Interior - Indian Affairs

May 19, 1967

Mr. Earl Boyd Pierce
General Counsel
Cherokee Nation
1008 Banes Building
Muskogee, Oklahoma 74401

Dear Earl Boyd:

Thank you for sending me a copy of plaintiff's brief which you filed in the United States Court for the Eastern District of Oklahoma in Civil Action No. 6219, The Cherokee Nation vs. State of Oklahoma, et al.

I have not yet had an opportunity to read the brief but hope to be able to do so before too long. It looks like you have developed quite an interesting legal theory.

Best wishes.

Sincerely,

CARL ALBERT, M. C.
Third District, Oklahoma

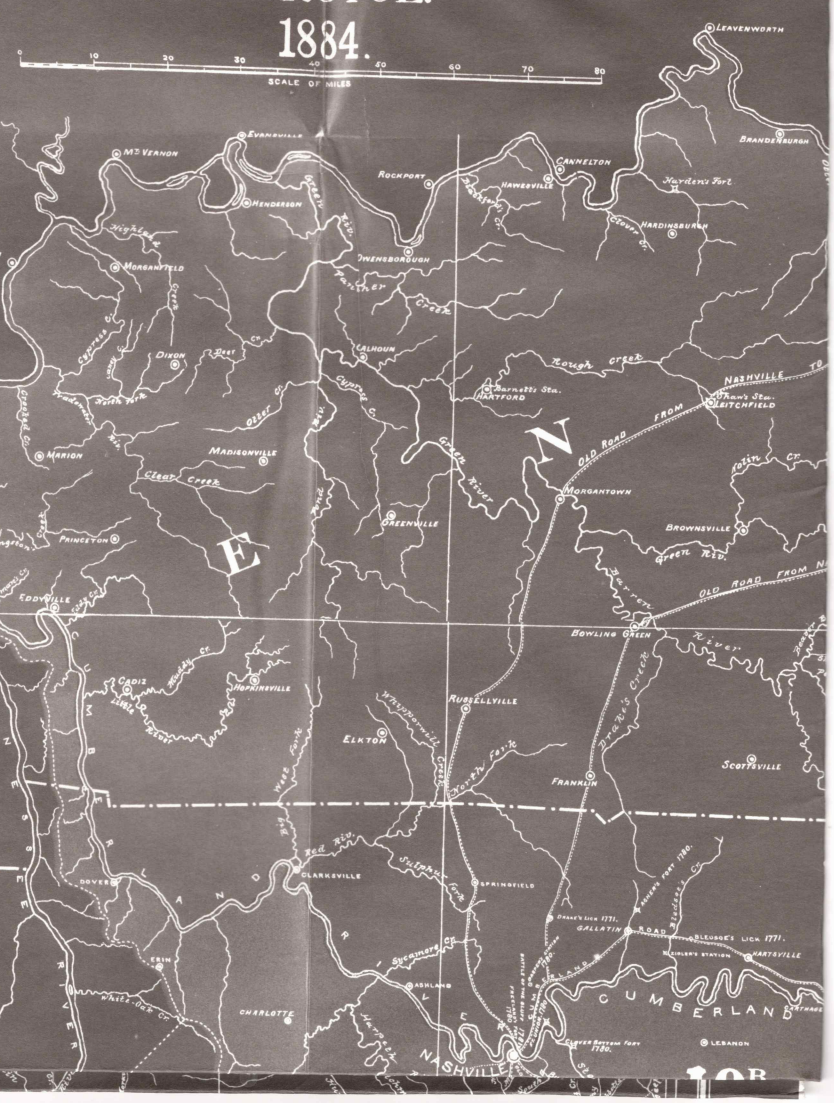
CA/Rpg

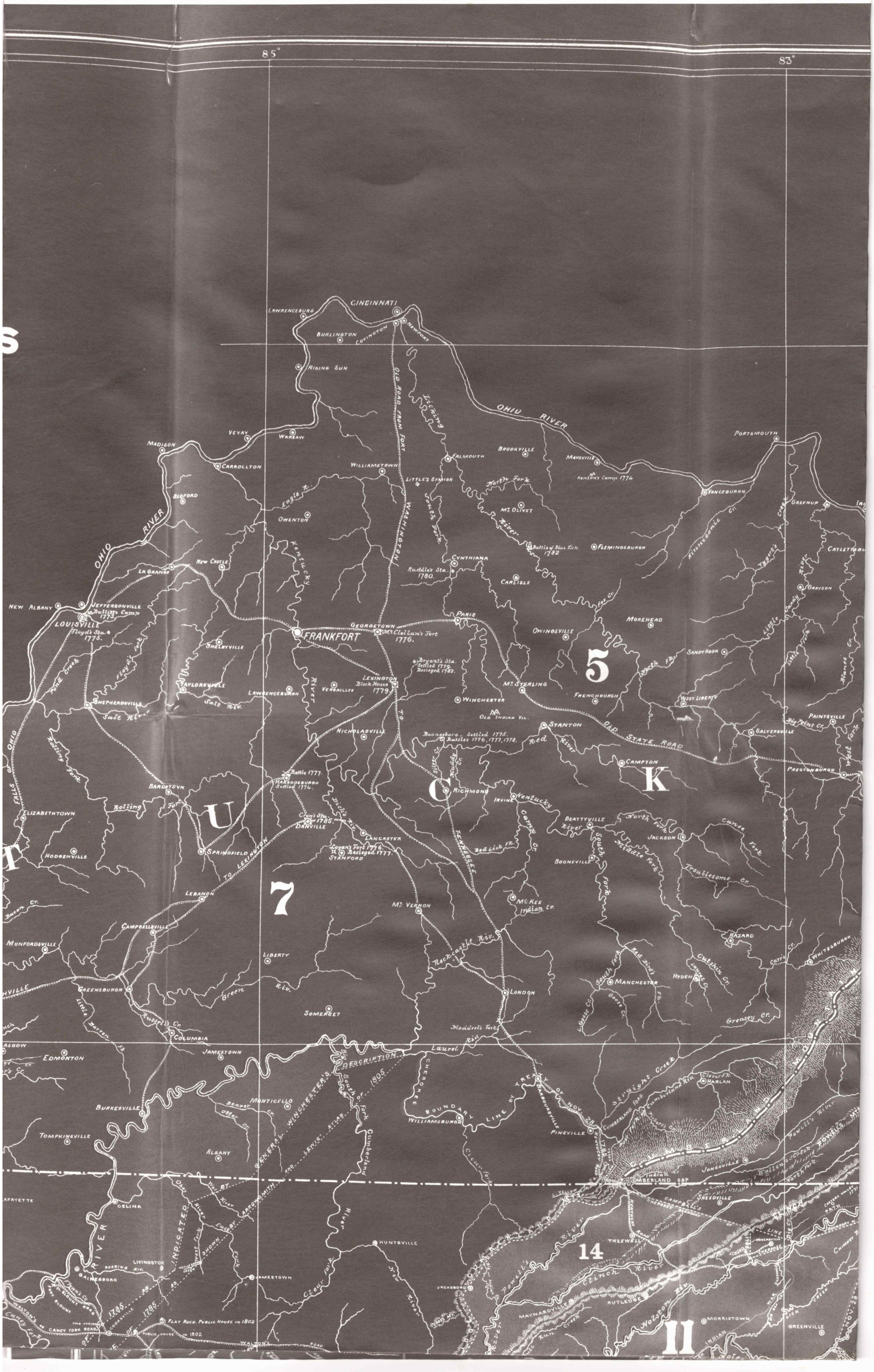
BUREAU OF ETHNOLOGY

SMITHSONIAN INSTITUTION — BUREAU OF ETHNOLOGY
J.W. POWELL, DIRECTOR.

MAP
OF THE FORMER
TERRITORIAL LIMITS
OF THE
CHEROKEE "NATION OF" INDIANS
EXHIBITING THE BOUNDARIES OF THE VARIOUS
CESSIONS
OF LAND MADE BY THEM TO THE
COLONIES AND TO THE UNITED STATES
BY TREATY STIPULATIONS, FROM THE BEGINNING OF THEIR RELATIONS WITH THE WHITES TO THE DATE OF THEIR REMOVAL WEST OF THE MISSISSIPPI RIVER,

BY
C.C. ROYCE.
1884.




85°
83°
S
CINCINNATI
LAWRENCEBURG
BURLINGTON
COVINGTON
NEWPORT
RISING SUN
OLD ROAD FROM FORT
WASHINGTON
Licking
OHIO RIVER
PORTSMOUTH
MADISON
VEVAY
WARSAW
CARROLLTON
WILLIAMSTOWN
FALMOUTH
BROOKVILLE
MAYSVILLE
Kenton's Camps 1774
Little's Station
North Fork
VANCEBURG
GREENUP
BEDFORD
Eagle R.
OWENTON
Mt. OLIVET
Battle of Blue Lick 1782
FLEMINGSBURG
RIVER
OHIO
NEW CASTLE
Kentucky
Ruddle's Sta. 1780.
CYNTHIANA
CARLISLE
CATLETTSBURG
GRAYSON
LA GRANGE
NEW ALBANY
JEFFERSONVILLE
Bullitt's Camps 1773
LOUISVILLE
Floyd's Sta. 1776.
FRANKFORT
GEORGETOWN
Mc Clellan's Fort 1776.
PARIS
OWINGSVILLE
MOREHEAD
SHELBYVILLE
5
SANDY HOOK
Bryant's Sta. Settled 1779. Besieged 1782.
LEXINGTON
Block House 1779.
TAYLORSVILLE
LAWRENCEBURG
VERSAILLES
Mt. STERLING
WINCHESTER
FRENCHBURG
WEST LIBERTY
PAINTSVILLE
SHEPHERDSVILLE
Salt River
Old Indian Vil.
STANTON
SALYERSVILLE
NICHOLASVILLE
Boonesboro - Settled 1775. Battles 1776, 1777, 1778.
Red River
OLD STATE ROAD
CAMPTON
PRESTONSBURG
Battle 1777.
HARRODSBURG
Settled 1774.
BARDSTOWN
Rolling Fork
RICHMOND
C
K
ELIZABETHTOWN
U
Logan's Sta. 1785
DANVILLE
IRVINE
Kentucky
BEATTYVILLE
North Fork
LANCASTER
Logan's Fort 1776. Besieged 1777.
STANFORD
JACKSON
SPRINGFIELD
TO LEXINGTON
Red Lick Fk.
BOONEVILLE
Troublesome Cr.
T
HODGENVILLE
South Fork
LEBANON
7
Mt. VERNON
Mc KEE
Indian Cr.
CAMPBELLSVILLE
MUNFORDSVILLE
HAZARD
LIBERTY
Rockcastle Riv.
WHITESBURG
MANCHESTER
HYDEN
GREENSBURG
Green Riv.
LONDON
SOMERSET
Russell's Cr.
COLUMBIA
Modrell's Fort
Laurel Riv.
Greasy Cr.
EDMONTON
JAMESTOWN
DESCRIPTION
Straight Creek
HARLAN
BURKESVILLE
MONTICELLO
CHEROKEE BOUNDARY LINE BY TREATY
WILLIAMSBURG
PINEVILLE
TOMPKINSVILLE
ALBANY
JONESVILLE
CUMBERLAND GAP
CELINA
RIVER
INDICATED
SNEEDVILLE
TAZEWELL
HUNTSVILLE
14
LIVINGSTON
GAINESBORO
JAMESTOWN
JACKSBORO
Clinch River
MAYNARDVILLE
RUTLEDGE
MORRISTOWN
FLAT ROCK. PUBLIC HOUSE in 1802
CANEY FORK ROAD
11
GREENVILLE

NUMERIC AND CHRONOLOGIC SCHEDULE OF CHEROKEE CESSIONS.

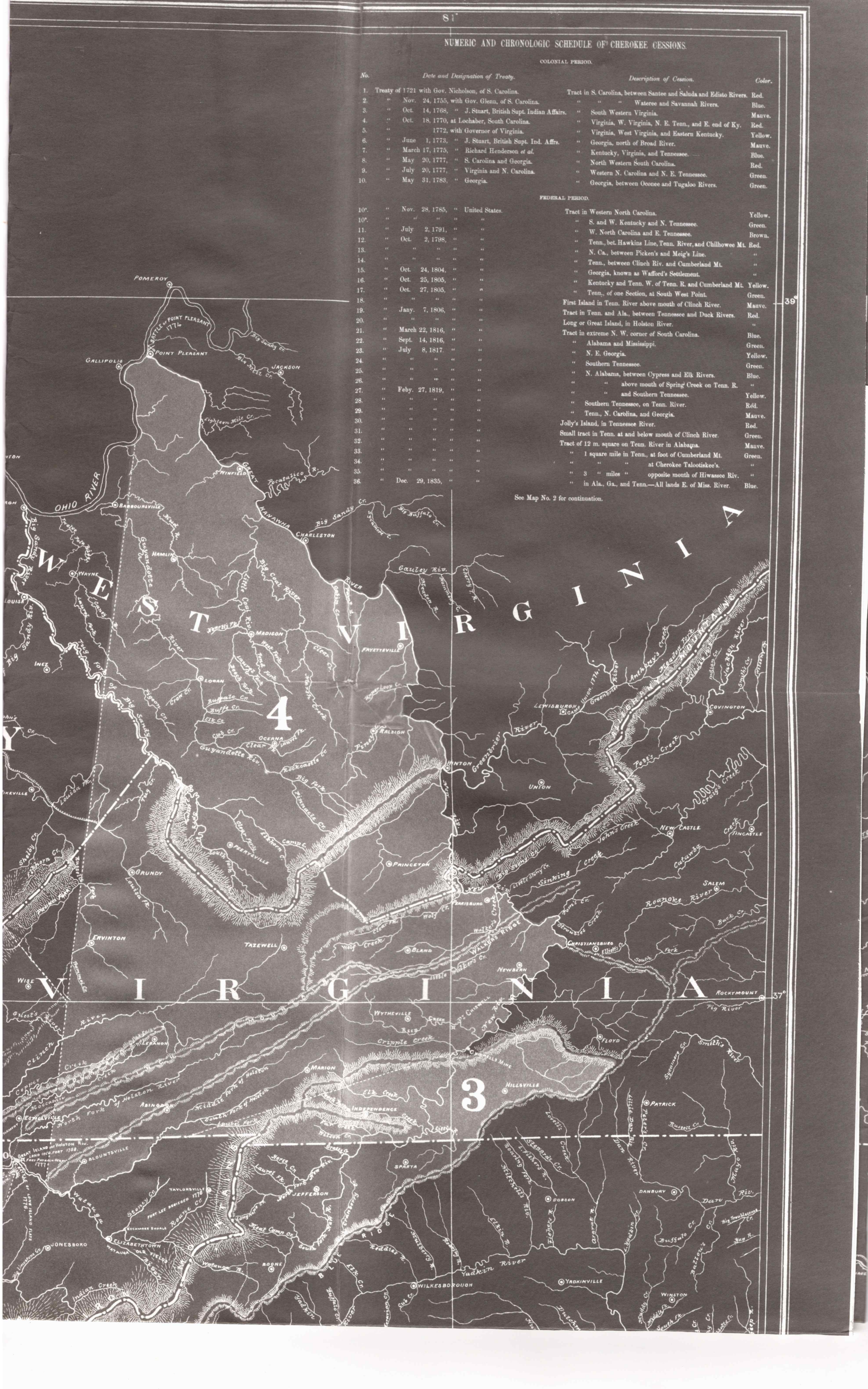
COLONIAL PERIOD.

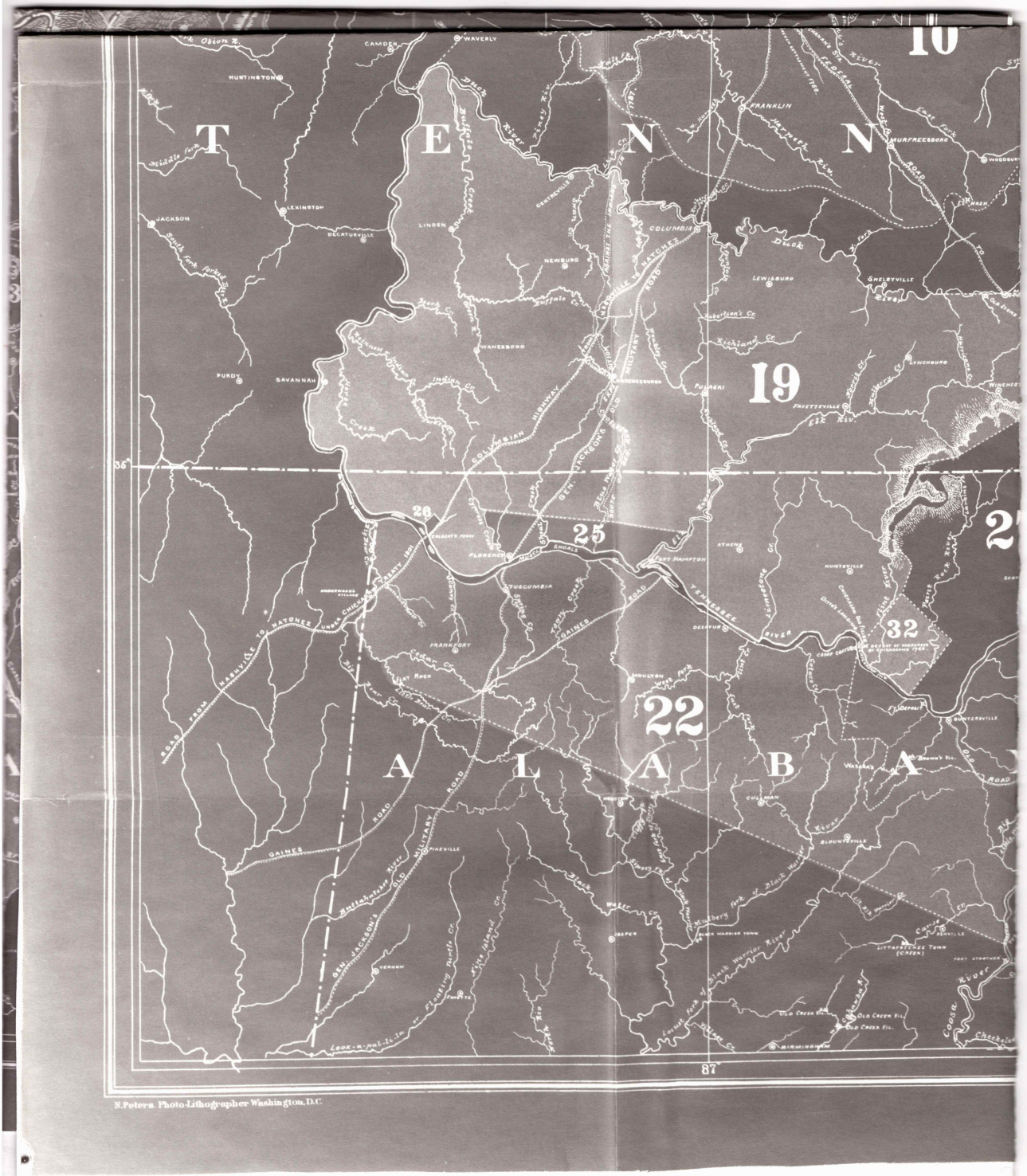
No.	Date and Designation of Treaty.	Description of Cession.	Color.
1.	Treaty of 1721 with Gov. Nicholson, of S. Carolina.	Tract in S. Carolina, between Santee and Saluda and Edisto Rivers.	Red.
2.	" Nov. 24, 1755, with Gov. Glenn, of S. Carolina.	" " " Wateree and Savannah Rivers.	Blue.
3.	" Oct. 14, 1768, " J. Stuart, British Supt. Indian Affairs.	" South Western Virginia.	Mauve.
4.	" Oct. 18, 1770, at Lochaber, South Carolina.	" Virginia, W. Virginia, N. E. Tenn., and E. end of Ky.	Red.
5.	" 1772, with Governor of Virginia.	" Virginia, West Virginia, and Eastern Kentucky.	Yellow.
6.	" June 1, 1773, " J. Stuart, British Supt. Ind. Affrs.	" Georgia, north of Broad River.	Mauve.
7.	" March 17, 1775, " Richard Henderson *et al.*	" Kentucky, Virginia, and Tennessee.	Blue.
8.	" May 20, 1777, " S. Carolina and Georgia.	" North Western South Carolina.	Red.
9.	" July 20, 1777, " Virginia and N. Carolina.	" Western N. Carolina and N. E. Tennessee.	Green.
10.	" May 31, 1783, " Georgia.	" Georgia, between Oconee and Tugaloo Rivers.	Green.

FEDERAL PERIOD.

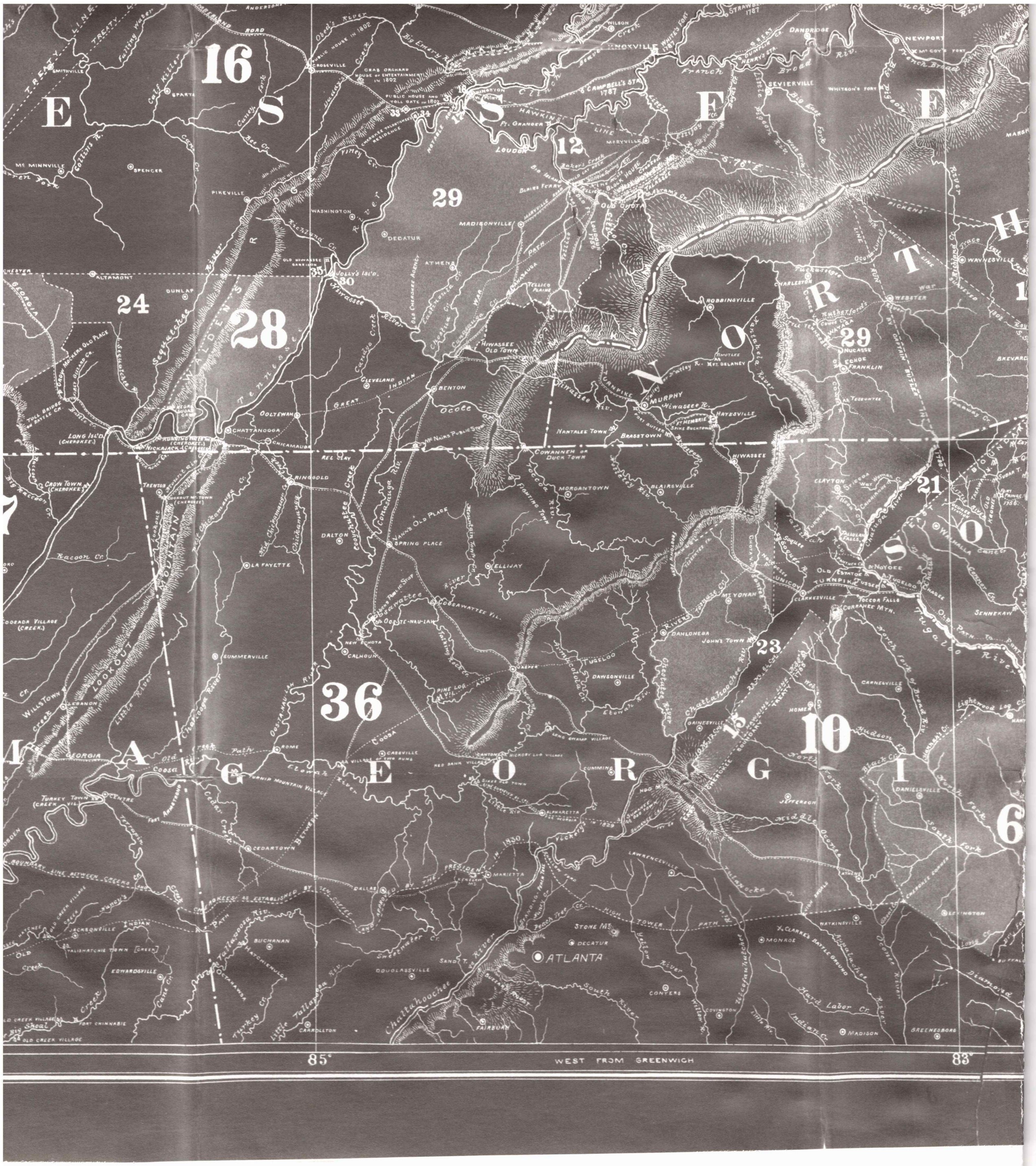
No.	Date and Designation of Treaty.	Description of Cession.	Color.
10a.	" Nov. 28, 1785, " United States.	Tract in Western North Carolina.	Yellow.
10b.	" " " " "	" S. and W. Kentucky and N. Tennessee.	Green.
11.	" July 2, 1791, " "	" W. North Carolina and E. Tennessee.	Brown.
12.	" Oct. 2, 1798, " "	" Tenn., bet. Hawkins Line, Tenn. River, and Chilhowee Mt.	Red.
13.	" " " " "	" N. Ca., between Picken's and Meig's Line.	"
14.	" " " " "	" Tenn., between Clinch Riv. and Cumberland Mt.	"
15.	" Oct. 24, 1804, " "	" Georgia, known as Wafford's Settlement.	"
16.	" Oct. 25, 1805, " "	" Kentucky and Tenn. W. of Tenn. R. and Cumberland Mt.	Yellow.
17.	" Oct. 27, 1805, " "	" Tenn., of one Section, at South West Point.	Green.
18.	" " " " "	First Island in Tenn. River above mouth of Clinch River.	Mauve.
19.	" Jany. 7, 1806, " "	Tract in Tenn. and Ala., between Tennessee and Duck Rivers.	Red.
20.	" " " " "	Long or Great Island, in Holston River.	"
21.	" March 22, 1816, " "	Tract in extreme N. W. corner of South Carolina.	Blue.
22.	" Sept. 14, 1816, " "	" Alabama and Mississippi.	Green.
23.	" July 8, 1817. " "	" N. E. Georgia.	Yellow.
24.	" " " " "	" Southern Tennessee.	Green.
25.	" " " " "	" N. Alabama, between Cypress and Elk Rivers.	Blue.
26.	" " " " "	" " above mouth of Spring Creek on Tenn. R.	"
27.	" Feby. 27, 1819, " "	" " and Southern Tennessee.	Yellow.
28.	" " " " "	" Southern Tennessee, on Tenn. River.	Red.
29.	" " " " "	" Tenn., N. Carolina, and Georgia.	Mauve.
30.	" " " " "	Jolly's Island, in Tennessee River.	Red.
31.	" " " " "	Small tract in Tenn. at and below mouth of Clinch River.	Green.
32.	" " " " "	Tract of 12 m. square on Tenn. River in Alabama.	Mauve.
33.	" " " " "	" 1 square mile in Tenn., at foot of Cumberland Mt.	Green.
34.	" " " " "	" " " at Cherokee Talootiskee's.	"
35.	" " " " "	" 3 " miles " opposite mouth of Hiwassee Riv.	"
36.	" Dec. 29, 1835, " "	" in Ala., Ga., and Tenn.—All lands E. of Miss. River.	Blue.

See Map No. 2 for continuation.





N. Peters. Photo-Lithographer Washington, D.C.



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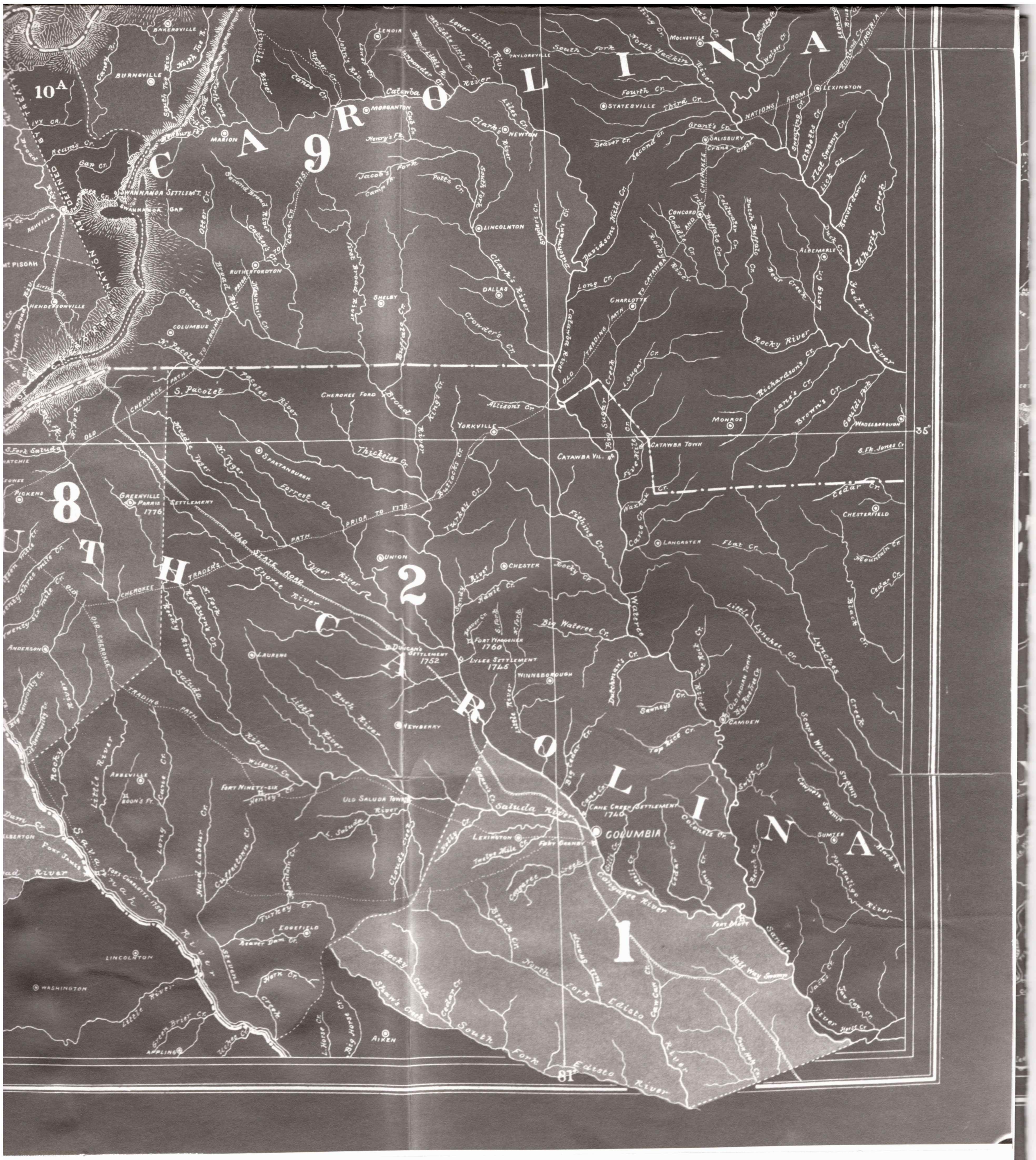
KNOXVILLE
SEVIERVILLE
DANDRIDGE
NEWPORT
MARYVILLE
LOUDON
MADISONVILLE
DECATUR
ATHENS
WASHINGTON
PIKEVILLE
SPENCER
MC MINNVILLE
SPARTA
SMITHVILLE
ALTAMONT
DUNLAP
CHATTANOOGA
CLEVELAND
BENTON
OOLTEWAH
ROBBINSVILLE
MURPHY
HAYESVILLE
BRASSTOWN
HIWASSEE
BLAIRSVILLE
MORGANTOWN
RINGGOLD
TRENTON
LA FAYETTE
DALTON
SPRING PLACE
ELLIJAY
CALHOUN
SUMMERVILLE
ROME
CASSVILLE
CUMMING
DAHLONEGA
GAINESVILLE
JEFFERSON
DANIELSVILLE
CLARKESVILLE
CLAYTON
FRANKLIN
WEBSTER
WAYNESVILLE
BREVARD
CEDARTOWN
MARIETTA
DALLAS
ATLANTA
DECATUR
STONE MT.
CONYERS
MONROE
MADISON
COVINGTON
CARROLLTON
FAIRBURN
BUCHANAN
JACKSONVILLE
EDWARDSVILLE
LOOKOUT
85°
WEST FROM GREENWICH
83°



CAROLINA
CAROLINA
10A
9
8
2
1
BAKERSVILLE
BURNSVILLE
LENOIR
TAYLORSVILLE
MOCKSVILLE
LEXINGTON
STATESVILLE
MORGANTON
MARION
NEWTON
SALISBURY
CONCORD
LINCOLNTON
ALBEMARLE
RUTHERFORDTON
SHELBY
DALLAS
CHARLOTTE
HENDERSONVILLE
COLUMBUS
YORKVILLE
MONROE
WADESBOROUGH
CATAWBA TOWN
SPARTANBURGH
GREENVILLE
PICKENS
CHESTERFIELD
UNION
CHESTER
LANCASTER
ANDERSON
LAURENS
WINNSBOROUGH
NEWBERRY
CAMDEN
ABBEVILLE
FORT NINETY-SIX
COLUMBIA
LEXINGTON
SUMTER
EDGEFIELD
ELBERTON
LINCOLNTON
WASHINGTON
AIKEN
APPLING
Rocky River
Saluda River
Congaree River
South Fork Edisto River
35°
81

IN THE UNITED STATES COURT IN AND FOR
THE EASTERN DISTRICT OF OKLAHOMA

THE CHEROKEE NATION OR TRIBE OF INDIANS IN OKLAHOMA Plaintiff. vs STATE OF OKLAHOMA, ET AL., Defendants.	)	Civil No. 6219

MEMORANDUM BRIEF OF PLAINTIFF

Earl Boyd Pierce
Andrew C. Wilcoxen
Joseph C. Muskrat

Attorneys for Plaintiff

May 1, 1967

IN THE UNITED STATES COURT IN AND FOR
THE EASTERN DISTRICT OF OKLAHOMA

THE CHEROKEE NATION OR TRIBE OF INDIANS IN OKLAHOMA, Plaintiff,	)	
vs	)	Civil No. 6219
STATE OF OKLAHOMA, ET AL., Defendants.	)	

MEMORANDUM BRIEF OF PLAINTIFF

I. STATEMENT

1. Plaintiff, The Cherokee Nation, seeks an accounting of and recovery from the State of Oklahoma, and of and from it's Land Office, all monies collected or otherwise derived from any and all leases purportedly granted by the State, involving the navigable portion of the Arkansas Riverbed in Oklahoma, and other equitable relief. The land, or bed involved, is described in the Complaint, (Paragraph III) and it is alleged that said purported leasing operations were and are unauthorized by law and were accomplished without the knowledge and consent of Plaintiff. Judgment is sought for recovery of all money thus collected and for all appropriate and necessary relief to afford protection of every interest of the Tribe connected with the matter in suit.

2. While the Complaint sets forth that fee title to the land in question, by virtue of Congressional action, (Act of April 26, 1906, Sec. 27, 34 Stat 137) passed to and became vested in the United States of America, in Trust for the Cherokees, it is conceded that,

as a matter of law, notwithstanding the long posture of Trusteeship assumed by the Interior Department, the Court may well recognize the apparent condition precedent contained in said Section 27, and hold that the Cherokee fee title to said property to this day remains vested in the Tribe. The Tribe's ultimate position is, therefore, that fee title to said property is vested either in the Tribe or in the United States in Trust for it.

3. The principal defendants, by their answers filed herein, assert that the Cherokees are not entitled to the relief prayed for, because, they say, since the advent of Statehood of Oklahoma (Proclaimed, November 16, 1907), fee title to said riverbed, along the stretch in question, by reason of it's navigability has been and is now vested in the State of Oklahoma, under and by virtue of the so-called "Doctrine of Equal Footing." Quite properly, these defendants, so far, seem to make no claim that title to said property has been heretofore adjudicated in the State, and thus we should be at liberty to and do point out that the Vickery and Lynch cases, 158 Okl. 120, 12 Pac 2d 881 and 263 p2d, 53, are inapplicable and are not binding on Plaintiff. Moreover, we think it possible to demonstrate herein that because of the total absence of essential operational facts the doctrine of Equal Footing, as originated and applied by the Federal Courts is inapplicable to this case, and that no other ground or basis exists to support the claim of the State. By Treaty and Patent it is alleged Plaintiff acquired it's title to said riverbed, and to this day it's rights therein and thereto have not been extinguished or disposed of, either by Grant, Deed, Congressional action, operation of law, or otherwise.

4. When the Complaint was filed herein, the Cherokees recognized that all defendants, other than the State and it's Agency, could have acted innocently in their respective leasing operations, and, equitably, should only be required to attorn to the Plaintiff thereafter. In this connection, since the filing of the suit counsel state that they have learned that in similar cases, U. S. vs. Hayes, and U. S. vs. Cimmaron Oil Company (both cases, reported in 20 Fed 2d, 873, Cert. denied, 275 U. S. 555), precedent exists for this attitude. There, during the Trials, the Department of Justice appeared, on behalf of the Creeks, to have agreed to a stipulation "that all oil and gas removed from the lands over and above the royalty, rental, and bonus portions thereof should become the property of the lessees, free of any claim of the Creek Nation." It is assumed that the corporate defendants herein were unaware of this precedent. Their forthright, proper and understandable alliance with the State in seeking to prevail herein, is better comprehended, if, as we believe, they had no knowledge of this precedent, and were thus dubious of the legality of the limitations expressed in the Complaint. The known history of their entry into the picture, at the moment the Complaint was drawn, seemed to call for the language and intentions as then and therein set forth.

5. Two Answers, on file, (Mobil and Skelly), appear to deny, specifically, every material allegation of the Complaint. Thus, unless before trial some concessions are made by these two defendants, comporting, at least, with the Answers of all other defendants, considerably more proof may be required of Plaintiff than is otherwise anticipated. We must assume that since some of the defendants are in alliance with the State in defense of this case, that this variant in the respective answers is not unintentional.

6. Counsel understands that presently the Court desires Briefs, not on the facts, but solely upon the law, on two questions: (A) title and (B) navigability of the Arkansas River. The Plaintiff and all defendants, unquestionably, are together in their views on the proposition of navigability, because their interests are the same. Therefore, the Cherokees will be content to adopt the views expressed in defendants Briefs on this question, and will give attention to the title question in the belief that if timely requested by counsel, the Court will permit the filing of such addendum on the navigation question as may appear to counsel to be proper.

II. ARGUMENT

A. HISTORY

Counsel believe the main issue in this case justifies a brief resume of a part of it's historical background. It's nature, at least, seems to be without precedent. Here, the Cherokees, many of whom are citizens of the State, acting as a Governmental entity, have been challenged by the Sovereign State of Oklahoma in respect to the basic question of title and ownership of the Arkansas Riverbed below the confluence of Grand-Neosho River in Oklahoma; the same being a part of it's Tribal Domain granted to it by Treaty and Patent, more than a century and a quarter ago, and upon which every land title within that large area of present Oklahoma is based.

The early case of Cherokee Nation vs. State of Georgia, 30 U.S. 1, (1831) represented a Cherokee effort to restrain Georgia from enforcing her laws within the Territory then and there alleged to belong exclusively to the Cherokees. While the issues in the two situations are indeed dissimilar in historical aspect, certain language

of the Tribunal in the Georgia case would seem to be apt and pertinent to the present situation, (except for the total absence here of fear, passion and cupidity,) as when written in 1831, by Chief Justice Marshall for the Supreme Court of the United States. In the Second Paragraph of the opinion, the great Chief Justice said:

> "If Courts were permitted to indulge their sympathies, a case better calculated to excite them can scarcely be imagined. A people once numerous, powerful, and truly independent, found by our ancestors in the quiet and uncontrolled possession of an ample domain, gradually sinking beneath our superior policy, our arts, and our arms, having yielded their lands by successive treaties, each of which contains a solemn guarantee of the residue, until they retain no more of their formerly extensive territory than is deemed necessary to their comfortable subsistence. To preserve this remnant, the present application is made."

After concluding that the Cherokee Nation was not a State within the meaning of the Federal Constitution, so as to enable the Court to take jurisdiction of the case, the Cherokee request for an injunction against Georgia was properly denied by Chief Justice Marshall, and he added these words:

> "If it be true that the Cherokee Nation have rights, this is not the tribunal in which these rights are to be asserted. If it be true that wrongs have been inflicted, and that still greater are to be apprehended, this is not the tribunal which can redress the past or prevent the future."

As the instant case stands today under Statute and judicial decisions adopted and expounded since Marshall's day this Court is not inhibited by any question of jurisdiction, such as prohibited the requested relief in the Georgia case. Nor for that matter would the Cherokees be fearful now, if it would be proper to do so, to submit to the other Tribunal referred to (the Congress) the rights for the redress of which they humbly seek at the hands of this Court.

But to go on.

History teaches that the "ample domain" in possession of the Cherokees, referred to by the learned Chief Justice, at the time of discovery of America, comprised almost 127,000 square miles, aggregating 79,986,454 acres.[1] Prior to the organization of the United States Government, Governmental powers, which preceded it, beginning in 1721, and ending May 31, 1783, obtained cessions of Cherokee land by ten successive treaties, the most important of which embraced the present State of Kentucky, containing 14,464,000 acres. After the Federal Government was organized and prior to the Act of March 3, 1871, (16 Stat. 566), when Congress ended the treaty making period, the Cherokees were persuaded to execute a total of thirteen successive treaties with the United States, which ceded the balance of all their land east of the Mississippi, the first, dated November 28, 1785, (7 Stat 18) and the last December 29, 1835, (7 Stat. 478).

Today, after being compelled to sell back to the United States 8,144,000 acres, of lands which they had bought from the Government, (the Cherokee Outlet), for $1.29 per acre, and thus enabling the Government to homestead 40,000 of it's citizens on 160 acres each; and submitting to the requirement of alloting it's remaining "allotable" domain to 41,889 of it's own citizens, 110 acres each; unallotable land, presently in suit, lying underneath the waters of the Arkansas, some thirty sections, comprise practically the remainder of the once vast Tribal estate; and one will search in vain the history of America for any substantial evidence showing that except for Tribal disunity, the Cherokees should be blamed for this loss.

[1]Charles C. Royce, The Cherokee Nation of Indians, Fifth Annual Report of Bureau of Ethnology, Smithsonian Institute, Washington, D.C. (1883-1884, Page 378). Also see Maps-Appendix.

The Treaty of 1835, so called, sometimes referred to as the Treaty of Removal, it may be well to mention now, because of it's particular pertinency to this litigation, due to the exigency and necessity of fulfillment of national policy, appears to have been literally forced upon the Cherokees. In no respect was it sought by the Cherokees, nor was it wanted or welcomed by them. By military force, they were compelled to accept it's terms, although the precise cession of lands made to them had previously been granted by solemn Treaty to a separate Band, the Western Cherokees. This Treaty of 1835 has been repeatedly denounced as a grave imposition upon the Cherokees by many historians, (2) and in one instance, at least, by decision of a United States Court. (27 Court of Claims, 1).

In 1891, the Chief Judge of the Court of Claims, Honorable Charles C. Nott, an appointee of President Lincoln, characterized the Treaty of 1835 as being neither the act nor deed of either branch of the Cherokee people. The smaller of the two branches, the so-called Western or Old Settler Cherokees, under the leadership of Oolooteka or John Jolly, by treaty of cession and exchange, dated July 8, 1817, (7 Stat 156) had voluntarily settled upon a tract of land in the present State of Arkansas, consisting of 4,000,000 acres, which had been exchanged and ceded exclusively to them by said treaty for their proportionate share of their own territory, and ancient domain lying east of the Mississippi River. Their numbers approximated 6,000 Sequoyah being one of them. For ten years, they resided in Arkansas, upon their own land, and governed by their own laws.

The great body of the Tribe remaining in the east, (until their forced removal under the terms of the pretended Treaty of 1835),

2Among others: Indian Removal, Dr. Grant Foreman, Univ. Of Okla. Press, 1932, James Mooney, 19th Annual Report, Bureau of Ethuology, Smithsonian Ins. Washington, D.C. 1897 and C. C. Royce, Supra.

comprised approximately 18,000. Their leader was John Ross. Chief Judge Nott, speaking for the Court of Claims, in the above case, Page 20, stated that the Eastern Cherokees, so-called, in 1838, immediately before their removal, had erected and operated their own National Government: "their individual rights and duties were prescribed by printed statutes; they had possessed schools, farms, orchards, and had so far progressed in the arts of civilization as to have established ferries and built turnpike roads and imposed tolls. They likewise had been recognized by the United States as a body politic, capable of entering into the obligation of a treaty-making power."

Apparently no sooner than the Western Cherokees became reconciled and satisfied with their new residency in the Territory of Arkansas, American citizens within that region commenced enroachment upon their property. In early February, 1828, a bare decade after their settlement within their reservation, the evidence in this case will show, that it became necessary for a delegation of Western Cherokees to proceed to Washington for the sole purpose of registering complaints against these encroachments. It will be shown that following extended negotiations in this matter, the Secretary of War of the United States, Honorable James Barbour, in order to satisfy the Government and the needs of it's citizens, prevailed upon the delegation to accept the terms of a treaty dated May 6, 1828, (7 Stat. 311) which brought about the uprooting of this band and their second removal to lands promised them in present Oklahoma, <u>including the riverbed in question</u>, in exchange for their 4,000,000 acres in Arkansas, title to which for ten years previously they had held in fee simple. The said treaty of 1828 in it's preamble reads as follows:

Whereas, it being the anxious desire of the Government

> of the United States to secure to the Cherokee Nation of Indians, as well those now living within the limits of the Territory of Arkansas, as those of their friends and brothers who reside in States East of the Mississippi, and who may wish to join their brothers of the West, a permanent home, and which shall, under the most solemn guarantee of the United States, be, and remain, theirs forever--a home that shall never, in all future time, be embarrassed by having extended around it the lines, or placed over it the jurisdiction of a Territory or State, nor be pressed upon by the extension, in any way, of any of the limits of any existing Territory or State; and, Whereas, the present location of the Cherokees in Arkansas being unfavorable to their present repose, and tending, as the past demonstrates, to their future degradation and misery; and the Cherokees being anxious to avoid such consequences, and yet not questioning their right to their lands in Arkansas, as secured to them by Treaty, and resting also upon the pledges given them by the President of the United States, and the Secretary of War, of March, 1818, and 8th October, 1821, in regard to the outlet to the West, and as may be seen on referring to the records of the War Department, still being anxious to secure a permanent home, and to free themselves, and their posterity, from an embarrassing connexion with the Territory of Arkansas, and guard themselves from such connexions in future; and, Whereas, it being important, not to the Cherokees only, but also to the Choctaws, and in regard also to the question which may be agitated in the future respecting the location of the latter, as well as the former, within the limits of the Territory or State of Arkansas, as the case may be and their removal therefrom; and to avoid the cost which may attend negotiations to rid the Territory or State of Arkansas whenever it may become a State, of either, or both of those Tribes, the parties hereto do hereby conclude the following Articles, viz:"

It is interesting to note that the first Article of this particular treaty defines and establishes the present line which divides the States of Oklahoma and Arkansas. The old western territorial line of Arkansas had it's northern terminus at a point north of the present City of Wagoner where State Highway 33 leaves U. S. Highway 69, immediately south of the Town of Choteau. That line proceeds directly south from this point to Red River. The Cherokee Treaty of 1828 re-established the line in it's present position, and we believe, it rests on no other statutory authority. It will be shown that the

intention of the Government was to provide the Western Cherokees and all other members of the Tribe, who would join them from the East, not only with a comfortable "Home Tract", but, also, with a perpetual outlet or hunting grounds to the West, and as far West as the sovereignity and right of soil of the United States extended.

Such an outlet, in fact, had previously been mentioned or promised to them by General Andrew Jackson as an inducement to their execution of the Treaty of 1817. While a substantial portion of this band were farmers and engaged in agricultural pursuits, a substantial number lived and supplied their families by hunting, as will be noted in the Preamble of the Treaty of 1817, and substantiated by other reliable historical sources.

President Jefferson's promise of January 1809, quoted in the Preamble, and the pertinent Articles effecting the exchange of land and grant to the Western Cherokees in the Treaty of 1817, read as follows:

> President Jefferson:
>
> "The United States, my children, are the friends of both parties, and, as far as can be reasonably asked, they are willing to satisfy the wishes of both. Those who remain may be assured of our patronage, our aid, and good neighborhood. Those who wish to remove, are permitted to send an exploring party to reconnoitre the country on the waters of the Arkansas and White rivers, and the higher up the better, as they will be the longer unapproached by our settlements, which will begin at the mouths of those rivers. The regular districts of the government of St. Louis are already laid off to the St. Francis.
>
> "When this party shall have found a tract of country suiting the emigrants, and not claimed by other Indians, we will arrange with them and you the exchange of that for a just portion of the country they leave, and to a part of which, proportioned to their numbers, they have a right. Every aid towards their removal, and what will be necessary for them there, will then be freely administered to them; and when established in their new settlements, we shall still consider them as our children, give them the benefit of exchanging their peltries for what they will want at our factories, and always hold them firmly by the hand."

Article I: The chiefs, head men, and warriors, of the whole Cherokee nation, cede to the United States all the lands lying north and east of the following boundaries, viz: Beginning

at the high shoals of the Appalachy river, and running thence, along the boundary line between the Creek and Cherokee nations, westwardly to the Chatahouchy river; thence, up the Chatahouchy river, to the mouth of Souque creek; thence, continuing with the general course of the river until it reaches the Indian boundary line, and, should it strike the Turrurar river, thence, with its meanders, down said river to its mouth, in part of the proportion of land in the Cherokee nation east of the Mississippi, to which those now on the Arkansas and those about to remove there are justly entitled.

Article V: The United States bind themselves, in exchange for the lands ceded in the first and second articles hereof, to give to that part of the Cherokee nation on the Arkansas as much land on said river and White river as they have or may hereafter receive from the Cherokee nation east of the Mississippi, acre for acre, as the just proportion due that part of the nation on the Arkansas agreeably to their numbers; which is to commence on the north side of the Arkansas river, at the mouth of Point Remove or Budwell's Old Place; thence, by a straight line, northwardly, to strike Chataunga mountain, or the hill first above Shield's Ferry on White river, running up and between said rivers for complement, the banks of which rivers to be the lines; and to have the above line, from the point of beginning to the point on White river, run and marked, which shall be done soon after the ratification of this treaty; and all citizens of the United States, except Mrs. P. Lovely, who is to remain where she lives during life, removed from within the bounds as above named. And it is further stipulated, that the treaties heretofore between the Cherokee nation and the United States are to continue in full force with both parts of the nation, and both parts thereof entitled to all the immunities and privilege which the old nation enjoyed under the aforesaid treaties; the United States reserving the right of establishing factories, a military post, and roads, within the boundaries above defined."

Because of it's obvious pertinency, we note, particularly, Article 9 of the Treaty of 1817; but, of course, the Treaty conveyed no land in present Oklahoma and only granted to the Cherokees land North of the Arkansas river. Article 9 reads as follows:

> It is also provided by the contracting parties, that nothing in the foregoing articles shall be construed so as to prevent any of the parties so contracting from the free navigation of all the waters mentioned therein.

THE TREATY OF 1828

Among others, the venerable Sequoyah, although without authority to do so, as the proof will show, and seven other leading Western Cherokees, executed this treaty. They had been authorized to seek redress for

intrusions, but not to sell land. The Secretary, alone, represented and signed for the Government.

It will be further shown that after the Western Cherokees removed themselves to present Oklahoma upon the land ceded to them by the treaty of 1828, it was discovered that the lines defining the promised outlet to them were in conflict with a previous grant made to the Creeks. Thus in order to settle the difficulty, Dr. Grant Foreman tells us, the Government authorized and dispatched Gov. Montfort Stokes, Henry L. Ellsworth and John F. Shermerhorn to Fort Gibson to negotiate with the Western Cherokees and Creeks, as commissioners on the part of the United States.

Following extended negotiations with the two Tribes, the proof will show that on February 18, 1833, at Ft. Gibson, the controversy was settled by Treaty stipulations by and between these commissioners and the representatives of the two Tribes or Nations of Indians West of the Mississippi. Pertinent here is Article I of the Treaty made with the Western Cherokees (7 Stat 414) which reads as follows:

> The United States agree to possess the Cheerokees, (sic) and to guarrantee (sic) it to them forever, and that guarrantee, is hereby pledged, of seven millions of acres of land, to be bounded as follows viz: Beginning at a point on the old western territorial line of Arkansas Territory, being twenty-five miles north from the point, where the Territorial line crosses Arkansas river--thence running from said north point, south, on the said Territorial line, to the place where said Territorial line crosses the Verdigris river--thence down said Verdigris river, to the Arkansas river-thence down said Arkansas to a point, where a stone is placed opposite to the east or lower bank of Grand river at its junction with the Arkansas--thence running south, forty-four degrees west, one mile--thence in a straight line to a point four miles northerly from the mouth of the north fork of the Canadian--thence along the said four miles line to the Canadian--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; and running thence with the western line of Arkansas Territory as now defined, to the southwest corner of Missouri--thence along the western Missouri line, to the land assigned the Senecas;

> thence, on the south line of the Senecas to Grand river; thence, up said Grand river, as far as the south line of the Osage reservation, extended if necessary--thence up and between said south Osage line, extended west if necessary and a line drawn due west, from the point of beginning, to a certain distance west, at which, a line running north and south, from said Osage line, to said due west line, will make seven millions of acres within the whole described boundaries. In addition to the seven millions of acres of land, thus provided for, and bounded, the United States, further guarrantee to the Cheerokee natin, a perpetual outlet west and a free and unmolested use of all the country lying west, of the western boundary of said seven millions of acres, as far west as the sovereignty of the United States and their right of soil extend--Provided however, that if the saline, or salt plain, on the great western prairie, shall fall within said limits prescribed for said outlet, the right is reserved to the United States to permit other tribes of red men, to get salt on said plain in common with the Cheerokees--and letters patent shall be issued by the United States as soon as practicable for the land hereby guarranteed. (underscoring ours)

The Court will note that in drafting the above Article the Commissioners were particular in defining the boundary of the Cherokee lands in the region along the Arkansas River below the mouth of the Canadian River; the language reads: "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; * * ".

The Government seems to have made no requirement whatever of the Cherokees in either treaty (1828 or 1833) to yield to it any privilege of any nature in respect to the use of the Arkansas River in present Oklahoma. This fact could be of interest to the Court and to opposing counsel, because here the United States was again disposing of it's own property, a part of the territory of the United States which it had acquired by purchase from France. The Government, particularly, was aware not only of the navigability of said river at

the precise time when the two treaties were made. In fact, the proof will be that Colonel Arbuckle made considerable use of the river in 1824, in the establishment of Fort Gibson. The awareness of the United States of the importance of carefully defining the rights which it expected to exercise in the future, is made plain by the terms of two previous treaties with the Cherokees, that of July 2, 1791, (7 Stat 39) commonly referred to as the Treaty of Holston, and the above Treaty of 1817. Article 5 of the 1791 treaty reads as follows:

> "It is stipulated and agreed, that the citizens and inhabitants of the United States, shall have a free and unmolested use of a road from Washington District to Mero District, and of the navigation of the Tennessee River."

Royce tells us (p 378) that by this treaty in addition to the right of navigation of the Tennesee River, the Cherokees ceded to the Government 2,600,000 acres of land, a very substantial portion of their ancient tribal domain. Notwithstanding this, it thus appears that in addition to the grant of land thus made, the United States deemed it of some importance that her citizens and inhabitants should thereafter, (as later in 1817, in respect to the Arkansas downstream from the present Ft. Smith to Russelville,) exercise the free right to navigate the Tennesee River as it flowed through the balance of the Cherokee domain.

In the pointing out of these significant facts counsel do not wish to be understood as saying that they do not recognize the paramount power and right of the United States Government lawfully to improve the Arkansas River for navigation. We do say, however, that in granting it's lands in fee simple to the Cherokees, for which valuable considera--

tion was given therefor, the United States simply did not reserve unto itself any right to navigate the waters of the Arkansas River within the boundaries of the grant, as thereafter (1836-37) surveyed by the Government itself; nor did the Government by express language or by words of fair implication make any pretention to hold in trust, fee title to the bed of the navigable portion of said stream for the use and benefit of any future state.

It will be shown that even the terms of the forced Treaty of 1835, mentioned above, a treaty which pretendedly conveyed to the Eastern Cherokees the same tract of land which had been previously granted to the Western Cherokees, the Government failed to indicate any intention or desire whatever for either it or it's citizens, subsequent to the date of the Treaty, to freely exercise the right of navigation upon the waters of the Arkansas River, within the grant, or to withhold title of the bed in trust for the benefit of a future state.

Moreover, as promised by Treaty, the United States carried out it's obligation to establish the boundaries of the Cherokee grant by an official survey which was made under the direction and orders of the General Land Office of the United States. The surveyor, as the proof will show, was Rev. Isaac McCoy, a citizen who was completely trusted by both parties. This surveyor's field notes of the Cherokee tract, of which the land in suit is a part, and which are presently on file in the Archives of the Government, were accepted and faithfully used by responsible Government officials who supervised and actually drafted the United States Patent which, pursuant to Treaty, will evidence the conveyance to the Cherokees of their Oklahoma lands.

It will thus be in evidence, in this case, that for valuable considerations, and under and by virtue of valid Congressional Act and Constitutional authority, the United States Government conveyed unto the Cherokee Nation all of their lands in Oklahoma, including the bed in question, and by the instruments mentioned vested in said Cherokees fee simple title thereto.

The Treaty of December 29, 1835, contains the following articles, pertinently expressive of the will and purpose of the United States:

Article I: The Cherokee Nation hereby cede relinquish and convey to the United States all the lands owned claimed or possessed by them east of the Mississippi river, and hereby release all their claims upon the United States for spoliations of every kind for and in consideration of the sum of five millions of dollars to be expended paid and invested in the manner stipulated and agreed upon in the following articles.* * *

Article II: Whereas by the treaty of May 6th, 1828, and the supplementary treaty thereto of Feb. 14th 1833 with the Cherokees west of the Mississippi the United States guarantied and secured to be conveyed by patent, to the Cherokee nation of Indians the following tract of country "Beginning at a point on the old western territorial line of Arkansas Territory being twenty-five miles north from the point where the territorial line crosses Arkansas river, thence running from said north point south on the said territorial line where the said territorial line crosses Verdigris river; thence down said Verdigris river to the Arkansas river; thence down said Arkansas to a point where a stone is placed opposite the east or lower bank of Grand river at its junction with the Arkansas; thence running south forty-four degrees west one mile thence in a straight line to a pint four miles northerly, from the mouth of the north fork of the Canadian; thence along the said four mile line to the Canadian; 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 and running thence with the Western line of Arkansas Territory as now defined, to the south-west corner of Missouri; thence along the western Missouri line to the land assigned the Senecas; thence on the south line of the Senecas to Grand river; thence up said Grand river as far as the south line of the Osage reservation, extended if necessary; thence up and

between said south Osage line extended west if necessary, and a line drawn due west from the point of beginning to a certain distance west, at which a line running north and south from said Osage line to said due west line will make seven millions of acres within the whole described boundaries. In addition to the seven millions of acres of land thus provided for and bounded, the United States further guaranty to the Cherokee nation a perpetual outlet west, and a free and unmolested use of all the country west of the western boundary of said seven millions of acres, as far west as the sovereignty of the United States and their right of soil extend:

Provided however That if the saline or salt plain on the western prairie shall fall within said limits prescribed for said outlet, the right is reserved to the United States to permit other tribes of red men to get salt on said plain in common with the Cherokees; and letters patent shall be issued by the United States as soon as practicable for the land hereby guarantied."

And Whereas it is apprehended by the Cherokees that in the above cession there is not contained a sufficient quantity of land for the accommodation of the whole nation on their removal west of the Mississippi the United States in consideration of the sum of five hundred thousand dollars therefore hereby conveant and agree to convey to the said Indians, and their descendants by patent, in fee simple the following additional tract of land situated between the west line of the State of Missouri and the Osage reservation beginning at the southeast corner of the same and runs north along the east line of the Osage lands fifty miles to the northeast corner thereof; and thence east to the west line of the State of Missouri; thence with said line south fifty miles; thence west to the place of beginning; estimated to contain eight hundred thousand acres of land; but it is expressly understood that if any of the lands assigned the Quapaws shall fall within the aforesaid bounds the same shall be reserved and excepted out of the lands above granted anda pro rata reduction shall be made in the price to be allowed to the United States for the same by the Cherokees.

Article III: The United States also agree that the lands above ceded by the treaty of Feb. 14 1833, including the outlet, and those ceded by this treaty shall all be included in one patent executed to the Cherokee nation of Indians by the President of the United States according to the provisions of the act of May 28, 1830. It is, however, agreed that the military reservation at Fort Gibson shall be held by the United States. But should the United States abandon said post and have no further use for the same it shall revert to the Cherokee nation. The United States shall always have the right to make and establish such post and military roads and forts in any part of the Cherokee country, as they may deem

proper for the interest and protection of the same and the free use of as much land, timber, fuel and materials of all kinds for the construction and support of the same as may be necessary; provided that if the private rights of individuals are interfered with, a just compensation therefor shall be made.

Article V: The United States hereby covenant and agree that the lands ceded to the Cherokee nation in the forgoing article shall, in no future time without their consent, be included within the territorial limits or jurisdiction of any State or Territory. But they shall secure to the Cherokee nation the right by their national councils to make and carry into effect all such laws as they may deem necessary for the Government and protection of the persons and property within their own country belonging to their people or such persons as have connected themselves with them: provided always that they shall not be inconsistent with the constitution of the United States and such acts of Congress as have been or may be passed regulating trade and intercourse with the Indians; and also, that they shall not be considered as extending to such citizens and army of the United States as may travel or reside in the Indian country by permission according to the laws and regulations established by the Government of the same.

Article VI: Perpetual peace and friendship shall exist between the citizens of the United States and the Cherokee Indians. The United States agree to protect the Cherokee nation from domestic strife and foreign enemies and against intestine wars between the several tribes. The Cherokees shall endeavor to preserve and maintain the peace of the country and not make war upon their neighbors they shall also be protected against interruption and intrusion from citizens of the United States, who may attempt to settle in the country without their consent; and all such persons shall be removed from the same by order of the President of the United States. But this is not intended to prevent the residence among them of useful farmers mechanics and teachers for the instruction of Indians according to treaty stipulations.

Article VII: The Cherokee nation having already made great progress in civilization and deeming it important that every proper and laudable inducement should be offered to their people to improve their condition as well as to guard and secure in the most effectual manner the rights guarantied to them in this treaty, and with a view to illustrate the liberal and enlarged policy of the Government of the United States towards the Indians in their removal beyond the territorial limits of the States, it is stipulated that they shall be entitled to a delegate in the House of Representatives of the United

States whenever Congress shall make provision for the same.

Article XIV: It is also agreed on the part of the United States that such warriors of the Cherokee nation as were engaged on the side of the United States in the late war with Great Britain and the southern tribes of Indians, and who were wounded in such service shall be entitled to such pensions as shall be allowed them by the Congress of the United States to commence from the period of their disability.

Article XVI: It is hereby stipulated and agreed by the Cherokees that they shall remove to their new homes within two years from the ratification of this treaty and that during such time the United States shall protect and defend them in their possessions and property and free use and occupation of the same and such persons as have been dispossessed of their improvements and houses; and for which no grant has actually issued previously to the enactment of the law of the State of Georgia, of December 1835 to regulate Indian occupancy shall be again put in possession and placed in the same situation and condition, in reference to the laws of the State of Georgia, as the Indians that have not been dispossessed; and if this is not done, and the people are left unprotected, then the United States shall pay the several Cherokees for their losses and damages sustained by them in consequence thereof. And it is also stipulated and agreed that the public buildings and improvements on which they are situated at New Echota for which no grant has been actually made previous to the passage of the above recited act if not occupied by the Cherokee people shall be reserved for the public and free use of the United States and the Cherokee Indians for the purpose of settling and closing all the Indian business arising under this treaty between the commissioners of claims and the Indians.

The United States, and the several States interested in the Cherokee lands, shall immediately proceed to survey the lands ceded by this treaty; but it is expressly agreed and understood between the parties that the agency buildings and that tract of land surveyed and laid off for the use of Colonel R. J. Meigs Indian agent or heretofore enjoyed and occupied by his successors in office shall continue subject to the use and occupancy of the United States, or such agent as may be engaged specifically superintending the removal of the tribe.

Article XVII: Whereas in consequence of the unsettled affairs of the Cherokee people and the early frosts, their crops are insufficient to support their families and a great distress is likely to ensue and whereas the nation will not, until after their removal be able advantageously to

expend the income of the permanent funds of the nation it is therefore agreed that the annuities of the nation which may accrue under this treaty for two years, the time fixed for their removal shall be expended in provision and clothing for the benefit of the poorer class of the nation; and the United States hereby agree to advance the same for that purpose as soon after the ratification of this treaty as an appropriation for the same shall be made. It is however not intended in this article to interfere with that part of the annuities due the Cherokees west by the treaty of 1819.

Article XIX: This treaty after the same shall be ratified by the President and Senate of the United States shall be obligatory on the contracting parties.

It will be evidenced in this case that because of the peculiar methods employed by the United States in effecting the Treaty of 1835 and the consequent disaster which befell the Cherokees as a result thereof, and especially of the alleged duplication of successive grants made of the same land, an extremely critical conflict arose between the two divisions of the Cherokee people. The controversy ensued for several years and was finally partially resolved by the Treaty of August 6, 1846, in Washington, (9 Stat 871) by which the Government strove to compose the differences. Article I of this treaty reads as follows:

"That the lands now occupied by the Cherokee Nation shall be secured to the whole Cherokee people for their common use and benefit; and a patent shall be issued for the same, including the eight hundred thousand acres purchased, together with the outlet west, promised by the United States, in conformity with the provisions relating thereto, contained in the third article of the treaty of 1835, and in the third section of the act of Congress, approved May twenty-eighth, 1830, which authorizes the President of the United States, in making exchanges of lands with the Indian tribes, "to assure the tribe or nation with which the exchange is made,

> that the United States will forever secure and guarantee to them, and their heirs or successors, the country so exchanged with them; and if they prefer it, that the United States will cause a patent or grant to be made and executed to them for the same: Provided, always, That such lands shall revert to the United States if the Indians become extinct or abandon the same."

Again, it will be noted that although the United States had the opportunity to do so it obtained no concessions from the Cherokees under this treaty respecting the use of the Arkansas River. While the differences within the Tribe were virtually composed by this Treaty of 1846, as exemplified by the fact that following it's execution the Cherokees prospered and made notable and steady advance in all aspects of civilization until the outbreak of the Civil War. This sanguine conflict, as the proof will show, almost brought about the complete destruction of the Cherokee people, although they had no agency whatever in it's commencement. History teaches and the proof will show that two-fifths of the Cherokees joined the Confederates and three-fifths remained loyal to the Union. The war ended with the nation totally devastated and every family reduced to abject poverty.

But again, they were required to submit to the dictation of a new treaty, that of July 19, 1866, (14 Stat. 799). Litigation, presently pending in the Indian Claims Commission, arose directly out of this last treaty. But pertinent and important here, is the fact that the Treaty of 1866 by it's terms attempted to erect a territorial Government out of a part of the tribal domain remaining to it, the Home Tract, free of any claim of the Government.

It will be in evidence that an effort was made to organize such a territorial Government as contemplated by the above Treaty. Failing in this effort the United States, in 1893, established and

authorized a Commission, afterwards known as the Dawes Commission, to appraoch the Cherokees and her sister tribes (collectively called the Five Civilized Tribes) with a view of extinguishing their Tribal ownership of title to their lands, and effecting their distribution to the members of the respective Tribes by allotments in severalty. It will be in evidence that the initial effort to make this arrangement was not fruitful, and that Congress took over and deliberately directed the Dawes Commission to survey the lands, prepare the Tribal rolls, and allot the remaining allotable lands in severalty to the enrolled citizens of the respective Tribes. (Stephens v Cherokee Nation, 174 U.S. 445 and Cherokee Nation v Hitchcock, 187 U.S. 294).

When Congress directed the rolls to close on March 4, 1907, the allotment process was practically finished in congressionally directed administrative detail. This was before Statehood, which was not, in fact, proclaimed until November 16, 1907. On this date there still remained not only substantial acreage within the Cherokee domain, described and referred to as "unallotted lands", title to which, unquestionably, belonged to the Tribe; but also there remained the unallotable bed of the navigable portion of the Arkansas River, the subject of this suit, and it too, along with the unallotted lands, were a portion of the Tribal domain acquired by the Cherokees from the United States as herein above related. It would seem, that this land, so long held by the Tribe in fee, except for the claim of the State, without question, constitutes Cherokee Tribal property, and unless and until the Tribe lawfully disposes of it, or Congress itself, takes the title from the Tribe, and gives it to others, it still belongs to the Cherokees.

B. TITLE

Discussion of the nature and quality of the vested Cherokee title in and to the lands in present Oklahoma, which includes the subject riverbed, immediately brings in perspective the historical status of the Tribe and it's legal relationship to the Government of the United States. Unlike the State of Oklahoma, the Cherokee Nation is not a creature of the Federal Government. While older than the Government, the Cherokee Nation is subordinate to it, and is only capable of operating under it's sanction.

Hence, the Cherokee Nation, as an organized Tribe of American Indians was authorized to institute proceedings of this character under the provisions of Section 18, Paragraph 2 of the Act of April 26, 1906, supra. 318 U.S. 629-640. Indeed, by reason of it's unique status, although many times sorely aggrieved, it was never able to appeal to the Courts and vindicate it's title even against the United States to it's patented lands, until Congress enacted in 1946, the Indian Claims Commission Act, Title 25 U.S.C. Sec. 70, et seq. See the Western (Old Settler) Cherokee Case 124 Ct. Cl. 127, 109 F. Supp. 238.

Following the organization of the Federal Government, under the Articles of Confederation, the United States, apprehensive of Cherokee alliance with Foreign Powers, took immediate action to protect itself and to fix and establish a fiduciary relationship between Plaintiff and the Federal Government. (See Worcester vs. Georgia, 6 Peters 515-1832). The initial Treaty with Plaintiff announcing this relationship was executed on November 28, 1785, (7 Stat 18), and provided in part as follows:

> "The said Indians for themselves and their respective tribes and towns do acknowledge all the Cherokees to be under the protection of the United States of America, and of no other sovereign whosoever."

After the reorganization of the Federal Government under the Constitution, the United States reaffirmed this relationship by the Treaty of Holston of July 2, 1791 (7 Stat 39). Article 2 of this Treaty provided in part that:

> "The undersigned Chiefs and Warriors, for themselves and all parts of the Cherokee nation, do acknowledge themselves and the said Cherokee Nation to be under the protection of the United States of America; and of no other sovereign whosoever; * *"

Under and by virtue of the above Treaty provisions, and under Article I, Section 8of the Constitution of the United States the Cherokee Nation became a dependent Indian Nation under protection and control of the United States (Cherokee Nation vs. Georgia, supra, 17-20; Choctaw Nation vs. U. S., 119 U.S. 1, 28; United States vs. Creek Nation 295 U.S. 103, 109-110; Seminole Nation vs. U. S., 316 U.S. 286, 296-297.) This relationship has endured until this day. See Section 28, Act of April 26, 1906, supra, and Title 25, Sec. 82A U.S.C.A.. Also, the Cherokee Distribution Act of 1962-Title 25 U.S.C.A. su. 991-998, where Congress empowered the Principal Chief, with approval of the Secretary of Interior to expend reverted Tribal funds for "any purpose". In view of this acknowledged status of wardship, the Court and Counsel may wonder about the absence of the Guardian in this proceeding. The Department's letter of 1908 to the Muskogee Superintendent printed in State vs. Nolegs, 40 Okla. 479, 139 P. 943, attempting to surrender to the State the riverbed in question, although troublesome, is impotent to pass the Cherokee title. Only Congress or the Tribe with it's consent, can do this, and if done solely by Congress, it is settled-law, the United States would be

liable. So the silence of the Guardian may be attributed to a belief in the ultimate existence of conflict of interest.

Under the terms of the several treaties referred to hereinabove, particularly the treaties dated May 6, 1828, February 14, 1833, and December 29, 1835, and the Act of May 28, 1830 (4 Stat 411), Plaintiff was caused to exchange it's aboriginal domain for a domain west of the Mississippi river, located in what was then known as Indian Territory, now constituting a part of the State of Oklahoma, including the lands in question; and the United States agreed to issue it's Patent to the Cherokee Nation, guaranteeing to it "forever" for the express purposes, as set forth and proclaimed in the preamble to the Treaty of May 6, 1828, supra, and reiterated in the Treaty of 1835, the land thereafter described in the Cherokee Patent. Federal interests of the gravest importance impelled the United States to carry out it's object, the removal of the Tribe, and thus avoid a collision with the people and State of Georgia. See 27 Ct. Cl. 1. (Appendix 1)

Paragraph 4 of the Complaint herein correctly sets forth the description of all the property thus transferred and conveyed to Plaintiff, including, of course, the land in question, as it appears in the Patent issued to Plaintiff, under date of December 31, 1838. This Patent, drafted faithfully from the official field notes of the United States Surveyor by responsible Federal Officials, covering <u>two separate Tracts</u>, one in the present State of Kansas of 800,000 acres, and the other in present Oklahoma aggregating 13,574,135.14 acres, or a total of 14,374,135.14 acres, in addition to what has been said hereinabove, has the following pertinent history. The Court will note that by the instructions quoted below, the Commissioner with commendable care pinned down the record showing the Government's intent

to place the boundary question beyond conjecture. The Cherokee survey, by "course and distance", we believe, is solitary and alone among the separate grants made to the Five Civilized Tribes. The surveyor's instructions and his subsequent report follows:

WAR DEPARTMENT, OFFICE INDIAN AFFAIRS
July 5, 1836

Rev. Isaac McCoy,
Now in Washington

Sir:

"By treaty of New Echota, of December 29, 1835, it is stipulated that the lands ceded to the Cherokees west of the Mississippi shall be secured to them by patent; and it appearing that the surveys of these lands have not been so far executed as to enable the Government to issue a patent, you are hereby appointed and instructed to cause the surveys of the said lands to be completed, and to supply every deficiency connected with the subject at this time, to prevent the issuing of a patent.

For information respecting the boundaries required, you are referred to the treaty itself. You will be careful to see that the requirement of that instrument, in relation to boundaries, are fully met. * * * *

It is expected that you will furnish the Department with field notes and plats of all the surveys that you shall cause to be made, and also with a duplicate plat of the whole tract provided by the treaty (one being for the use of the Cherokees), or duplicates of each, should their lands necessarily form two tracts.

Accompanying your plat of the whole you will furnish a statement of the course and distance of each line and the character of the object that terminates it; the names of the water courses, so far as they form boundaries, and the number of acres contained in the whole tract, if the land be included in one, or of each tract if it be in two. * * *

The appropriation for this business is $7,000.00, and this amount will in no event be exceeded. Your own compensation will be at the rate of $8 per day, to include your expenses for the time actually employed, to be paid on your certificate of honor. Your accounts will be accompanied by the requisite vouchers, according to the regulations of the Department.

You are authorized to draw on this Department for such

sums as may be necessary to enable you to fulfill these instructions."

Very respectfully,

C. A. HARRIS,
(Commissioner of Indian Affairs)

Senate Executive Document, 120-25th Congress, second session, Page 144.

Westport, Jackson County, Mo.,
September 20, 1837

Hon. C. A. Harris,
Commissioner of Indian Affairs,

Sir:

"By your instructions of July 5, 1836, I was required to cause the surveys of the Cherokee lands to be completed and to supply every deficiency connected with the subject which at that time prevented the issuing of the patent.

The surveys have been completed, the field notes of which are herewith respectfully submitted, together with duplicate plats of each tract of Cherokee land, also a summary description of the boundaries, and the quantity of acres embraced therein.

The surveys being made agreeably to the requisition of the treaty necessarily divides the Cherokee lands into two distinct tracts, the northeast corner of the one approaching the southwest corner of the other, within a distance of 30 chains. This intervening tract is a slip of unappropriated land lying north of the Quapaws, 1 mile 45 chains and 50 links wide, and extending from the Neosho River, the place where the two Cherokee tracts appraoch each other, east 25 miles 36 chains and 56 links, to the western boundary of Missouri * * *.

The second article of the Cherokee treaty provides that if the salt plain at which the Indians of the various tribes procure salt "should fall within the Cherokee lands, the right should be reserved to the United States to permit other tribes of red men to get salt on said plain in common with the Cherokees.

It appears there are two noted places at which the Indians, from time immemorial, have collected salt. One is on the Cherokee lands. (Italics). It is a plain on which salt is formed by solar evaporation, situated on the salt fork of Arkansas River, about 15 or 29 miles south of their northern boundary and about 220 miles west of the State of Missouri. * * *

Notwithstanding the Cherokee lands are divided into two separate tracts, the second article of the treaty requires both to be included in the same patent. * * *

Sir, I have the honor to be,with great respect, your obedient servant,"

ISAAC McCOY"

Ibid. 950, 951, 952.

Counsel believe that the Cherokee title picture, regarding the Tribe's holdings in Indian Territory, as herein submitted, as of the moment before the commencement of allotment in severalty,(respecting it's history, nature, quality, extent and ownership,) is amply sufficient to sustain Plaintiff's allegations. That the acreage, promised and conveyed by Treaty and confirmed by Patent, is the "official acreage", recognized by the grantor, is evidenced by the following letter:

UNITED STATES DEPARTMENT OF
THE INTERIOR
BUREAU OF LAND MANAGEMENT
WASHINGTON 25, D. C.
March 2, 1967

Hon. Fred R. Harris
United States Senate
Washington, D. C. 20510

Dear Senator Harris:

"A letter to you from Mr. Earl Boyd Pierce, General Counsel, Cherokee Nation, dated January 5, has been forwarded to this Bureau by the Bureau of Indian Affairs for an appropriate reply.

A search of the Archives and the records of this Bureau has failed to uncover any information that would explain the difference in acreage between that given in the Cherokee Nation Patent, dated December 31, 1838, and that shown in the letter from the Commissioner, General Land Office, to Senator James Harlan, United States Senate, dated March 1, 1869.

It is assumed that, for the purposes of this particular letter, the Commissioner chose to round off the area to the nearest acre. Since he was totaling two areas, estimated to the nearest acre, he apparently considered

it incongruous to try and show a total area to hundredths of an acre.

The official acreage is the area shown on the plat and quoted in the patent, regardless of what other acreage figure may appear in miscellaneous correspondence pertaining to this case.

Your enclosures are returned as requested."

Sincerely yours,

JOHN O. CROW
ASSOCIATE DIRECTOR"

Enclosure

Opposing counsel are not likely to dispute that the area of the riverbed in question, as well as the beds of all streams within the Cherokee patented area, were included in the computation of the total acreage granted; and, as surveyed and bounded, the Oklahoma tract contained 13,574,135.14 acres, and that the thirty sections, more or less, reputedly embraced in the stretch of the riverbed in suit, was intended to be and, was in fact, included in the surveyor's computation, upon which, pursuant to Treaty, the Cherokee Patent was based; and, that considered otherwise, a land shortage would exist to the extent of, at least, thirty sections, or 19,200 acres.

THE CHOCTAW CLAIM

Since any consideration of the title question of the riverbed in question brings to focus the claim of the Choctaw Nation, counsel believe it proper to first deal with an item which appears of some importance to the relative claims of the two Tribes, under the assumption that the Choctaws will come in as co-plaintiff and join the Cherokees in the main effort and, if successful, then submit to the Court for decision, any Tribal conflict of ownership of the riverbed.

As stated, the field notes of Rev. Isaac McCoy, were employed in drafting the Cherokee Patent, and the Court will note the official care and effort to avoid a "vacancy" on the ground, of unsurveyed land, by an examination of the Patent Calls from the mouth of the Canadian river (complaint, pages 4 and 5), which reads:

> " * *; thence down the Canadian river, on it's North bank to it's junction with Arkansas river; thence down the main channel of Arkansas river to the western boundary of the State of Arkansas, at the Northern extremity of the eastern boundary of the Choctaws, on the south bank of the Arkansas river, four chains and fifty-four links, East of Ft. Smith."

The Cherokee Patent, which evidences and confirms the Treaty grant is thus very specific, and unlike the Choctaw's contains no indefinite words or directions. We think these differences are significant.

OKLAHOMA'S CLAIM

Oklahoma, by waiving immunity and filing it's answer herein, has done the commendable thing and assumed the only possible position which the circumstances would seem to permit.

The State, by answer, claims title to the riverbed "by operation of law", under the so-called doctrine of "Equal Footing", a well established rule of real property in English and American law. But, as held by the Supreme Court of the United States, this "rule" is and understandably should be limited by important exceptions, one of which would seem to militate against Oklahoma and justify full recovery for Plaintiff in this case.

The leading case, Shively vs. Bowlby, 152 U.S., 1, cites practically every opinion, existing at that date, (1894) on the question of the

origin and application of the "doctrine" of Equal Footing. This monumental opinion was written by Mr. Justice Horace Gray. It is exhaustive of the entire subject. Pertinent here, is the Court's discussion and analysis of the power of Congress to grant the bed of a navigable stream. At Pages 565-566 of this opinion as reported in Volume 14, Supreme Court Reporter, the learned Justice said:

> "Notwithstanding the dicta contained in some of the opinions of this court, already quoted, to the effect that Congress has no power to grant any land below high-water mark of navigable waters in a territory of the United States, it is evident that this is not strictly true.
>
> Chief Justice Taney, in delivering the opinion already cited, after the subject had been much considered in the cases from Alabama, said: "Undoubtedly, congress might have granted this land to the patentee, or confirmed his Spanish grant, before Alabama became a state. Goodtitle v. Kibbe, 9 How. 471, 478. In the cases from California, already referred to, the question whether a Mexican grant, confirmed by the United States, did or did not include any lands below high-water mark, was treated as depending on the terms of the decree of confirmation by a court of the United States under authority of congress. By the application of that test, no such lands were held to be included, in U. S. v. Pacheco, 2 Wall. 587; and some such lands were held to be included, in Knight v. Association, 142 U. S. 161, 12 Sup. Ct. 258. And in Packer v. Bird, 137 U. S. 661, 672, 11 Sup. Ct. 210, Mr. Justice Field, speaking for the court, after referring to the rule, as stated in Railroad Co. v. Schurmeir, 7 Wall. 272, 288, above quoted, that congress, by the provisions of the land laws, intended that the title to lands bordering on navigable streams should stop at the stream, said: "The same rule applies when the survey is made and the patent is issued upon a confirmation of a previously existing right or equity of the patentee to the lands, which, in the absence of such right or equity, would belong absolutely to the United States, unless the claim confirmed, in terms, embraces the land under the waters of the stream."
>
> By the constitution, as is now well settled, the United States, having rightfully acquired the territories, and being the only government which can impose laws upon them, have the entire dominion and sovereignty, national and municipal, federal and state, over all the territories, so long as they remain in a territorial condition.

Insurance Co. v. Canter, 1 Pet. 511, 542; Benner v. Porter, 9 How. 235, 242; Cross v. Harrison, 16 How. 164, 193; National Bank v. Yankton co., 101 U.S. 129, 133; Murphy v. Ramsey, 114 U. S. 15, 44, 5 Sup. Ct. 747; Late Corporation, etc., of Latter-Day Saints v. U. S., 136 U. S. 1, 42, 43, 10 Sup. Ct. 792; McAllister v. U. S., 141 U. S. 174, 181, 11 Sup. Ct. 949.

We cannot doubt, therefore, that congress has the power to make grants of lands below high-water mark of navigable waters in any territory of the United States, whenever it becomes necessary to do so in order to perform international obligations, or to effect the improvement of such lands for the promotion and convenience of commerce with foreign nations and among the several states, or to carry out other public purposes appropriate to the objects for which the United States hold the territory.

9. But congress has never undertaken, by general laws, to dispose of such lands, and the reasons are not far to seek."

The Court, in the instant proceeding, will observe that the Supreme Court, after setting forth exceptions to the "Rule" merely suggested that "Congress has never undertaken, by General Laws, to dispose" of beds of navigable streams. All arrangements, which in some cases were extremely delicate, with American Indian Nations and Tribes, although commonly referred to, denoted and called Treaties and Agreements, are indeed, special statutes of the United States, (as an example, see Gritts vs. Fisher, 224 U.S. 640) which in no instance could hardly be considered statute law of general application. It is this very special method of dealing with the Indian Nations and Tribes, a method as old as the Government itself, (Const. Article I, Section 8, and Title 25 U.S.C.A., Section 177) which has enabled the Government to control exclusively the administration of Indian Affairs.

Doubtless, the Supreme Court's sure and special knowledge of the operations of the Government in Indian Affairs, and, so far as may

be known, the Cherokee situation, particularly, which, in part, had been clearly delineated in 1891, by Judge Nott in 27 Court of Claims, just three years before Mr. Justice Gray spelled out the above suggestions to the "Rule", could have caused the Court to add the final clause which concedes that Congress had the right and power under the Constitution to grant to others, and, we say, to an Indian Nation or Tribe, the bed of a navigable stream, by Treaty and Patent if the arrangement is made in order to carry out a public purpose "appropriate to the objects for which the United States" held the territory. The instant Treaties and Patent actually consummated a very important part of the Great Object of the Government: The removal of the Five Civilized Tribes. This was accomplished after the Act of May 28, 1830, 4 Stat 411, which declared the national purpose and authorized the President to effect it.

Apparently, counsel for plaintiff are not the first to urge that grants made to American Indian Nations and Tribes, by Treaty and Patent, are protected by the exception announced in Shively. The Court knows that the Government, as it is presently doing in the instant case, stood silent and completely aloof from the proceedings in the Nolegs case, 40 Oklahoma 479, 139 p. 943. There, the State and the lessees prevailed. Immediately thereafter, the United States, as Guardian or Trustee, launched the so-called Brewer-Elliott litigation to quiet title to the same land (the Arkansas riverbed above Tulsa) and to recover the money derived from State leases of the property.

After stating the history of the litigation and carefully outlining the issues in the case on appeal, the venerable Judge Sanborn, Circuit Judge, in affirming the case, gives us the clearest conception

of the correct application of Shively to riverbed grants to Indian Nations or Tribes. Upon the record, the Trial Court below had held the Arkansas at the point then in question, non-navigable, and Judge Sanborn in affirming, took occasion to probe in depth principles of law which we think are impressive and which, we think, the Court will agree are fairly applicable to the case at bar.

At pages105-106 of the opinion in Brewer-Elliott reported in 270 Fed., Judge Sanborn said:

> "The theory of counsel for the state is that, if this river is navigable, the United States held the title to the bed of the river below high-water mark until the admission of Oklahoma into the Union in 1907, when that title vested in the state, but that, if it was not navigable, the title to the bed in controversy vested in the Osage Tribe. This theory ignores the grave question whether or not the United States did not by the treaties and grants to which reference has been made vest in the Cherokee Nation in 1838, and thereafter in the Osage Tribe, its successor in interest, the title to this property even if the river was navigable. Shively v. Bowlby, 152 U.S. 1, 48, 58, 14 Sup. Ct. 548, 38 L. Ed. 331; Alaska Pacific Fisheries v. United States, 248 U.S. 78, 87, 90, 39 Sup. Ct. 40, 63 L. Ed. 138; United States v. Romaine et al., 255 Fed. 253, 260, 166 C. C. A. 423, 430; Knight v. U. S. Land Association, 142 U. S. 161, 183, 184, 12 Sup. Ct. 258, 35 L. Ed. 974. As, in the view we take of the evidence and the law in this case, it is not necessary to a disposition of it to discuss and decide this question, we lay it aside without intimating any opinion upon it. Conceding, but not deciding or admitting, that counsels' theory is sound, we consider the question now in hand whether, in the construction and application of the treaties, acts of Congress, and conveyances under which the Osage Tribe holds, the court below erred in deciding that, so far as the navigability of the river conditions that tribe's title, it was not and is not navigable in law while it is not and never was navigable in fact. * * *

And at page 107-108 the Court said:

> * * *In State v. Nolegs, State v. Akers, and United States v. Mackey the claims adverse to those of the state to rights or titles to the bed of the Arkansas river below high-water mark were derived from grants or conveyances made before the respective states were admitted. But it seems to us that in those cases insufficient consideration and weight were given to the existing law, the facts and circumstances surrounding the parties to the original

grants by the United States at the times they were made respectively, to the intentions of the parties to those grants at those times evidenced by the grants themselves and the circumstances surrounding the parties, and to the rules for the interpretation and application of treaties, contracts, and transactions between the United States and Indian tribes.* * *

* * *The United States has always been both sovereign and proprietor in its territories. As such it has always had the right and power to dispose absolutely of any of its public land therein, high or low, wet or dry. While it has held its public lands in its territories below high-water mark under navigable waters in trust for future states, while it has not conveyed them by general laws and has acted upon the policy, unless in some case of international duty or public exigency, of leaving the administration and disposition of the sovereign rights in navigable waters and in the soil under them to the control of future states when they should be admitted to the Union, nevertheless it has always possessed and has frequently exercised the absolute power to grant such lands and any interest it had in them irrevocably whenever it became necessary to do so to perform international obligations or to carry out other public purposes appropriate to the objects for which it has held the lands in its territories. Shively v. Bowlby, 152 U.S. 1, 48, 58, 14 Sup. Ct. 548, 38 L. Ed. 331; McGilvra v. Ross, 215 U. S. 70, 79, 30 Sup. Ct. 27, 54 L. Ed. 95; Goodtitle v. Kibbe, 9 How. 471, 478, 13 L. Ed. 220; San Francisco City and County v. Le Roy, 138 U. S. 656, 670, 671, 11 Sup. Ct. 364, 34 L. Ed. 1096; Knight v. U. S. Land Association, 142 U. S. 161, 183, 184, 12 Sup. Ct. 258, 35 L. Ed. 974; Winters v. United States, 207 U. S. 564, 576, 577, 28 Sup. Ct. 207, 52 L. Ed. 340; United States v. Winans, 198 U.S. 371, 381, 25 Sup. Ct. 662, 49 L. Ed. 1089; United States v. Romaine, 255 Fed. 253, 260, 166 C. C. A. 423, 430; Alaska Pacific Fisheries v. United States, 248 U. S. 78, 87, 88, 90, 39 Sup. Ct. 40, 63 L. Ed 138. * * *

On appeal to the Supreme Court, the Circuit Court's determination to reserve the question of the lack of power of the United States to grant the bed of a navigable river under the trust theory met the same reaction there as it did in the Circuit Court. Brewer-Elliott Oil and Gas Company vs. United States, 260 U.S. 77, 84, 85, 87, and the Court, speaking through Mr. Chief Justice Taft, stated:

"The whole subject has been clarified after the fullest examination of all the authorities in a most useful

opinion by Mr. Justice Gray, speaking for the court in Shively v. Bowlby, 152 U. S. 1, 14 Sup. Ct. 548, 38 L. Ed. 331. On page 47 of 152 U. S., on page 565 of 14 Sup. Ct. (38 L. Ed. 331), the learned Justice says:

"VIII. Notwithstanding the dicta contained in some of the opinions of this court, already quoted, to the effect that Congress has no power to grant any land below high-water mark of navigable waters in a territory of the United States, it is evident that this is not strictly true."

And he then reviews the cases and thus states the court's conclusion (152 U.S. 48, 14 Sup. Ct. 566, 38 L. Ed. 331):

"We cannot doubt, therefore, that Congress has the power to make grants of lands below high-water mark of navigable waters in any territory of the United States, whenever it becomes necessary to do so in order to perform international obligations, or to effect the improvement of such lands for the promotion and convenience of commerce with foreign nations and among the several States, or to carry out other public purposes appropriate to the objects for which the United States hold the territory. * * *

* * *We do not think the declared purpose of the Louisiana Purchase Treaty with France (8 Stat. 200) that statehood should be ultimately conferred on the inhabitants of the territory purchased, relied on by the appellants, varies at all the principles to be applied in this case. They are the same in respect to territory of the United States whether derived from the older states, Spain, France or Mexico. If the Arkansas river were navigable in fact at the locus in quo, the unrestricted power of the United States when exclusive sovereign, to part with the bed of such a stream for any purpose, asserted by the Circuit Court of Appeals would be before us for consideration. If that could not be sustained, a second question would arise whether vesting ownership of the river bed in the Osages was for "a public purpose appropriate to the objects for which the United States hold territory," within the language of Mr. Justice Gray in Shively v. Bowlby above quoted. *We do not find it necessary to decide either of these questions in view of the finding as a fact that the Arkansas is and was not navigable at the place where the river bed lots, here in controversy, are. * * * *"

" * * *But it is said that the navigability of the Arkansas river is a local question to be settled by the Legislature and the courts of Oklahoma, and that the Supreme Court of the state has held that at the very point here in dispute, the river is navigable. State v. Nolegs, 40 Okl. 479, 139 Pac. 943. A similar argument was made for the same purpose in Oklahoma v. Texas, supra, based on a decision by the Supreme Court of Oklahoma as to the Red river. Hale v. Record, 44 Okl. 803, 146 Pac. 587. The controlling effect

of the state court decision was there denied because the United States had not been there, as it was not here, a party to the case in the state court. Economy Light Co. v. United States, 256 U.S. 113, 123, 41 Sup. Ct. 409, 65 L. Ed. 847."* * * *

From the language of the above two Fed. decisions it is plain that the basic legal questions, after the evidence is submitted, to be determined by the Court are whether, under the issues presented by the pleadings herein, (a) the Arkansas river, along the stretch in question, was navigable on and before the date of the Cherokee title; (b) whether the United States had lawful power to grant said riverbed; (c) whether, in fact, the language employed in the treaties and patent vested in the Cherokee fee simple title to said riverbed; (d) whether from the whole history of the transaction, as permitted by the Rule in Shively, the United States intended to pass title to said riverbed; and (e) whether any words of limitation less than a fee are contained in the instruments of title, or indicating an intent on the part of the grantor to reserve to itself or for the benefit of a future State, the title to said riverbed.

It is further submitted that by fair construction and interpretation the Oklahoma Enabling Act, as well as it's Constitution, by express terms, precludes the State's claim to title; that the eastern half of present Oklahoma ceased to be a part of the public domain upon acquisition thereof, as private property, as to the several tracts conveyed to each of the Five Civilized Tribes. That because no land in Indian Territory thus acquired by each of said Tribes, before Statehood of Oklahoma, had reverted to the public domain, and at the moment of Statehood and afterwards constituted private property, the essential operational facts necessary to pass title of the riverbed to the State of Oklahoma was non-existent. The State, therefore, took

and only could take, under the "Equal Footing" doctrine, only such public property as existed at the time of Statehood. Private property, whether held by an individual, a group of individuals, or a Nation of Indians, so far as we know, has never been made the subject of loss or "taking" by Government, either Federal or State, without the payment, or assuming the liability to pay, just compensation therefor.

Further, had Congress intended to turn over to the State the riverbed in question it could have done so in the Enabling Act with language similar to that employed in the Oregon Enabling Act. By the Act of February 14, 1859, (11 Stat 383), it is provided:

> * **"the said state of Oregon shall have concurrent jurisdiction on the Columbia and all other rivers and waters bordering on the said state of Oregon, so far as the same shall form a common boundary to said state, and any other state or states now or hereafter to be formed or bounded by the same; and said rivers and waters, and all the navigable waters of said state, shall be common highways and forever free, as well to the inhabitants of said state as to all other citizens of the United States." * * *

The case of Missouri, Kansas and Texas Railroad Company vs. United States, 235 U.S. 37, aptly discloses the extent and nature, as well as the scope of the interest of the Government, in it's effort to protect Tribal property against the consequences of becoming a part of the public domain. With valuable Tribal interests at stake, the Government, as well as Tribal leaders, vigoriously resisted not only every effort to establish a Federal Government territory, out of the Five Civilized Tribes' land area, but every other effort to cause the private holdings of the Tribes to revert to or become a part of the public domain. Their efforts were successful, and the

inhabitants of the twin territories were admitted to Statehood November 16, 1907, with no noticeable adverse consequences. In truth, it may be said, that this litigation seems to present the only instance of conflict between the State of Oklahoma and either of the Five Civilized Tribes which has resulted from the unique circumstances under which Oklahoma came into the Union.

It is believed that because of the public importance of this litigation, affecting as it does valuable interests claimed by the members of the Cherokee Tribe, that the Court will permit counsel for both sides to prepare and submit supplemental or answer briefs to those which have been filed, and request to do this is hereby made by counsel for Plaintiff.

In conclusion, we think we have successfully shown that in fact and in law the Cherokee Nation is now and has been since the date of it's Patent the absolute owners, in fee simple, of the title to that portion of the bed of the Arkansas river in Oklahoma, lying below the mean level of the high-water marks on the banks thereof, from the confluence of the Grand River in Muskogee County downstream to the North bank of the Canadian river, and the North half of the said Arkansas river bed downstream from the Canadian to the State line of Arkansas, and, by reason thereof, is entitled to the relief prayed for in it's Complaint herein filed.

RESPECTFULLY SUBMITTED

Joseph C. Muskrat

JOSEPH C. MUSKRAT
Oklahoma City, Oklahoma

Andrew C. Wilcoxen

ANDREW C. WILCOXEN
Muskogee, Oklahoma

Earl Boyd Pierce

EARL BOYD PIERCE
Muskogee, Oklahoma
ATTORNEYS FOR PLAINTIFF

This is to certify that a true copy of the above and foregoing Brief of Plaintiff was on this 28th day of April, 1967, mailed to each and every counsel or attorney of record in this case.

Earl Boyd Pierce

EARL BOYD PIERCE

APPENDIX I

INTRODUCTORY

The stress of the weight to be given to the "facts and circumstances surrounding the parties to the original grants by the United States at the times they were made," establishing the intent of the parties, as emphasized by Judge Sanborn, 270 F. 107-109, supra, seem to justify counsel to append the following extract from the opinion of the Court of Claims, written by Honorable Charles C. Nott, in 1891. The facts of history disclosed from the evidence in that case, we repeat, should be helpful in understanding what could well have been a purpose, in view of Article 1, Section 8 of the Constitution, of the Supreme Court, in 1894, in carving out the additional exception to the "rule", in Shively.

The case decided by Judge Nott, as the full opinion will show, (27 Ct. Cl. 1) had been brought by the Western (Old Settler) Cherokees against the United States under a jurisdictional bill (25 Stat 694) dated February 25, 1889, which allowed the Court "unrestricted latitude" to adjudge the case. The Cherokees had consistently complained, since 1839. They alleged in their petition that all of the Oklahoma lands had been granted to them by Treaty in 1828; and that the Treaty of 1835, of which they were not a party, which occasioned the removal of 18,000 other Cherokees upon their lands, was in clear violation of their property rights, and that their subsequent consent to the consequences, by Treaty in 1846, had been obtained by fraud upon their leaders, who executed the same.

Before holding that the jurisdictional act did not allow the Court to "go behind" the Treaty, Judge Nott saw fit, nevertheless,

to set forth important evidence in the case which, we think, is highly pertinent to one of the cardinal principles inherent in the instant case. On appeal to the Supreme Court, 148 U.S. 427, the Western Cherokees were allowed an adjustment of the money due them from the subsequent arrangement made by the 1846 Treaty, but they were denied exclusive title to the Oklahoma lands. This decision by the Supreme Court, together with the decision in the Choctaw case, 119 U.S. 1, both holding that Federal Courts were without judicial power to go behind an Indian Treaty and denounce it for fraud, gave rise to the peculiar provisions in clauses 3 and 5 of Section 2 of the Indian Claims Commission Act of 1946. Title 25 U.S.C.A., 70b.

(But for the express limitations in the language of the above statute, it is conceded that the Findings and Opinion in the recent Cherokee Outlet case, Docket 173, of the Claims Commission, adjudging the Cherokee Outlet Agreement of 1891, ratified by Congress March 3, 1893, to sell the Outlet, having been procured "under circumstances amounting to duress, and for an unconscionable consideration", would have entitled the Cherokees to a judgment quieting their title to the land, instead of the relief actually granted: A money judgment based upon the difference of fair market value in 1893, and the amount paid under the terms of the Agreement.) Thus, the importance of the historical facts connected with almost every land transaction of the Government with an Indian Tribe, is, as Judge Sanborn indicates, a vital factor to be considered and weighed in determining the intent of the parties.

We therefore, respectfully submit the following extract,

in the belief that it will be helpful to the Court and to the parties herein, in fully understanding the exigency, circumstances and Governmental purpose behind the acquisition of the Cherokee title to their Oklahoma lands.

APPENDIX I

THE WESTERN CHEROKEE INDIANS V. THE UNITED STATES
(No. 16599. Decided November 30, 1891.)
THE COURT OF CLAIMS
(EXTRACT)

"Nott, J., delivered the opinion of the court:
In 1838 the condition of the Cherokee people was this:
The Western Cherokees inhabited that portion of the Indian Territory which had been ceded to ehm by the treaty 1828. They are believed to have been about 6,000 in number, having a governor, a legislative assembly, statute laws, and the autonomy which has been and is now exercised by the different nations in the Territory. They had made treaties with the United States in 1817 and 1819, by which they acquired lands in Arkansas, and had receded those lands in exchange for others in the Indian Territory in 1828, and had corrected the boundaries of the latter by another treaty in 1833, and they were as fully recognize as a body politic as any other of the limited Indian governments which the United States recognized through the medium of treaty obligations.

The Eastern Cherokees were prisoners in Georgia, under the guard of 5,000 United States soldiers, who had hunted them down from their mountains and driven them out of their valleys and were now bringing them to the terms of an enforced emigration. In numbers they were believ to be about 18,000. They also had had a national autonomy; their individual rights and duties were prescribed by printed status; they had possessed schools, farms, orchards, and had so far progressed in the arts of civilization as to have established ferries and built turnpike roads and imposed tolls. They likewise had been recognized by the United States as a body politic, capable of entering into the obligation of a treaty-making power.

Within the mass of the Eastern Cherokees there was or had been a small body of men exceptionally friendly to the United States, who, by aiding the Government in its attempt to obtain a peaceable emigration from Georgia, and more especially by assuming to execute the treaty of New Echota, on behalf of the Eastern Cherokees, had brought down on themselves the suspicion and enmity of nearly all their race. Their political leaders were Ridge and Boudinot, and they were known as the treaty party. But between 1835 and 1838, that is to say, between the treaty of New Echota and the forcible removal of the Eastern Cherokees, the greater part of these Indians had voluntarily emigrated to the Indian Territory and merged with the Western Cherokees.

The Eastern Cherokees had been controlled by a chief whose intellectual successes deserve to be ranked among the extraordinary achievements of diplomacy, if not of statesmanship. For eight years he had maintained a contest with both the Government and the State of Georgia in the field of intellectual resource-objecting, procrastinating, evading; sometimes invoking moral forces, sometimes foreshadowing forceful resistance, and again and again he had achieved the negative triumph of frustrating the emigration of his people. And it is not a trivial element of the case that for six years his resistance was effectual against the iron determination of Andrew Jackson. The Indian name of

this leader was Koo-weskoowe, but he is generally known only by his adopted name of John Ross.

In 1836 the Government, apprehensive of collisions with the people of Georgia, and weary of being thwarted in the diplomatic field, sent a military force to bring negotiations to an end and effect a forcible removal. The commander was an officer of what is termed the old school, a strict disciplinarian, who deemed it the highest duty of a soldier to obey orders, but almost immediately he seems to have passed under the strategic magnetism of Ross. Insensibly, unconsciously, in feeling and judgment, he went over to the Indians' side. His first dispatch was in these terms:

"HEADQUARTERS, VALLEY TOWN, N. C.,
August 1, 1836.

"SIR: I arrived at this place on the 29th instant with five companies.

"Marrow, with his company, reported himself ten miles off; he had made a circuit of two hundred and fifty miles. The feeling and disposition of the Indians are altogether adverse to removal; I have had two meetings on the subject without any decision. On Wednesday next we have another, when I expect a large number will be present; it will then be determined whether they will go peacefully or by force. If they hesitate, I will take them. Under any circumstances I shall take hostages.

"I am so constantly engaged that I have little time to write; I am day and night employed.
"I have the honor to be, very respectfully, yours, etc.,

"John E. Wool,
"Brig. Gen., Commanding.

"To the Major-General Commanding the Army."

In less than two months he wrote as follows:

"Headquarters Army, E. T. and C. N.,
"Red Clay, Sept. 25, 1836.

"Sir: * * * During the whole period of holding the council the Cherokees appeared pacific in their language and conduct, and generally conducted themselves with as much order and propriety as the same number of men assembled in any part of the United States would have done.
"I have the honor to be, very respectfully , your obedient servant,

"John E. Wool,
"Brig. Gen., Commanding in the Cherokee Country.
"To the Hon. Lewis Cass,
"Secretary of War."
And in less than five months more he wrote:

"Headquarters Army, C. N.,
"New Echota, Georgia, Feb. 18, 1837.

"Sir: * * * After they had voted I had them called together, when I made

a short speech to them. It is, however, in vain to talk to a people almost unanimously opposed to the treaty and who uniformly declare that they have never made the treaty in question, and if one has been made with the United States it was done without the consent of the nation, and by a few unauthorized individuals, aided and assisted by corrupt agents of the Government. So determined are they in their opposition that not one of all those who were present and voted at the council held but a day or two since at this place, however poor or destitute, would receive either rations or clothing from the United States, lest they might compromit themselves in regard to the treaty.

"The same people, as well as those in the mountains of North Carolina, during the summer past, preferred living upon the roots and sap of trees rather than receive provisions from the United States; and thousands, as I have been informed, had no other food for weeks. Many have said they will die before they will leave the country.

I am, very respectfully, your obedient servant,

"John E. Wool,

"Brig. Ge., Commanding in C. Nation.

"To Major M. M. Payne."

For twenty months the troops did not move, and the eviction did not begin.

In 1837 the Government fixed the 23rd of May, 1838, as the time, and sent Gen. Scott with reenforcements and positive orders. He moved quickly and successfully, and has thus recorded the most painful experience of his military life:

"Food in abundance had been provided at the depots, and wagons accompanied every detachment of troops. The Georgians distinguished themselves by their humanity and tenderness. Before the first night thousands--men, women, and children, sick and well--were brought in. Poor creatures. They had obstinately refused to prepare for the removal. Many arrived half starved, but refused the food that was pressed upon them. At length the children, with less pride, gave way, and next their parents. The Georgians were the waiters on the occasion, many of them with flowing tears. The autobiographer has never witnessed a scene of deeper pathos."

The treaty of New Echota is the root from which controversies innumerable, involving force, bloodshed, diplomatic negotiations, Congressional action, and judicial determination have for more than half a century been springing. Its history is this:

The first act for the removal of the Cherokees was the treaty of 1817. Under it several thousand had emigrated in a few years to a reservation within the present boundaries of Arkansas and become known as the Western Cherokees. Their portion of the country was surrendered to the United States, but border rapacity had intruded on the lands of the remaining Cherokees--more than five hundred farms, it is said, were occupied by white people--and demanded the removal of the entire people and the opening of 5,000,000 acres for settlement. The Cherokees on

their side protested against the invasion of their country by these intruders and demanded that they be removed.

In 1830: "The United States, in order to avert the evils and unhappy difficulties that now exist, and are likely to continue, between the Cherokee Indians and the United States, and with a view to promote the future peace and happiness of all concerned, propose to enter into a contract or treaty on the following terms." Such was the preamble of the agent of the United States, Col. John L. Lowrey, October 20, 1830, to the proposition which followed it. First. That the United States should give them a country west of the Mississippi equal in value to their own. Second. That they should allow to each and every warrior and widow a reservation of 200 acres, for which the United States should pay a fair price if ultimately abandoned. Third. That they should allow to Indians who should choose to become citizens, being able to sustain themselves, a reservation in fee simple. Fourth. That they should "remove those who should choose to emigrate, at the expense of the Government, and furnish them with provisions one year after they arrive at their new homes, and also pay them for all their stock, except horses and other personal property, which they may choose to take with them, thereby giving them a perfect choice to go or stay, and in either event to be provided for as above described."

A liberal school fund was also to be added, to be vested in the hands of such trustees as should be worthy of trust, "that the rising generation should thereby be enabled to improve in useful learning, together with such annuities as they be thought entitled to, compared with those that have been afforded to other nations."

These propositions were submitted to the general council then in session, and two days later Ross communicated its decision in a note characteristic of the clearness, terseness, and dignity which ran through all of his diplomatic writings:

"New Echota, C. N., October 22, 1830.

"Sir: The general council have deliberated upon the subject of your propositions, submitted through me for their consideration, and the inclosed document contains the result of that deliberation, which is submitted for your information.

"The Cherokees have long since come to the conclusion never again to cede another foot of land, and of this determination there is abundant proof among the public documents in the offices of the General Government. The President was addressed upon this subject fully at Nashville last summer through the agent, and they now only ask from the General Government the protection of those rights which have been solemnly guarantied to them under former treaties.

"The offer of new guaranties can be no inducement to treat,
"I am, sir, etc.,

"John Ross.

"Col. John Lowrey,
"Special Agent."

At the beginning of 1835 the Cherokees were still in the Southern States, and no treaty for their removal had been made. But the Government had then brought to the work of negotiation a less scruptulous representative, and he, failing to accomplish anything with the constituted authorities of the Cherokee Nation, devised a scheme which he thus sketched in an official report to his superior, the Commissioner of Indian Affairs:

"Red Clay Council Ground, October 27, 1835.

"I have now just opened negotiations with them, and I hope to come to a treaty, now I have commenced; but there are still many difficulties in the way, and the only way I have of accomplishing it now is the fear of the Indians of Georgia legislation. Alabama and Tennessee, I think, will also pass some wholesome laws to quicken their movements.

"I have the council which the commissioners were authorized to call still in reserve, and if I am broke up here I shall notify these gentlemen that they will not be received at Washington, and that they must treat here or nowhere, during General Jackson's administration, and at the proper time, when the legislature begins to press the call, then convene at New Echota.

"With great respect, your obedient servant,

"J. F. Schermerhorn,

"Com. to treat with Cherokees east.

"To the Hon. Elbert Herring, Commissioner."

This scheme was effectually carried out. An assemblage of Indians, estimated at from two to three hundred men, women, and children, under the influence of Ridge and Boudinot, were brought together at New Echota, and twenty of these signed the treaty, not one of whom possessed official or delegated authority. At the same time the commissioner succeeded in getting two Western Cherokees to sign the certificate of approval on behalf of the Western Cherokee Nation, which appears appended to the treaty (7 Stat. L., p. 487). Their authority as delegates has not been shown and their mission, if any, was undoubtedly to counsel the Eastern Cherokees against the treaty, and it moreover appears by a voucher on file that the commissioner paid them $1,500 "for their trouble and expenses." Their action was afterwards ascribed by themselves to ignorance, persuasion, and bribery and was immediately and always disavowed by the Western Cherokees.

Thus on the 29th of December, 1835, the treaty of New Echota was executed.

On the 3d of February following a general council was convened, which unanimously adopted a resolution setting forth--

"That having been informed that certain individuals of the Cherokee Nation, after having organized themselves into a body and calling themselves a general council, did, on the 28th or 29th of December last, at New Echota, enter into an agreement or treaty with John F. Schermerhorn, commissioner on the part of the United States, ceding away the entire lands of the Cherokee Nation east of the

Mississippi to the United States, contrary to the known will and declaration of a large majority of the Cherokee people and without any authority whatever from the authorities and people of the Cherokee Nation so to act."

Wherefore the resolution proceeds:

"We do most solemnly protest before God and man and of its ratification by the Senate of the United States, as we are determined never to acknowledge any acts of individuals without authority to treat away the most sacred rights and dearest interests of the Cherokee people."

On the 5th of March following Maj. William M. Davis, the enrolling and appraising agent of the United States, thus reported to the Secretary of War, and the accuracy of his statement is confirmed by Lieut. Hooper, one of the witnesses who attested the treaty:

"Cherokee Agency, East, 5th March, 1836.

"Sir: In 1831 I had the honor to recieve from your hands the appointment of enrolling and appraising agent in the removal of the Cherokees west of the Mississippi.

"Sir, that paper, containing the articles entered into at New Echota in December last, called a treaty, is no treaty at all, because not sanctioned by the great body of the Cherokee people, and made without their consent or participation in it pro or con; and I here solemnly declare to you, without hesitation, that upon a reference of this treaty to the Cherokee people it would be instantly rejected by more than nine-tenths of them; in fact, I incline to the belief that nineteen-twentieths would rise up against it. I was not present at the meeting at New Echota, being prevented by indisposition. But, sir, I have it from the best authority that there were not present at the meeting more than a hundred voters, and in all, including men, women, and children, not exceeding three hundred souls.

"The Cherokee people are a peaceable, harmless people, but you may drive them to desperation; and this treaty can not be carried into effect except by the strong arm of force.

"With very great respect, I have the honor to subscribe myself your most obedient servant,

"Wm. M. Davis.

"Hon. Lewis Cass,
"Secretary of War, Washington City."

On the 28th September of the same year, the national committee and council, in general council assembled, again declared that the treaty of New Echota was not the act of the Cherokee people, and hopeless of redress from the Executive, addressed a memorial to Congress, which among other things set forth:

"To the honorable the Senate and House of Representatives of the United States of America, most respectfully and most humbly showeth:

"That your memorialists and chiefs, national committee and council, and people of the Cherokee Nation, in general council assembled, solicit permission to approach your honorable bodies under circumstances peculiar in the history of nations, circumstances of distress and anxiety beyond our power to express. We earnestly bespeak your patience, therefore, while we lay before you a brief epitome of our griefs.

"The instrument in question is not the act of our nation; we are not parties to its covenants; it has not received the sanction of our people. The makers of it sustain no office nor appointment in our nation under the designation of chiefs, headmen, or any other title by which they hold or could acquire authority to assume the reins of government and to make bargain and sale of our rights, our possessions, and our common country. And we are constrained solemnly to declare that we can not but contemplate the enforcement of the stipulations of this instrument on us against our consent as an act of injustice and oppression which we are well persuaded can never knowingly be countenanced by the Government and people of the United States, nor can we believe it to be the design of those honorable and high-minded individuals who stand at the head of the Government to bind a whole nation by the acts of a few unauthorized individuals. And therefore we, the parties to be affected by the result, appeal with confidence to the justice, the magnanimity, the compassion of your honorable bodies against the enforcement on us of the provisions of a compact in the formation of which we have had no agency.

"In truth, our cause is your own; it is the cause of liberty and of justice; it is based upon your own principles, which we have learned from yourselves, for we have gloried to count your Washington and your Jefferson our great teachers; we have read their communications to us with veneration; we have practiced their precepts with success. And the result is manifest. The wilderness of the forest has given place to comfortable dwellings and cultivated fields, stocked with the various domestic animals. Mental culture, industrious habits, and domestic enjoyments have succeeded the rudenss of the savage state. We have learned your religion also. We have read your sacred books. Hundreds of our people have embraced their doctrines, practiced the virtues they teach, cherished the hopes they awaken, and rejoiced in the consolations which they afford. To the spirit of your institutions, and your religion, which has been imbibed by our community, is mainly to be ascribed that patient endurance which has characterized the conduct of our people under the laceration of the keenest woes. For assuredly we are not ignorant of our condition; we are not insensible of our sufferings. We feel them, we groan under their pressure, and anticipation crowds our breasts with sorrows yet to come."

The only answer that was made to this memorial came in the form of a dispatch from the Acting Secretary of War to Gen. Wool:

"War Department, October 12, 1836.

"I am instructed to express the surprise of the President that you permitted the council of the Cherokees to remain in session a

moment after it became apparent that it was determined to declare the treaty void."

The treaty of New Echota, therefore, was the act and deed of neither the Eastern nor Western Cherokees.

Ross had been chosen principal chief of the Cherokees in 1828, and for ten years performed with astonishing ability two distinct and difficult tasks--that of repelling and outwitting the treaty-seeking agents of the United States, and that of keeping a wild, impulsive people, deprived of their annuities and maddened by repeated aggressions of the border whites, from becoming the aggressors. A confidential agent of the War Department, sent to ascertain the truth of various matters, reports in September, 1837--

"Though unwavering in his opposition to the treaty, Ross's influence has constantly been exerted to preserve the peace of the country; and Col. Lindsay says that he alone stands at this time between the whites and bloodshed."

When the removal of the Cherokees began all that Ross had struggled to prevent was accomplished, and the accomplishment had demonstrated to the Indian mind a power that was irresistible. His policy of negotiation, procrastination, and appeal to moral forces had resulted in a disaster which had driven every family out of their own home and every man out of his own country. In a word, his policy seemed a mistake, his public career finished, and himself utterly overthrown. An ordinary man so overthrown would have bowed his head and acknowledged that his life-work had ended.

But it is at this point that his success begins. Where the rest of his nation saw only humiliation and submission he saw an opportunity, audacious but practicable, and with a skill and readiness that belong to the marvels of political biography, in less than two months he gave to it form and effect, and changed the future into an enduring victory and made the past a transitory defeat. On the 1st August, 1838, while the dispirited throng of Cherokee exiles paused in their march at a temporary halting place the name of which does not appear on the map nor in the list of post-offices, and which is known only from what transpired there as Aquohee camp, he framed a declaration of rights which secured and has ever since retained the autonomy of the Eastern Cherokees.

The instrument, after again declaring that the Eastern Cherokees were not a party to the pretended treaty of New Echota and will forever demand redress for the wrongs and injuries which have been brought upon them by the United States, sets forth in terms which will bear the scrutiny of scholars in modern international law that--

"Whereas the Cherokee people have existed as a distinct national community in the possession and exercise of the appropriate and essential attributes of sovereignity for a period extending into antiquity beyond the dates and record and memory of man;

"And whereas these attributes, with the rights and franchises which they involve, have never been relinquished by the Cherokee

people, but are now in full force and virtue;

"And whereas the natural, political, and moral relations subsisting among the citizens of the Cherokee Nation towards each other and towards the body politic cannot, in reason and justice, be dissolved by the expulsion of the nation from its own territority by the power of the United States Government:

"Resolved, therefore, by the national committee and council and people of the Cherokee Nation, in general council assembled, That the inherent sovereignty of the Cherokee Nation, together with the constitution, laws, and usages of the same, are, and by the authority aforesaid are hereby declared to be, in full force and virtue, and shall continue so to be in perpetuity, subject to such modifications as the general welfare may render expedient."

When the column of captives or immigrants, whichever they were, entered the Indian Territory the Western Cherokees, who had been passing hospitable and kindly resolutions of welcome, were astounded by the intimation that their government was to come to an end, and that they themselves as a people, would be lost and merged in the greater mass of the intruders, and that thenceforth the constitution and laws and government of the Eastern Cherokees would reign over them. The position taken by Ross did not indeed go so far as this in terms. He maintained, first, that the Cherokee people by their enforced removal had lost nothing of their inalienable right of sovereignty; second, that it was impossible that two distinct sovereignties could exist in the same territory; third, that a general council of all the Cherokees, Eastern and Western, should frame a new constitution for the government of all.

The Western Cherokees maintained that they were possessed of their own country, purchased with their own money, subject to their own laws, ruled by their own constituted authorities, and that the coming of the Eastern Cherokees, uninvited so far as they were concerned, could not overthrow their existing constitution and government. Either party's deductions were right from their own premises. The trouble was that the two were utterly irreconcilable, and the certainty was that if the Western Cherokees acceded to the seemingly fair proposition of Ross to hold a council and frame a government for all, they would immediately be swallowed up in the overwhelming majority of the Eastern Cherokees.

Ross never varied the simplicity of his first position, a position which he maintained with calmness and dignity and invincible firmness.

The military commander at Fort Gibson and the Indian agent of the Government remonstrated, and he replied:

"Park Hill, June 30, 1839.

"Gentlemen:

We perfectly coincide with your judgment that two governments can not and ought not to exist in the Cherokee Nation any longer than arrangements can be made for uniting the two communities, and in conforming with these views we have used our best endeavors to bring about this desirable event in a manner which might be satisfactory to

all parties, and by which all rights might be provided for and the peace and wellbeing of the Cherokees permanently secured.

"We have claimed no jurisdiction over our Western brethren, nor can we, consistently with the responsibilities with which our constituents have invested us, recognize their jurisdiction over us.

"When they refused to mingle councils with us for free conversation on our affairs, and requested that our wishes might be reduced to writing, we offered to meet them on equal ground. But our just and reasonable overtures were unconditionally rejected by them and our communication treated with contempt. We have no disposition, however, to stand upon punctilios, but what are we to understand by the proposition now made, and even these, rigorous as they are, it appears are yielded with reluctance through your influence and at your instance. Is it required that the late emigrants relinquish all their rights and appear before the Western chiefs in the attitude of suppliants? If such be their wish, and we know not how otherwise to construe their words, we are compelled to say that we do not believe our brethren, the Western people, have the least desire to reduce us to so abject a condition. Indeed, they have expressed their sentiments, and in the exercise of their inalienable and indefeasible rights have appointed a national convention for Monday, July 1, 1839; and, for ourselves, we are unable to perceive any irregularity in their proceedings. They formed an integral branch of the late general council. Their acts are perfectly legtimate, and we can not assume the responsibility of protesting against them or of declaring them invalid."

To the remonstrances and propositions of a national conven-(tion) of the Western Cherokees, he answered through his own national committee:

"Council Ground, July 19, 1839.

"The national committee and council of the Eastern Cherokees having had under consideration the communication from those of the Western Cherokees, can not but express their regret at the course pursued by their Western brethren, as well as the views entertained by them on a question so important and so indispensable to the welfare of the great Cherokee family as the reunion of the two nations.

"To the assertion made in that communication that "it is believed by the national council that the two people have already been united," we are compelled to refuse our assent.

"That the ancient integrity of the Eastern Nation should be dissolved, and her existence annihilated, without discussion, without conditions, and without action of any kind is utterly inconceivable; and the rejection by the representatives of our Western brethren of the reasonable proposition to unite the two nations on the basis of the strictest rule of justice and equality is an act equally unlooked for and surprising: Therefore

"Resolved, That the declarations of the general council of the nation at Aquohee Camp, on the first day of August, 1838, in reference

to the attributes of sovereignty derived from our fathers, be, and they are hereby, reasserted and confirmed.

"Resolved, That the proceedings of the committee and council be forthwith laid before the people, that their sense may be had upon the subject."

In 1840 Gen. Arbuckle, with the commendable patience and good sense that mark all of his intercourse with the conflicting parties, endeavored to bring them together in two conventions to agree upon a form of government and compose their differences. The scene which in 1835 had been acted by the treaty party east of the Mississippi was reacted here, a few of the Western Cherokees, partly by persuasion and partly by intimidation, holding a nominal convention, adopting an act of union, and issuing the following declaration:

"Whereas a meeting of the Cherokee people was agreed on and requested by the United States agent and the assistant principal chief and others, on the 15th instant, at this place, and general notification given throughout the country to all parties whatever, requesting their prompt attendance for the purpose of ascertaining fairly and properly the sense and choice of a majority of the nation in relation to the subject of their future government; and whereas, we the people of the Cherokee Nation, having assembled under this call, and having heard read and interpreted the act of union adopted by the Eastern and Western Cherokees, dated July, 1839, and the constitution framed by a convention composed of members from both parties in pursuance of the provisions of the aforesaid act, and being satisfied with the same, we do hereby approve, ratify, and confirm the said act of union and the constitution, and acknowledge and make known that the government based upon this act and this constitution is the legitimate government of the Cherokee Nation, and of our choice, and that it has both our confidence and support.

"Done at Tahlequah, Cherokee Nation, the 16th day of January, 1840.

"J. Vann,
"Assistant Principal Chief.
"W. Shorey Coodey,
"President National Committee."

But during the same month Gen. Arbuckle reported to the Secretary of War:

"The act of union referred to in one of the accompanying decrees is certainly not entitled to credit, as there were a very small number of the old settlers present who concurred in it, and they acted without authority."

He added:

"This change will no doubt be severely felt by the old settlers generally, who in their kindness invited the late emigrants to enjoy with them the lands they have secured for themselves, and who have in less than one year after their arrival formed a new government for the nation in which the old settlers are not represented by a single individual of their own choice."

And on the 29th January he wrote to the Commissioner of Indian Affairs:

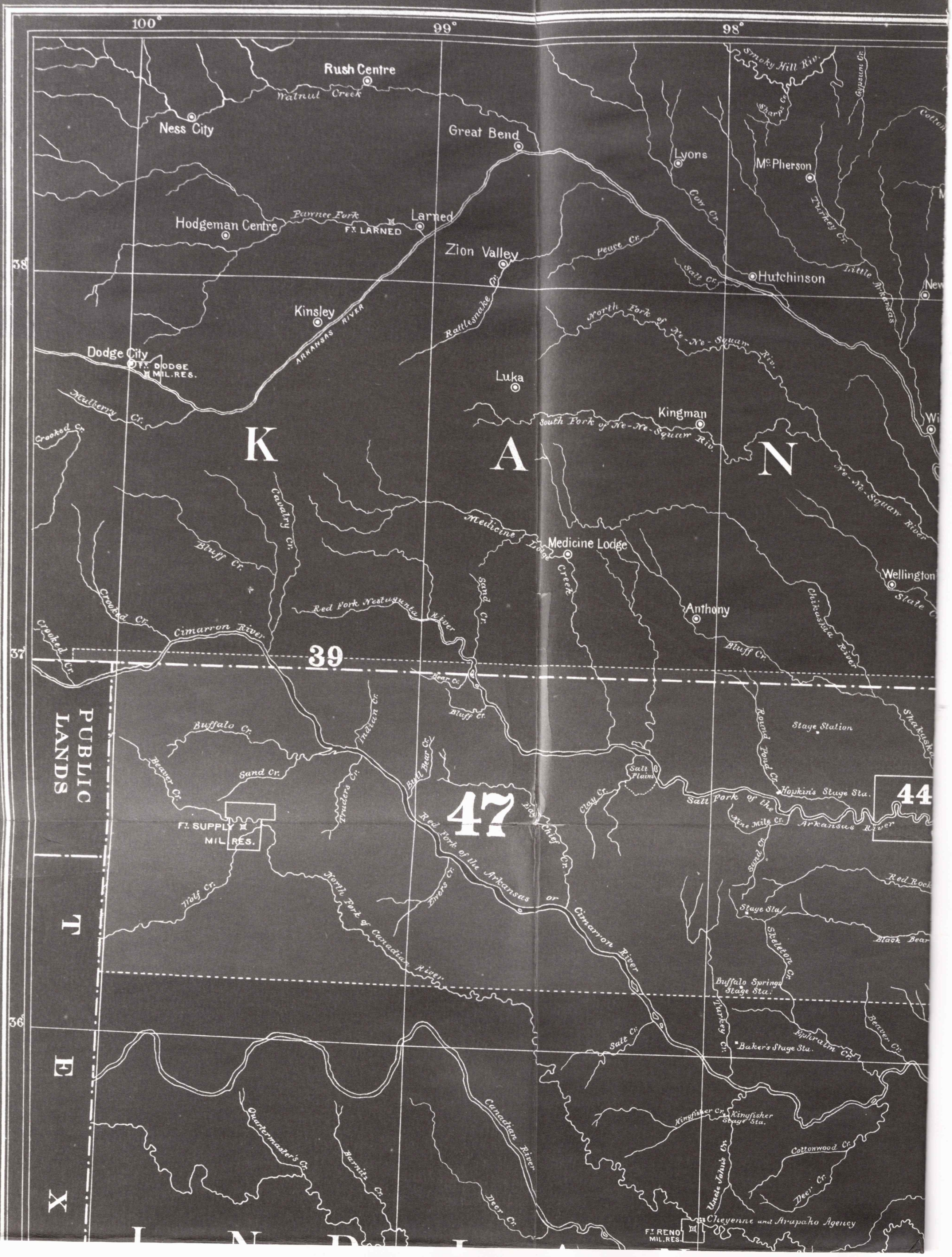
"A meeting was called for both parties to attend, consisting of old settlers and new emigrants, Cherokees, the object being to ascertain which party had the majority. The old settlers did not attend, as they were doubtless well aware that they were in the minority. There were about 700 voters present, who were in favor of the new government; they voted in favor of the constitution and laws of the Ross party."

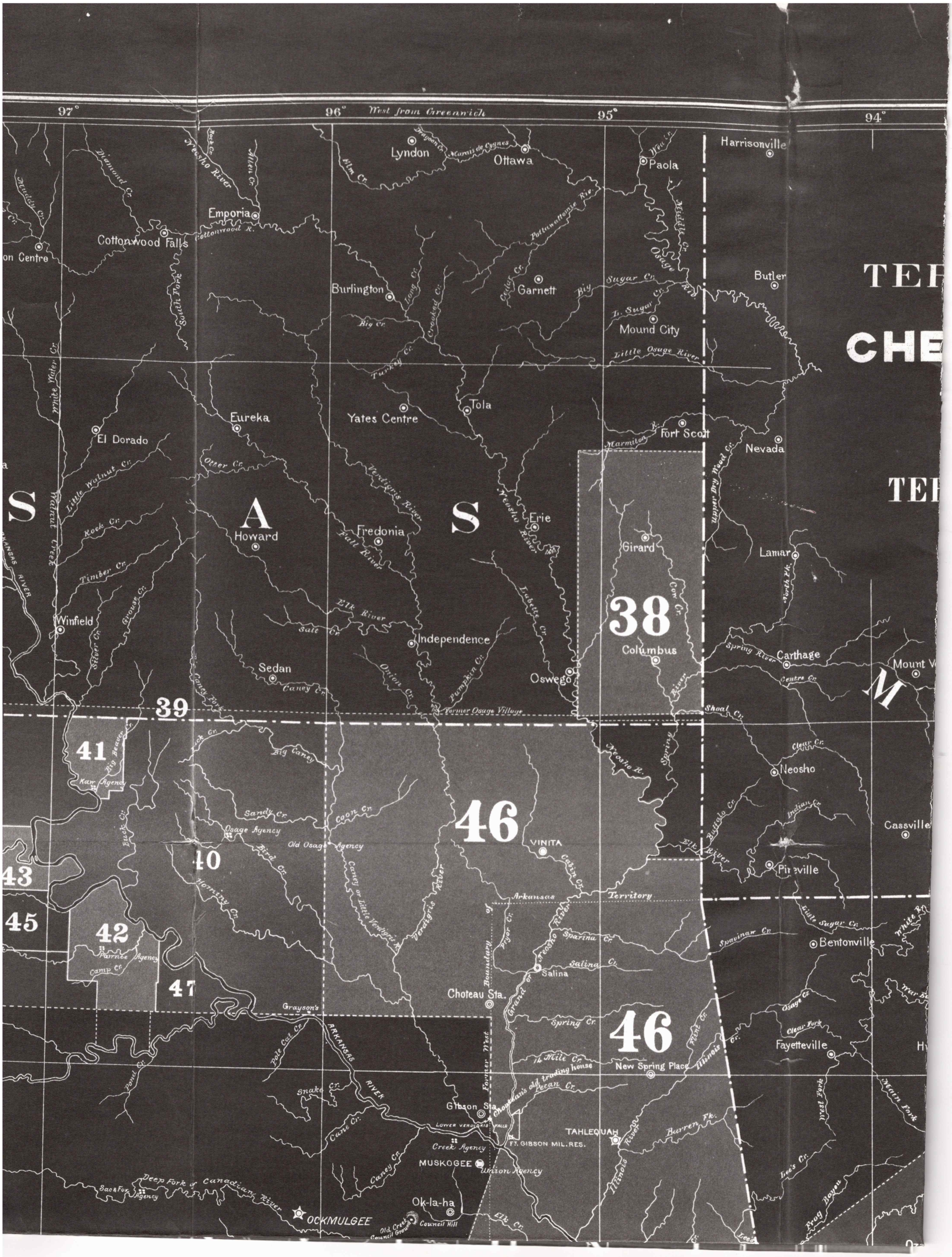
In 1842 the Western Cherokees addressed a memorial to the President. "They have," they say, "their complaints to make which can no longer be with safety deferred, and they will endeavor in doing so to divest themselves of all unkind feelings against those from whom they have suffered wrong, and base their appeal upon provisions made by law and treaty stipulations." And they then with wonderful temperateness and accuracy set forth their chain of title to the 14,000,000 acres of which they had been deprived, and their legal and moral rights to the full and exclusive enjoyment of the same; and in 1844 "An oppressed and ruined people, stripped of the property and deprived of the protection which were repeatedly promised and guaranteed to them by the Government of the United States, appeal to the Congress of those United States for reparation." "Penniless and in exile," they say, "we are able to bring no influence to bear upon the Government or people of this Republic but the power of truth and the sympathy which wrong and oppression, when made manifest, never fail to excite. If these be not sufficient to procure your interposition in our behalf, nothing will be left to us and our people but oppression, dispersion, despair, and death." And they, in effect, pray Congress for a division of the Territory; to be "repossessed of a corner of that country which is all their own;" for a new country to which to flee; for anything which will deliver them from the intolerable condition to which they have been reduced by the action of the Government through the treaty of New Echota.

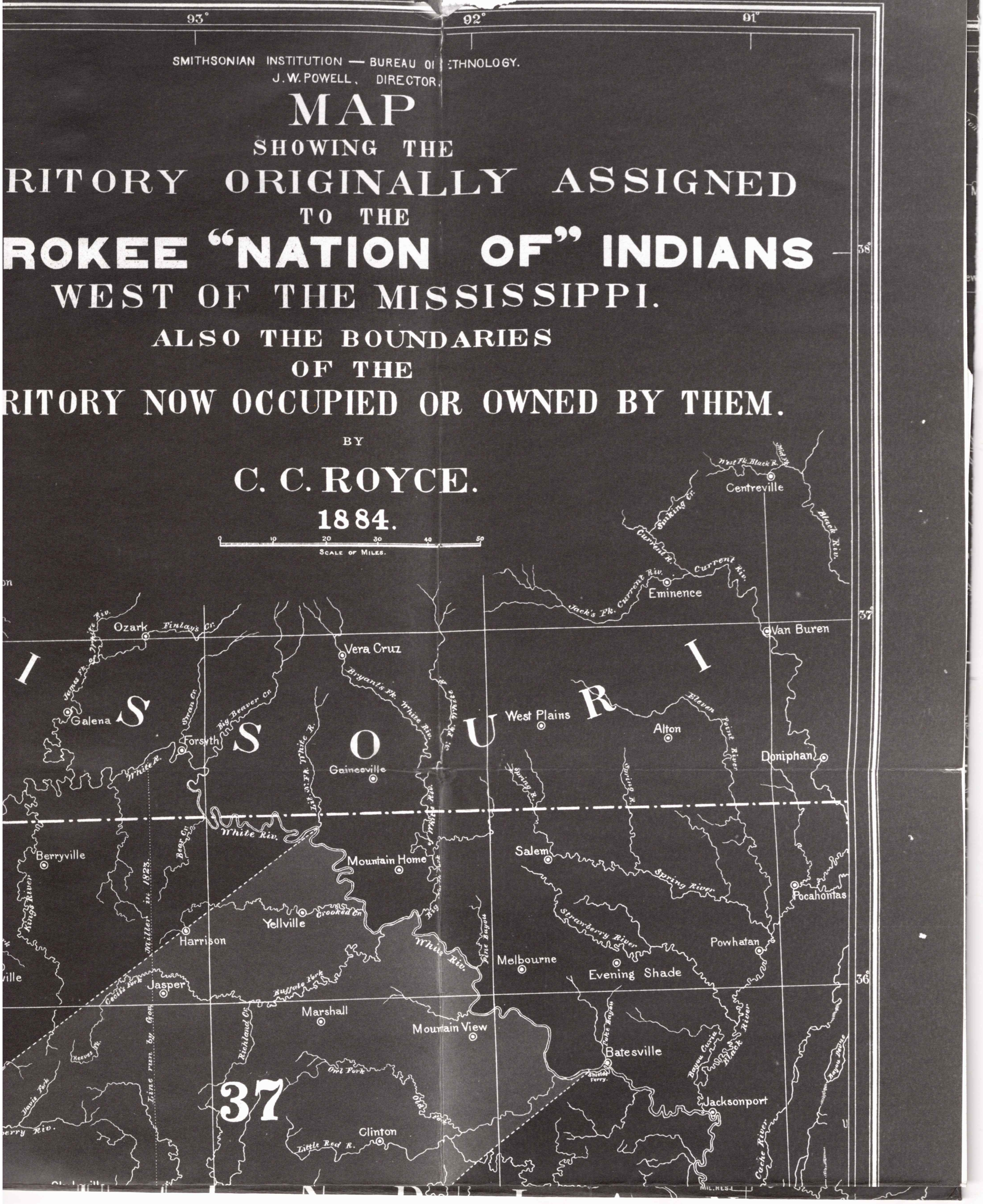
But the Government rested on the platitude that in this country the majority must rule.

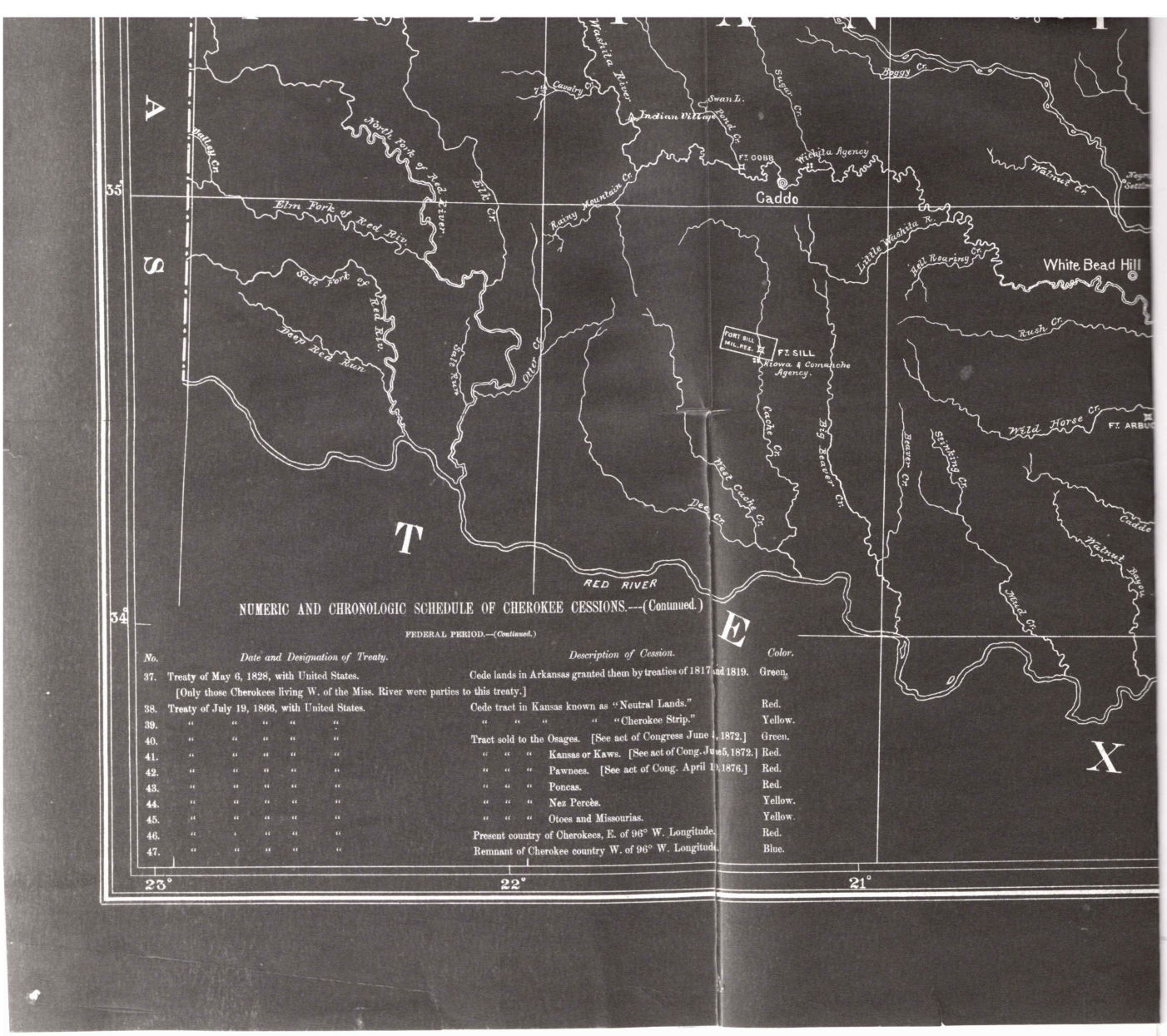
All of the ills deplored and foreseen by Gen. Arbuckle continued to fall upon the Western Cherokees. The decree of outlawry against every Cherokee who signed the treaty of New Echota, though repealed, was still enforced. An armed police played the part of a miniature standing army, treating them as rebels to constituted authority, and exterminating under the pretense of maintaining law. The Government hesitated before the growing power of Ross and the horrors of a general Indian war. The Secretary of War sent reproaches and demands, to which Gen. Arbuckle added remonstrances and warnings. The inhabitants of Arkansas saw with alarm that the Eastern Cherokees, from "a peaceable and harmless people," as Major Davis characterized them in 1836, were becoming a military power, and armed and organized in anticipation of a border war. For seven years the state of the Cherokee country was not unlike that which in a few years was to be the condition of the adjacent Territory of Kansas.

And thus it came to pass, by the fatality which so often unhappily has attended our compacts with the Indian, (1) That the Western Cherokees who acquired the territory by reiterated treaties, who gave a valuable consideration for it in their Arkansas lands, who for nearly a generation kept faith with the Government, who thrice acquiesced in its policy--by removing to Arkansas, by removing from Arkansas, by receding a portion of their lands to the Creeks--were deposed as a political power, their leading men fugitives in Texas, hundreds of families despoiled of their homes and individual property, and all of them as a people ousted from two-thirds of their communal estate; (2) That the leaders of the treaty party, who, at the request and upon the faith of the repeated assurances of the agents of the Government, cooperated with it in imposing on their people the treaty of New Echota, had been for the most part massacred, and, as a party, utterly destroyed; (3) That the Eastern Cherokees, who resisted the Government for sixteen years, and compelled it to resort to the costly remedy of an overpowering military force, were the rulers of the Cherokee country, and the only power which the United States recognized as a body politic."


100°
99°
98°
38°
37°
36°
Rush Centre
Walnut Creek
Ness City
Great Bend
Lyons
McPherson
Smoky Hill Riv.
Hodgeman Centre
Pawnee Fork
Ft. LARNED
Larned
Zion Valley
Peace Cr.
Hutchinson
Salt Cr.
Little Arkansas
Kinsley
Arkansas River
Rattlesnake Cr.
North Fork of Ne-Ne-Squaw Riv.
Dodge City
Ft. DODGE MIL. RES.
Luka
Mulberry Cr.
Kingman
South Fork of Ne-Ne-Squaw Riv.
Crooked Cr.
K
A
N
Ne-Ne-Squaw River
Cavalry Cr.
Medicine Lodge
Medicine Lodge Creek
Bluff Cr.
Sand Cr.
Wellington
Anthony
Chikaskia River
Red Fork Nestugunta River
Cimarron River
Crooked Cr.
39
Bluff Cr.
Bear Cr.
Bluff Cr.
PUBLIC LANDS
Buffalo Cr.
Indian Cr.
Stage Station
Round Pond Cr.
Salt Plains
Sand Cr.
Beaver Cr.
Bull Bear Cr.
Traders Cr.
47
Eagle Chief Cr.
Clay Cr.
Hopkin's Stage Sta.
Salt Fork of the Arkansas River
44
Nine Mile Cr.
Ft. SUPPLY MIL. RES.
Red Fork of the Arkansas or Cimarron River
Wolf Cr.
North Fork of Canadian River
Emers Cr.
Sand Cr.
Red Rock
Stage Sta.
Skeleton Cr.
Black Bear
T
Buffalo Springs Stage Sta.
Turkey Cr.
Salt Cr.
Baker's Stage Sta.
Ephraim Cr.
Beaver Cr.
E
Canadian River
Quartermaster's Cr.
Barnitz Cr.
Kingfisher Cr.
Kingfisher Stage Sta.
Cottonwood Cr.
Uncle Johns Cr.
Deer Cr.
Deer Cr.
X
Ft. RENO MIL. RES.
Cheyenne and Arapaho Agency


97°
96°
West from Greenwich
95°
94°
Lyndon
Ottawa
Paola
Harrisonville
Emporia
Cottonwood Falls
Cottonwood R.
Neosho River
Burlington
Garnett
Mound City
Butler
Little Osage River
Big Sugar Cr.
Marais de Cygnes
Pottawatomie Riv.
Osage Riv.
TER
CHE
TER
Eureka
Yates Centre
Iola
Fort Scott
Nevada
El Dorado
S
A
S
Howard
Fredonia
Erie
Girard
Lamar
Verdigris River
Fall River
Neosho River
Walnut Creek
Little Walnut Cr.
Rock Cr.
Timber Cr.
Otter Cr.
Elk River
Winfield
Independence
Sedan
Oswego
Columbus
Carthage
Mount V
38
39
M
Spring River
Labette Cr.
Pumpkin Cr.
Caney Cr.
Former Osage Village
41
Kaw Agency
Big Beaver Cr.
Big Caney
Sandy Cr.
Coon Cr.
46
VINITA
Neosho
Cassville
Osage Agency
Old Osage Agency
40
43
Pineville
Arkansas Territory
45
42
Pawnee Agency
47
Hominy Cr.
Bird Cr.
Caney or Little Verdigris R.
Verdigris River
Salina
Spavinaw Cr.
Bentonville
Choteau Sta.
Grand or Neosho River
Grayson's
46
Spring Cr.
14 Mile Cr.
New Spring Place
Illinois Cr.
Fayetteville
ARKANSAS RIVER
Snake Cr.
Gibson Sta.
Chouteau's old trading house
Pecan Cr.
Former West Boundary of Arkansas
TAHLEQUAH
Barren Fk.
Illinois River
FT. GIBSON MIL. RES.
Creek Agency
MUSKOGEE
Union Agency
Deep Fork of Canadian River
Sac & Fox Agency
OCKMULGEE
Ok-la-ha
Council Hill
Elk Cr.
Frog Bayou
West Fork
Lee's Cr.

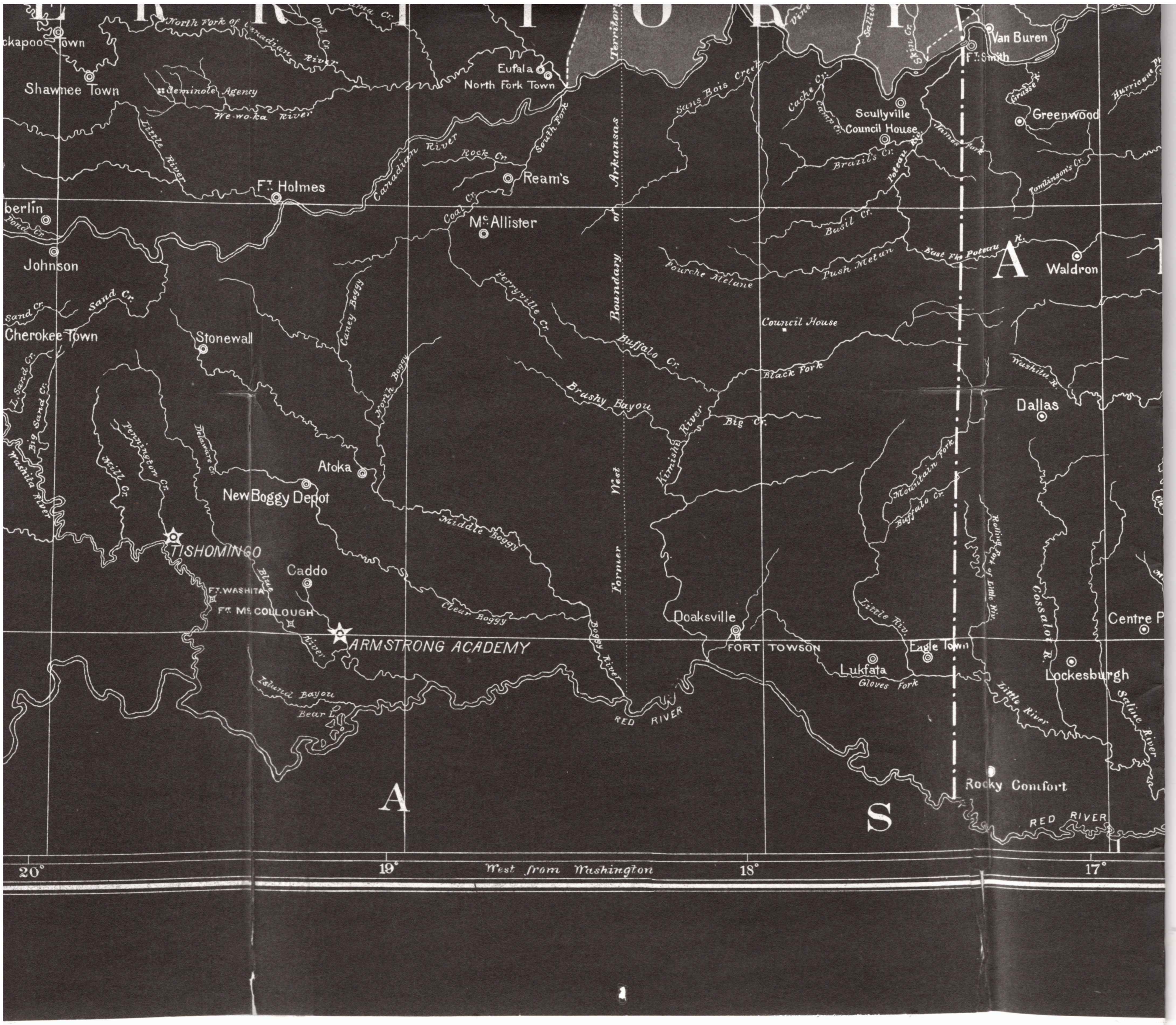

93°
92°
91°
SMITHSONIAN INSTITUTION — BUREAU OF ETHNOLOGY.
J. W. POWELL, DIRECTOR.
MAP
SHOWING THE
RITORY ORIGINALLY ASSIGNED
TO THE
ROKEE "NATION OF" INDIANS
WEST OF THE MISSISSIPPI.
ALSO THE BOUNDARIES
OF THE
RITORY NOW OCCUPIED OR OWNED BY THEM.
BY
C. C. ROYCE.
1884.
Scale of Miles.
38°
37°
36°
I S S O U R I
Centreville
Eminence
Van Buren
Ozark
Vera Cruz
Galena
Forsyth
West Plains
Alton
Doniphan
Gainesville
Berryville
Mountain Home
Salem
Pocahontas
Yellville
Harrison
Melbourne
Powhatan
Evening Shade
Jasper
Marshall
Mountain View
Batesville
Jacksonport
Clinton
37
White Riv.
Current Riv.
Black Riv.
Spring River
Strawberry River
Little Red R.
Buffalo Fork
Eleven Point River
Line run by Gen. Miller in 1823.



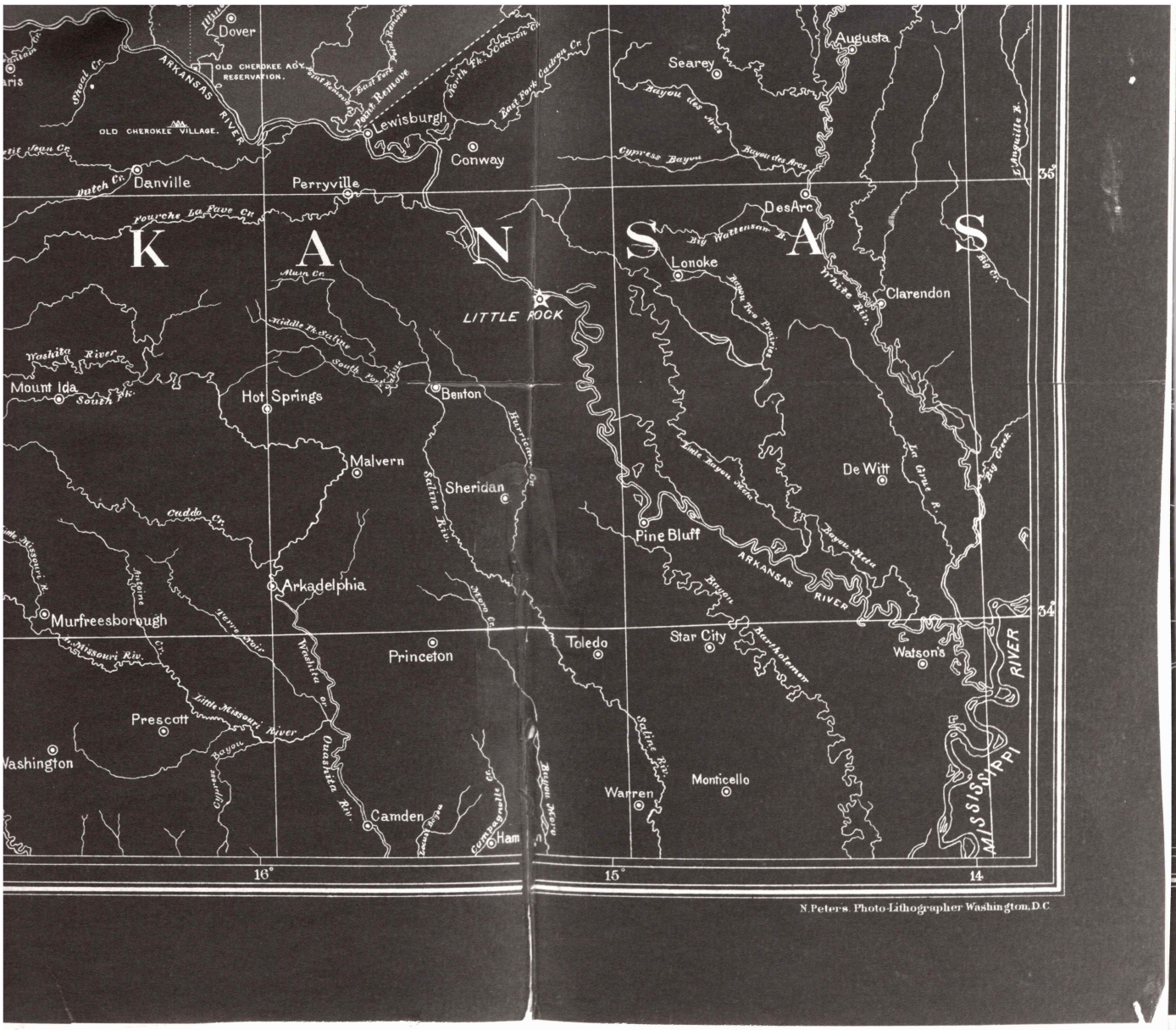
NUMERIC AND CHRONOLOGIC SCHEDULE OF CHEROKEE CESSIONS.---(Continued.)

FEDERAL PERIOD.—(*Continued.*)

No.	*Date and Designation of Treaty.*	*Description of Cession.*	*Color.*
37.	Treaty of May 6, 1828, with United States. [Only those Cherokees living W. of the Miss. River were parties to this treaty.]	Cede lands in Arkansas granted them by treaties of 1817 and 1819.	Green.
38.	Treaty of July 19, 1866, with United States.	Cede tract in Kansas known as "Neutral Lands."	Red.
39.	" " " " "	" " " " "Cherokee Strip."	Yellow.
40.	" " " " "	Tract sold to the Osages. [See act of Congress June 4, 1872.]	Green.
41.	" " " " "	" " " Kansas or Kaws. [See act of Cong. June 5, 1872.]	Red.
42.	" " " " "	" " " Pawnees. [See act of Cong. April 10, 1876.]	Red.
43.	" " " " "	" " " Poncas.	Red.
44.	" " " " "	" " " Nez Percès.	Yellow.
45.	" " " " "	" " " Otoes and Missourias.	Yellow.
46.	" " " " "	Present country of Cherokees, E. of 96° W. Longitude.	Red.
47.	" " " " "	Remnant of Cherokee country W. of 96° W. Longitude.	Blue.



E R R I T O R Y
North Fork of Canadian River
Shawnee Town
Seminole Agency
We-wo-ka River
Little River
Eufala
North Fork Town
South Fork
Canadian River
Rock Cr.
Ream's
Ft. Holmes
Mc Allister
Coal Cr.
Johnson
Sand Cr.
Cherokee Town
Stonewall
Canty Boggy
North Boggy
Perryville Cr.
Buffalo Cr.
Brushy Bayou
Kimishi River
Atoka
New Boggy Depot
Pennington Cr.
Mill Cr.
Washita River
Big Sand Cr.
TISHOMINGO
Blue River
Caddo
Ft. WASHITA
Ft. Mc COLLOUGH
ARMSTRONG ACADEMY
Middle Boggy
Clear Boggy
Boggy River
Island Bayou
Bear Cr.
RED RIVER
Former West Boundary of Arkansas Territory
Sans Bois Creek
Cache Cr.
Scullyville
Council House
Brazil's Cr.
Poteau R.
Van Buren
Ft. Smith
Greenwood
Fourche Maline
Push Ma-taha
Bussil Cr.
East Fk Poteau R.
A
Waldron
Council House
Black Fork
Big Cr.
Washita R.
Dallas
Mountain Fork
Buffalo Cr.
Little Riv.
Doaksville
FORT TOWSON
Lukfata
Gloves Fork
Eagle Town
Cossatot R.
Lockesburgh
Centre P
Saline River
Little River
Rocky Comfort
RED RIVER
A
S
20°
19°
West from Washington
18°
17°



N. Peters. Photo-Lithographer Washington, D.C.