The Court reviewed the three Nations' various treaties with the United States, the land patents executed by the President, and the historical and legal context in which those treaties and patents were made, and held that (1) when the United States ceded lands to the three Indian Nations in the Indian Territory, it intended to cede the bed and banks of even the navigable segment of the Arkansas River, from Three Forks near present day Muskogee down to the Arkansas territorial line, and (2), by operation of the 1906 Act, the bed and banks of the River went to the United States in trust for the Indian Nations.

Because of its adherence to the erroneous legal opinion referred to above, the Department of Interior did nothing between the time of statehood and 1970 to protect the three Indian Nations' interests in riverbed resources. When Congress authorized the construction of the McClellan-Kerr Navigation System along the Arkansas River after the Second World War, no provision was made for compensating the three Nations for the use of their resources in constructing the dams, revetments and levies within the system. Nor did the Department take steps to prevent depletion of the Nations' oil and gas reserves under the river, or to prevent landowners from occupying thousands of acres of the riverbed that became dry or "fast" as the result of natural or man-made changes in the course of the River. Today, in the lower reaches of the Arkansas River near the Oklahoma-Arkansas state line, there are approximately 7,750 "dry" acres of riverbed lands that belong to the Nations but are occupied and used by adjacent landowners without consent of, or compensation to, the three Nations.

In 1989, the three Nations filed suit against the United States in the United States Court of Federal Claims[22], after receiving special permission from the Congress to do so, seeking compensation from the Government for the taking of tribal resources along the riverbed and for it breach of trust to protect the Nations' beneficial interests in the riverbed. Those lawsuits are still pending today. In 1997, the United States brought a quiet title action against many dozens of landowners occupying tribal lands along a small segment of the River[23]—representing only a small percentage of the total number of persons who might be occupying or claiming an interest in the Nations' riverbed lands—but the lawsuit was dismissed without prejudice on technical grounds. Thus, the task of removing persons occupying tribal lands along the Arkansas has not even begun.

Mr. Chairman and members of the Committee, this legislation is the culmination of many years of work by a succession of tribal administrations to resolve the complex controversies surrounding the Nations' ownership of the bed and banks of the Arkansas River in Oklahoma. Our earliest efforts to reach a settlement for lost riverbed resources began in the late 1970s. My predecessors in office, Principal Chiefs Ross Swimmer and Wilma Mankiller, worked diligently with the tribal leaders of Choctaw and Chickasaw Nations to bring closure to these controversies, not only through litigation but also through negotiation with Interior and Justice, but always, for one reason or another, settlement has proven to be an elusive thing.

The current bill, HR 3534, would settle the three Nations' damage claims against the United States now pending in the Court or Federal Claims, and it would give them, in a single lump sum, the past and future fair rental value of the lands being used for the two powerheads that were constructed on tribal lands on the bed of the Arkansas. The bill would also compensate the Nations for the lands being occupied by adjacent landowners and other potential claimants in the lower segments of the River. In exchange for the appropriated sums, the three Nations would dismiss their lawsuits against the Government and disclaim any right, title or interest in the 7,750 of lands being occupied by non-tribal interests. Those disclaimers will serve to eliminate the cloud of tribal claims in the title to lands being occupied by these people and relieve the Government of the very expensive burden of having to bring ejectment litigation against a very large number of Oklahoma citizens.

Mr. Chairman and members of the Committee, this is a good bill and I urge that you give it your unqualified support. I also thank you for taking the time in the Committee's busy schedule to set this matter for hearing and for providing me the opportunity to testify on behalf of a bill that will be of great benefit not only to the people who are my constituents, the Cherokee people, but to many non-Indian citizens of Oklahoma as well.

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[1] *See* Treaty of Holston, July 2, 1791, 7 Stat. 39, 40.

[2] *See* the act of March 26, 1804, 2 Stat. 289.

[3] *See* treaties of January 20, 1825, 7 Stat. 234, and May 6, 1828, 7 Stat. 311.

[4] 4 Stat. 411.

[5] *Cherokee Nation v. Georgia*, 5 Pet. 1, 8 L.Ed. 25 (1831); *Worcester v. Georgia*, 6 Pet. 515, 8 L.Ed. 483 (1832).

[6] 7 Stat. 333.

[7] 7 Stat. 478.

[8] A small number managed to avoid removal and remain near their homelands. Their descendants are members of the Eastern Band of Cherokee Indians.

[9] *See* treaty of January 17, 1837, 11 Stat. 573, and treaty of June 22, 1855, 11 Stat. 611.

[10] *See* Article 5 of the Treaty of New Echota, 7 Stat. 478, 481.

[11] *See* treaty of August 6, 1846, 9 Stat. 871, declaring amnesty for crimes committed within Cherokee Nation during the factional struggles and making special monetary provisions for the Old Settlers. Article 1 of this treaty also affirms that the Cherokee Nation's new lands in the Indian Territory "shall be secured to the whole Cherokee people for their common use and benefit."

[12] *See* treaties of March 21, 1866, 14 Stat. 755 (Seminole Nation), April 28, 1866, 14 Stat. 769 (Choctaw and Chickasaw Nations), June 14, 1866, 14 Stat. 785 (Creek Nation), and July 19,1866, 14 Stat. 799 (Cherokee Nation).

[13] *See* article 31 of the Cherokee's 1866 treaty, 14 Stat.799, 806.

[14] *See* article 12 of the Cherokee's 1866 treaty, 14 Stat. 799, 802.

[15] *See* the Act of March of March 3, 1893, 27 Stat. 645.

[16] Act of June 28, 1898, 30 Stat. 495.

[17] Act of April 26, 1906, 34 Stat. 148.

[18] For an excellent legal analysis of how the governments of the five Nations continued to survive after and despite the 1906 Act, *see Harjo v. Kleppe*, 420 F. Supp. 1110 (D.D.C. 1976), *aff'd*. *sub nom.*, *Harjo v. Andrus*, 581 F.2d 949 (D.C. App. 1978).

[19] *See* memorandum of Duard R. Barnes, Acting Associate Solicitor, Division of Indian Affairs, Department of Interior, to Legislative Counsel dated August 12, 1976.

[20] 402 F.2d 739 (10th Cir. 1968).

[21] *Choctaw Nation v. Oklahoma*, 397 U.S. 620 (1970).

[22] Case Nos. 218-89L and 630-89L.

[23] *United States of America v. Pates Farms, Inc., et al.,* Case No. Civ.97-685-B, United States District Court for the Eastern District of Oklahoma.