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United States v. Cherokee Nation - Indian Water Rights: Giving with One Hand and Taking with the Other

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United States v. Cherokee Nation — Indian Water Rights: Giving With One Hand and Taking With the Other

I. Introduction

In the *United States v. Cherokee Nation of Oklahoma*, the United States Supreme Court addressed whether the Cherokee Nation, having fee simple title to portions of the bed of the Arkansas River, should be paid just compensation for damages to sand and gravel interests caused by navigational improvements to the river.[1] The Supreme Court held that the Cherokee Nation was not due just compensation as no taking had occurred.[2] The Court explained that the commerce clause[3] gave Congress the power to control navigation and that this power creates a dominant servitude to which the fifth amendment takings clause does not apply.[4] This note will show that although Congress has this power, compensation must be paid when the use of that power physically invades property rights of another.

II. Background and Historical Development

A. *Historical Overview*

The aboriginal lands of the Cherokee Nation, a federally recognized nation of American Indians, includes parts of the present states of Kentucky, Virginia, North and South Carolina, Tennessee, Georgia, and Alabama.[5] The first treaty with

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1. 480 U.S. 700 (1987).

2. U.S CONST. amend. V provides "nor shall private property be taken for public use, without just compensation." This is commonly called the "Takings Clause".

3. U.S. CONST. art I, § 8, cl.3.

4. *Cherokee Nation*, 480 U.S. at 704.

5. Brief for Respondent at 4, United States v. Cherokee Nation of Okla., 480 U.S. 700 (1987) (No. 85-1940).

the Cherokee Nation was executed in 1791.[6] The white settlers from Europe quickly populated the eastern portion of the United States and the United States government removed the Cherokee from their aboriginal lands, forcing them to relocate in Arkansas.[7] In 1830, Congress passed the Indian Removal Act[8] which took the tribal lands in the east in exchange for land west of the Mississippi River.

Conflict between the United States and the Cherokee continued, and despite the Indian Removal Act, a major portion of the Cherokee remained in the east. The Treaty of New Echota[9] was executed in an attempt to relocate the eastern Cherokee to the west and force them to relinquish their eastern lands to the United States. However, this treaty was executed by only a small number of the Eastern Cherokee and was never accepted by a majority of that Indian nation.[10] Finally, in 1838, the Eastern Cherokee were forcibly removed by the military to Cherokee lands west of the Mississippi River.[11] This removal has come to be known as the Trail of Tears.[12]

Prior to their removal, the Cherokee held an estimated total of 76,986,454 acres in their vast tracts of land in the east.[13] The Cherokee were subsequently issued a patent in fee simple absolute to the lands west of the Mississippi River, lands which are now part of the State of Oklahoma. This patent was issued by President Martin Van Buren on December 31, 1838 and sets out in metes and bounds the seven million

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6. This treaty is commonly referred to as the Treaty at Hopewell. Treaty with Cherokees, Nov. 28, 1785, art. 3, 7 Stat. 18. This was a peace and friendship treaty and the treaty acknowledged that the Cherokee Nation was under the protection of the United States. *See* Brief for Respondent, United States v. Cherokee Nation of Okla., 480 U.S. 700 (1987) (No. 85-1940).

7. Treaty with the Cherokee, Feb. 27, 1819, 7 Stat. 195.

8. Indian Removal Act of May 28, 1830, ch. 148, 4 Stat. 411.

9. Cherokee Nation the Treaty of New Echota, December 29, 1835, 7 Stat. 478.

10. *Id. See* Brief for the Respondent at 10, United States v. Cherokee Nation of Okla., 480 U.S. 700 (1987) (No. 85-1940).

11. Western Cherokee Indians v. United States, 27 Ct. Cl. 1 (Ct. Cl. 1891).

12. O'BRIEN, *The International Protection of Human Rights*, in AMERICAN INDIAN POLICY IN THE TWENTIETH CENTURY 50 (V. DeLoria ed. 1985).

13. Brief for the Petitioner at 5, Choctaw Nation v. Oklahoma, 397 U.S. 620 (1970) (No. 1104).

acres ceded to the Cherokee.[14]

B. *Background of Case*

The initial dispute began in December of 1966 when the Cherokee filed suit against the State of Oklahoma over title to the bed of the Arkansas River. At issue were various mineral leases. The Cherokee sought an injunction against use of the land underlying the bed of the Arkansas River. They asserted that title to the river bed was ceded to them pursuant to treaties and deeds which granted them the entire area in fee simple.[15] The district court[16] and the court of appeals[17] found in favor of the State of Oklahoma. The United States Supreme Court held in favor of the Cherokee, Choctaw, and Chickasaw Indian tribes.[18]

Oklahoma's argument was based on the Enabling Act.[19] Oklahoma was admitted into the union in 1907 upon compliance with the Act which provided that Oklahoma would be admitted "on equal footing with the original States."[20] This Act gave Oklahoma title to all its land within the State and required that it must disclaim title "to all lands . . . owned or held by any Indian or Indian tribes."[21] But an Oklahoma statute provides that the State owns the beds underlying navigable streams.[22] This position has been maintained by the Oklahoma State Supreme Court.[23]

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14. Cherokee Patent of 1838, *cited in*, Brief for Respondant at Appendix D, United States v. Cherokee Nation of Okla., 480 U.S. 700 (1987).

15. Cherokee Nation or Tribe of Indians in Okla. v. Oklahoma, 416 F. Supp. 838, 839 (E.D. Okla. 1976).

16. *Id.*

17. Cherokee Nation of Tribe of Indians in Okla. v. Oklahoma, 402 F.2d 739 (10th Cir. 1968).

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

19. *Choctaw Nation*, 397 U.S. at 627. *See* Act of June 16, 1906, 34 Stat. 267.

20. Act of June 16, *supra* note 19, at 271.

21. *Id.* at 279.

22. *See* 64 Okla. Stat. Ann. § 290 (West 1964); 60 Okla. Stat. Ann. § 337 (West 1971).

23. *See* State v. Nolegs, 40 Okla. 479, 139 P. 943 (1914); Vickery v. Yahola Sand & Gravel Co., 159 Okla. 120, 12 P.2d 881 (1932); City of Tulsa v. Commissioners of Land Office, 187 Okla. 82, 101 P.2d. 246 (1940); and Lynch v. Clements, 263 P.2d 152 (Okla. 1953).

Oklahoma's position has been upheld by previous decisions of the United States Supreme Court. In *Shilvely v. Bowlby*[24] and *Alaska Pacific Fisheries v. United States*,[25] the Court held that the United States owns lands in territorial status, including lands underlying bodies of water. Unless otherwise reserved, title to land underlying bodies of navigable water was held to pass to the states upon their admission into the Union in *Donnelly v. United States*.[26]

The United States Supreme Court closely examined all the treaties applicable. In finding for the Indians, Justice Marshall stated that "treaties were imposed upon them and they had no choice but to consent. [T]his Court has often held that treaties with the Indians must be interpreted as they would have understood them . . . , and any doubtful expression should be resolved in the Indians' favor."[27]

The Supreme Court concluded that title to the bed of the Arkansas River did not vest to the state of Oklahoma upon its admission to the Union. It was decided that the United States intended to convey title to the bed of the Arkansas River below its junction with the Grand River within the present State of Oklahoma by the grants it made to the Cherokee.[28]

III. Legal Issues and Procedural History

A. *Legal Issues*

The issue presented by the Cherokee in *United States v. Cherokee Nation*[29] was whether the Indians were entitled to just compensation under the Takings Clause of the United States Constitution[30] for the destruction of sand and gravel due to navigational improvements carried out by the United States government under the McClellan-Kerr Project.[31] When

24. 152 U.S. 1 (1894).
25. 248 U.S 78, 87 (1913), *aff'd*, 240 Fed. 274 (9th Cir. 1917).
26. 228 U.S. 243, 260 (1913).
27. *Choctaw Nation*, 397 U.S. at 631.
28. *Id.* at 635.
29. United States v. Cherokee Nation of Okla., 480 U.S. 700 (1987).
30. U.S. CONST. amend. V.
31. Act of July 24, 1946, ch. 595, 60 Stat. 634, 635-636.

the United States Army Corps of Engineers made the navigational improvements, it altered the river's natural course, dredged the main channel, and rendered oil, gas and coal deposits inaccessible.[32] The Cherokee contended that the property rights awarded to them in *Choctaw Nation v. Oklahoma*[33] entitled them to compensation. The United States Supreme Court sought to determine whether Congress' power to control navigation, implied under the commerce clause,[34] precluded the Cherokee's Fifth Amendment claim.

The Cherokee argued further that the relationship between the United States and the Indians is of a special fiduciary nature. The United States government has an obligation of trust when dealing with the Indians.[35] The Cherokee asserted that this unique relationship elevated the Government's actions to that of a taking.[36] It is outside the scope of this note to discuss the fiduciary nature of the relationship between the United States and Indian peoples.

B. *Procedural History*

After the United States Supreme Court's decision in *Choctaw Nation*, the Cherokee attempted to obtain compensation from the Government.[37] The Army Corps of Engineers concluded the navigational servitude held by the United States rendered the claim meritless and, therefore, Congress refused to fund the claim.[38] Congress, however, did provide the Cherokee with the opportunity to seek judicial relief and gave jurisdiction to the United States District Court for the Eastern District of Oklahoma.[39]

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32. Brief for the respondent Cherokee Nation at 33, United States v. Cherokee Nation of Okla., 480 U.S. 700 (1987) (No.85-1940).

33. *Choctaw Nation*, 397 U.S. 620 (1970).

34. U.S. CONST. art. I, § 8, cl. 3.

35. Seminole Nation v. United States, 316 U.S. 286, 296 (1942).

36. *Cherokee Nation*, 480 U.S. at 707.

37. *Id.* at 700.

38. *See Department of the Interior and Related Agencies Appropriations for 1980: Hearings Before a Subcommittee of the House Committee on Appropriations*, 96th Cong., 1st Sess. 379-92 (1979).

39. Act of Dec. 23, 1982, Pub. L. No. 97-385, 96 Stat. 1944 (1982). The statute provides in part:

The Cherokee Nation filed its complaint in district court on May 23, 1983.[40] It alleged that the McClellan-Kerr Navigation System destroyed tribal assets in the river bed of the Arkansas River, which the United States held in trust for the Cherokee Nation, and that action constituted a taking under the fifth amendment of the Constitution of the United States.[41]

On cross motions for a summary judgment the District court found in favor of the Cherokee Nation. The court held that the decision in *Choctaw Nation* created a unique situation and, in fact, made a private waterway of that portion of the Arkansas River which is found on the Cherokee reservation.[42] The court held that since the United States had not specifically reserved a navigational servitude in its patents, it could not now be asserted.[43]

The United States court of appeals affirmed the decision of the district court, but on different grounds.[44] The court found that the uniqueness of this case is derived from the Cherokee's fee simple ownership in the bed and banks of the Arkansas River, and noted that the Cherokee are not merely riparian owners.[45] The court found that the Cherokee's use was non-navigational and that the exercise of public power affected the private ownership rights of the Cherokee. The

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[J]urisdiction is hereby conferred upon the United States Court of Claims, or upon the United States District Court for the Eastern District of Oklahoma, to hear, determine, and render judgment, under the jurisdiction provisions of section 2 of the Indian Claims Commission Act of August 13, 1946, as amended (60 Stat. 1049, 1050; 25 U.S.C. 70a), on any claim which the Cherokee Nation of Oklahoma may have against the United States for any and all damages to Cherokee tribal assets related to and arising from construction of the Arkansas River Navigation System, including, but not limited to, the value of sand, gravel, coal, and other resources taken, the value of the damsites and powerheads of the dams constructed on that part of the Arkansas riverbed within the Cherokee domain in Oklahoma, without the authority or consent of said Cherokee Nation . . . .

40. Brief for the respondent Cherokee Nation at 1, United States v. Cherokee Nation of Okla., 480 U.S. 700 (1987) (No. 85-1940).

41. *Id.*

42. Cherokee Nation of Okla. v. United States, No. 83-306-C (E.D. Okla. 1984).

43. *Id.* at 3.

44. Cherokee Nation of Okla. v. United States, 782 F.2d 871 (10th Cir. 1986).

45. *Id.* at 877.

court further held that in such circumstances there must be a balancing of the public and private interests to decide if compensation is due.[46] Ruling in favor of the Cherokee Nation the court stated: "[t]o create as sweeping a power for which the government here argues in light of these constitutional safeguards would distort the very nature and scope of the navigational servitude."[47]

The court of appeals recognized that the United States can exercise navigational servitude, and the Cherokee cannot interfere with the exercise of that power. The Cherokee have the right, however, to compensation for the subsequent loss of property or diminution in value.[48] The case was then referred back to the trial court for a factual inquiry as to damages incurred by the Cherokee.

A dissenting opinion was filed. The dissenting judge found that the source or the nature of the Cherokee's title made no difference.[49] "[T]he exercise is not the taking of property but the exercise of a power to which the property owners have always been subject."[50] Judge Seth voted to reverse the holding of the trial court that a taking had occurred.

IV. The Opinion of the Court

The United States Supreme Court reversed the decision of the Tenth Circuit Court of Appeals, finding that no taking had occurred and the Cherokees were therefore not entitled to compensation under the fifth amendment.[51] The opinion of the court was delivered by Chief Justice Rehnquist. No dissenting opinions were filed.

In reversing the court of appeals, the Supreme Court found that the Tenth Circuit "erred in formulating a balancing test to evaluate this assertion of the navigational servi-

46. *Id.*
47. *Id.* at 878.
48. *Id.* at 879.
49. *Id.* at 880.
50. *Id.* at 882-83.
51. United States v. Cherokee Nation of Okla., 480 U.S. 700 (1987).

tude."[52] The Supreme Court decided that no balancing test was required in reaching a decision on the Cherokee's taking claim.

The source of the Cherokee's title, or the fact that the Cherokee held a fee simple title, rather than being merely a riparian owner, made no difference to the Court. To the contrary, the Court found that this dominant servitude applied to all riparian owners and those with riparian interests.[53] In 1970, the Cherokees had been granted fee simple by the United States Supreme Court in *Choctow Nation.* However, the Cherokee's degree of sovereignty over tribal lands created no exception to the servitude, and the Court in 1987, found that no taking had occurred.[54] The Cherokee's reading of or reliance on *Choctow Nation* did not withstand the decision of this Supreme Court. "We think that the decision in *Choctow Nation* was quite generous to respondent, and we refuse to give still a more expansive and novel reading of respondent's property interests."[55]

Finally, the Court rejected the Cherokee's argument that the fiduciary responsibility of the United States in relation to the Indian Nations puts them in a different position regarding the alleged taking of the tribal assets. The Court held that "[t]hese principles . . . do not create property rights where none would otherwise exist . . . ."[56]

V. Analysis

The United States Constitution gives Congress the power to control commerce.[57] The power to control navigation is not explicit in the commerce clause, however, it is implied. It is well settled that commerce includes navigation.[58]

Congress' power under the commerce clause is indeed ex-

52. *Id.* at 703.
53. *Id.* at 706.
54. *Id.* at 707.
55. *Id.*
56. *Id.*
57. U.S. CONST. art. 1 § 8, cl. 3.
58. Gibbons v. Ogden, 22 U.S. (9 Wheat) 1 (1824); Corfield v. Coryell, 4 Wash. C.C. 371 (1823); Gilman v. Philadelphia, 3 Wall. 713 (1866).

tensive. The Supreme Court of the United States has sustained broad interpretations of the commerce clause by Congress. In fact, the commerce clause has been used by Congress to implement legislation that has had major social impact.[59]

In contrast, the takings clause in the fifth amendment is clear on its face. "Private property shall not be taken for public use, without just compensation."[60] Although the takings clause itself has been subject to intense litigation, its mandate is clear.

These two principles of constitutional law appear to conflict when applied to damages resulting to private property from improvements made by the United States to navigable waters. The problems inherent in reconciling these principles and applying them on a case by case basis persists.

The Supreme Court sought to reconcile the takings clause and the rights of riparian owners in *United States v. Rands*.[61] The Court asserted that "[t]he Commerce Clause confers a unique position upon the government in connection with navigable waters."[62] Navigable water used in the regulation of commerce is the property of the United States, and "[t]his power to regulate confers upon the United States a 'dominant servitude' which extends to the entire stream and the stream bed below ordinary high water mark."[63] The Court found that the exercise of this "dominant servitude" is a power to which riparian owners have always been subject and is not a taking under the fifth amendment entitling the plaintiff to compensation.[64]

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59. *See* Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964) and Katzenbach v. McClung, 379 U.S. 294 (1964). These cases upheld Title I of the Civil Rights Act of 1964 in holding that racial discrimination was an unconstitutional restraint on interstate commerce.

60. U.S. CONST. amend. V.

61. 389 U.S. 121 (1967). The plaintiff sought the value of sand and gravel assets as well the property's special value as a port site. The plaintiffs' land was along the Columbia River in Oregon and they did not claim to have fee simple title to the bed of the river as the Cherokee Nation had.

62. *Id.* at 122.

63. *Id.* at 123.

64. *Id.* at 123.

The Supreme Court in *Montana v. United States*[65] held that the states' power over the river bed of navigable waters is subject to "the paramount power of the United States to ensure that such waters remain free to interstate and foreign commerce."[66] In fact, the Court in *Cherokee Nation* relied on this language.[67] However, the question of a taking is not at issue in *Montana*. The question in that case involved the scope and source of power the Crow Indian Tribe had to regulate hunting and fishing within its reservation.[68]

The principal of navigational servitude has not always been interpreted as the Court did in the preceding cases. The Supreme Court looked at two companion cases in 1917, *United States v. Cress* and *United States v. Kelly*,[69] and reached different conclusions. The damage to the plaintiffs' properties was the result of the erection of a lock and dam. Cress' property was along a tributary and seven acres of land were subject to overflow from the river. Kelly owned a mill situated on a creek. The mill could no longer be driven by water power because of a pooling of the water at the lock and dam prevented the drop in water necessary.[70] Kelly was awarded $995 by the district court as just compensation for a taking.[71] In *Cress*, the court found there was a partial taking and that the plaintiffs were entitled to compensation.[72] "[T]he authority to make such improvements is only a branch of the power to regulate interstate commerce and foreign, and, as already stated, this power, like others, must be exercised, when private property is taken, in subordination to the Fifth Amendment."[73]

The dissenting Justices in *Scranton v. Wheeler*[74] attempted to formulate an approach to solving these apparent

65. 450 U.S. 544 (1980).
66. *Id.* at 551.
67. United States v. Cherokee Nation of Okla., 480 U.S. 700, 707 (1987).
68. *Montana*, 450 U.S. at 547.
69. 243 U.S. 316 (1917).
70. *Id.* at 318, 319.
71. *Id.* at 318.
72. *Id.* at 330.
73. *Id.* at 326.
74. 179 U.S. 141 (1900).

inconsistencies. The plaintiff in *Scranton* owned land along the Sault Ste. Marie River. The right to access the shore to the navigable portion of the river was permanently obstructed by a pier that was erected by the United States under the authority of Congress.[75] The Court held that there was not a taking and that the commerce clause gave Congress absolute power to regulate navigation.[76]

Justice Shiras wrote the dissent in *Scranton* and two other Justices concurred. The dissent noted that this is a case of access to navigable waters that are adjacent to upland property which was owned by the plaintiff. The dissent suggested that the nature of the riparian right of access must first be determined.[77] That right of access must constitute private property within the meaning of the constitution to receive compensation for its taking and, the dissent continued, if it is a private property right, then just compensation is due when it is taken.[78]

Applying the reasoning of the dissent in *Scranton* to *Cherokee Nation*, it is clear that the tribe had a private property interest in the river bed.[79] It would follow that the Cherokee would be due compensation under this rationale. In fact, the dissent stated "[w]hen the case does arise, I'm inclined to think it can be shown, upon principle and authority, that private property in submerged lands cannot be taken and exclusively occupied for a public purpose without just compensation."[80]

The dissent in *Scranton* argued that the assumption being made is, that since the government has the right to make improvements in navigable waters, it can do so without affording compensation to owners of private property. "But this assumption is, as I think, entirely without foundation, and, if

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75. *Id.* at 141.

76. *Id.* at 160-61.

77. *Id.* at 169.

78. *Id.* at 170.

79. The Supreme Court in Choctaw Nation v. Oklahoma, 397 U.S. 620 (1970) gave fee simple title to portions of the bed underlying the Arkansas River to the Cherokee Nation.

80. *Scranton*, 179 U.S. at 169.

permitted by the courts to be made practically applicable, would amount to a disregard of the express mandate of the Constitution that private property shall not be taken for public uses without just compensation."[81] "It cannot be supposed that a recognition of such a duty would cripple the Government in the just exercise of the power it incidently possesses to regulate interstate navigation."[82]

Richard A. Epstein, in his book *Takings*, advances this argument when he states "[t]he Supreme Court has given far too much weight to the 'navigation servitude' . . . ."[83] Epstein asserts that navigation servitude is a grant of jurisdiction and the Supreme Court has an "elementary confusion of jurisdiction with entitlement . . . ."[84]

A broad interpretation of the commerce clause could be maintained by the Court without continuing to support the concept of navigation servitude. The Cherokee Nation obtained its fee simple title to portions of the bed of the Arkansas River by a Supreme Court decision.[85] A later decision rendered that title to have little value when the assets of the bed were destroyed by the United States government.[86] As Epstein aptly states:

> Given the constant metaphor of the navigable river as a water highway, the same principle should be applied against the government, but a uniform line of cases starting with *Scranton v. Wheeler* have reached the opposite conclusion that all access rights, total and partial, including the worth of riparian land as a "portsite," are subordinate to the navigation easement. The decisions are so clearly wrong under any sensible view of the original entitlement between riparians, on the one hand, and the public at large represented by the government, on the

81. *Id.* at 183.

82. *Id.* at 190.

83. R. EPSTEIN, TAKINGS, PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 67-68 (1985).

84. *Id.* at 68.

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

86. United States v. Cherokee Nation of Okla., 480 U.S. 700 (1987).

other, that they require no further comment.[87]

IV. Conclusion

The question in *Cherokee Nation* is not whether the United States can take private property for public use, even if that property is the bed of a river, but what the responsibility of the United States is when it confiscates such private property. The power of eminent domain lies within the fifth amendment of the Constitution and not even the plaintiffs in this case question that right. The criteria for whether a taking has occurred in cases involving riparian owners is unclear. Chief Justice Rehnquist stated in *Cherokee Nation* "this Court has never held that the navigational servitude creates a blanket exception to the Takings Clause . . . ."[88] However, it appears that the Court in *Cherokee Nation* has created a blanket exception to the takings clause, and the precedent established in *Cress* has been set aside.

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87. EPSTEIN, *supra* note 83, at 72 (footnotes in original text omitted). *See* Scranton v. Wheeler, 179 U.S. 141 (1900). On port sites see United States v. Rands, 389 U.S. 121 (1967). For loss of access to major rivers see United States v. Commodore Park Inc., 324 U.S. 386 (1945).

88. *Cherokee Nation*, 480 U.S. at 704 (quoting, Kaiser Aetna v. United States, 444 U.S. 164, 172 (1979)).