INDIAN WATER RIGHTS TO THE MIDDLE ARKANSAS: THE CASE FOR THE KAWS

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What in the 19th century was a generally futile attempt on the part of Indian people to maintain their land base in the face of white encroachment, has in the 20th century given way to a struggle over water. This should not surprise serious students of the American West, for it is in the West where most Indians live today, and where dams and reservoirs collect this resource so short in supply. The stakes are high, and as a consequence professional researchers and the courtroom are replacing land jobbers and the treaty ground in a struggle that has enormous significance for the welfare of Indian America. One aspect of this struggle is the subject of this article.

More often than not, we tend to think of the desert Southwest as the locus for problems over water. For example, professional appraisal of the Gila river Pima's plight consequent to the Tonto-Salt river reclamation project near Phoenix, Ariz., at the turn of the century is comparable to an analysis of more recent judicial maneuvering regarding the future of Pueblo water rights to the upper Rio Grande. But on the more humid eastern flank of the West—roughly the area between the 95th and 100th meridians—water is also a problem, especially in the middle Arkansas river valley

Title-page photo: This sketch from The Illustrated London News, London, April 25, 1857, shows a delegation of Kaw Indians concerning with Commissioner of Indian Affairs James W. Denver in Washington, D.C. At this time the Kow (Kante) Indians were settled on a reservation in the Upper Neosho valley where their lands were being invaded by white speculators and squatters.

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extending from Great Bend, Kan., to Tulsa, Okla. Here intensive grain, livestock, oil, gas, salt, and gypsum production are matched by increasing manufacturing and urbanization that place heavy demands on the water supply. And in the near center of the region is Kaw lake, the only major federal reservoir on the Arkansas between John Martin reservoir in eastern Colorado and Keystone reservoir just west of Tulsa. Authorized by the flood control act of 1962, the present conservation pool extending north from the damsite near Ponca City to Arkansas City, covers approximately 20 miles of the now inundated Arkansas river that is claimed by the Kaw tribe of Oklahoma.

The historical context of this claim dates back several centuries. Once residents of the lower Wabash valley in present Indiana, the Kaws (or Kansa Indians) were forced westward by more powerful Algonkian people from the East. This movement by way of the Ohio, Mississippi, and Missouri rivers may have begun prior to the Coronado expedition to the Central Plains in the mid-16th century, or perhaps even prior to the Columbian invasion itself. More certain is evidence of Kaw occupation of much of future Kansas by the closing years of the 17th century. Here their village sites along the Missouri and Kansas rivers, and their regular hunting excursions to the plains to the west attest to the fact that by 1800 the Kaws had secured a proprietary claim to most of the Republican, Smoky Hill, and Kansas river valleys—a domain of nearly 20 million acres. But the advance westward of white Americans following the War of 1812, and land-cession treaties with the United States, soon dispossessed them of these lands.

Following a "friendship and protection" treaty in 1815, the Kaws first negotiated in earnest with the United States in 1825. Meeting with Indian Superintendent William Clark in St. Louis, in June of that year, the Kaws ceded all of their lands except 23 small tracts for the Kaw half-breed, and "a tract of land, to begin twenty leagues up the Kansas river, and to include their village on that river; extending West thirty miles in width . . . . to be surveyed . . . . at the expense of the United States." Because segments of the Kansas and Republican rivers flowing through this diminished reservation were considered strategic from a military and commercial point of view, the government deemed it necessary to secure permission to navigate these watercourses. This was done by Article 11 of the treaty, which stated that the Kaws owned the rivers and riverbanks in question, and were granting only the enumerated navigation rights. Indeed, Article 11 was comparable to the supplemental Kansa treaty later that year, which allowed non-Indian passage over the Santa Fe trail, but which in no way required that the Kaws relinquish title to the land itself.

Thus from the start the United States recognized legal ownership of rivers and riverbeds on Kaw tribal lands. In treaties subsequently negotiated in 1846, 1859, and 1862, there is no mention of waterways as reservation boundaries or as resources useful to the tribe. But that water remained central to their life can be seen in their choice of village sites on Mission creek west of Topeka, and on the Neosho river and its tributaries between Emporia and Council Grove. And as will be seen, their final settlements at the junction of the Arkansas river and Beaver creek in present northern Oklahoma conforms to this tradition.

To the Kaws, rivers and water had spiritual and temporal value. Of particular significance to them was a large salt spring near the fork of the Solomon river, in northwest Mitchell county. This deposit, now inundated by the Glen Elder reservoir, was named Ne-Pah-Olla by the Kaws, meaning "Water on the Hill." According to an account of 1830, the bubbling center of the huge deposit was Ne Wohkondaga or "Spirits water." It was repeatedly visited by the Kaws, who threw conjuring charms into the water to placate or invoke the power of

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6. Ibid., p. 224.
7. Ibid., pp. 248-250.
8. Ibid., pp. 552-554, 800-803, 829-830.
The U.S. government's policy of placing Indian tribes on more concentrated reservations led to increasing reductions of the Kaw land base. By the treaties of 1846 and 1859 their lands were reduced to an 80,000-acre tract along the upper Neosho river. In 1872 congress authorized the sale of the Kansas lands and the purchase of a reservation in present Kay county, Oklahoma. This map of Kaw lands in Kansas is reproduced from The Kaw People by William E. Unrath (Phoenix: Indian Tribal Series, 1975).

Recently, in an interview with Kaw full blood Jesse Meholah, Jr., whose grandfather was No-pah-wah, chief of the Kahola band at the time of forced removal from Kansas in 1873, it was reaffirmed that the tribe had always settled on the banks of life-sustaining rivers and streams. "From these streams and rivers," said Meholah, "which the Kaw people viewed in a spiritual and proprietary manner, water was taken for prayers that were said to Wau-Con-Dah prior to the taking of meals. The water was placed in a large stone pitcher and passed around to the people seated at the table. Each person would then invoke the presence of the Great Spirit by drinking from the pitcher of sacred water." 9


10. Interview with Jesse Meholah, Jr., October 14, 1978, Kaw tribal office, Ponca City, Okla. Meholah was then chairman, Kaw tribe of Oklahoma. No-pah-wah died on January 15, 1897, and his wife, Pah-kah-shin-tah, died on September 20, 1894.— Unrath, The Kaw People, p. v.

The government's policy of placing Indian tribes on more concentrated reservations led to an enormous reduction of the Kaw land base. By the treaties of 1846 and 1859 their lands were reduced to an 80,000-acre tract along the upper Neosho river, and by the late 1860's it became apparent that this land would soon be ceded as well. After several futile efforts to negotiate a formal treaty, congress authorized the sale of the remaining Kaw lands in Kansas in 1872, and the purchase of a 100,137-acre reservation in present Kay county, Oklahoma. It was this purchase that established Kaw ownership of the Arkansas river from the Kansas-Oklahoma border to just above Ponca City. 11

The statutory foundation of this claim is provided in the boundaries assigned to the Great and Little Osages by the Cherokee National Council on June 15, 1872: "Bounded on the east by the ninety-sixth meridian, on the south and west by the north line of the Creek country and the main channel of the Arkansas.

river, and on the north by the south line of the State of Kansas." For the Kaws the statute provided, "That said Great and Little Osage tribe of Indians shall permit the settlement within the limits of said tract of land of the Kansas [or Kaw] tribe of Indians, . . . not exceeding one hundred and sixty acres for each member of said tribe, to be paid for by said Kansas tribe of Indians out of the proceeds of the sales of their lands in Kansas, at a price not exceeding that paid by the Great and Little Osage Indians to the Cherokee nation of Indians." 12 In fact it was not until June 14, 1883, that the actual legal instruments of transfer were concluded. Nineteen years later, on February 8, 1902, this last Kaw reservation was allotted by congress, and divided equally between individual Kaws, with a small acreage reserved for school, agency, cemetery, and townsite purposes. 13

Because there is no mention of the Arkansas river in either the act of 1902 or the individual deeds issued to those Kaws whose allotments included fractional lots along the east bank of the river, the question of post-allotment river ownership as described in the 1872 statute remained cloudy. For the period 1872 to 1902 there is no doubt that the Kaws as a nation owned the river from the east bank to the main channel. But because several 20th-century federal court cases—notably Brewer-Elliott Oil & Gas Co. v. United States (1922)—dealing with other segments of the Arkansas, or with other rivers abutting on allotted Indian reservations, have held that the riparian allottees secured ownership to the center of the rivers in question, it has been uncritically assumed that the same circumstance prevailed with the Kaws. 14

12. Ibid., p. 229.

13. "Indenture made and entered into this fourteenth day of June A.D. eighteen hundred and eighty three, between the Cherokee Nation, by Dennis Bushyhead, Principal Chief, Richard M. Wolfe and Robert B. Ross, delegates of said Cherokee Nation, for and in behalf of said Nation, of the first part, and the United States of America, in trust for the use and benefit of the Osage and Kansas Indians, of the second part, June 14, 1883," "Indian Deed Book," vol. 6, pp. 482-486, Record Group 75, National Archives; U.S. Statutes at Large, 1901-1903, pp. 636-641.

14. In 1922 the U.S. Supreme Court considered the scope of the Arkansas river and riverbed title acquired by the Osage Nation under the Cherokee deed of 1883, and concluded that under the language of the act of 1872, the deed of conveyance carried title to the riverbed on the east side out to the main channel. Under this decision it is clear that the title of the Kaw Nation acquired under the same deed also extended to at least the main channel—Brewer-Elliott Oil & Gas Co. v. United States, U.S. Reports, 260, 1925, p. 573, affirmed, U.S. Reports, 275, p. 555, and United States v. Champlain Refining Co., Federal Reporter, 195, 2d ser., p. 769, affirmed, U.S. Reports, 275, p. 788.

As early as 1869 it was clear that the Kaw lands in Kansas would be relinquished. Squatters had overrun the reservation on the Neosho and newly appointed Kaw agent, Mahlon Stubbs (1825-1916), reported in January, 1870, that "this tribe . . . have been so badly dealt with in former years—that they have but little confidence in white men of any class."

A case in point is an opinion rendered by the solicitor's office of the U.S. Department of Interior in 1935 over the Donahoe oil and gas lease to certain Kaw lots located between the east bank and the main channel of the Arkansas. The opinion relied essentially on the U.S. v. Brewer-Elliott ruling that the Arkansas river was a non-navigable stream, and thus not under authority of the act of March 3, 1811, which provided "that all navigable rivers and waters in the territories of Orleans and Louisiana shall be, and forever remain, public highways." 15 Acting Solicitor Charles Fahy concluded "that the conveyances to the allottees of the land bordering on the Arkansas River within the Kaw Reservation carried title to the thread of the stream and that no interest

Anticipating removal of the Kaws from their Kansas lands, the U.S. Land Office in the fall of 1871 dispatched surveyor Ehud N. Darling to the Indian territory. Darling surveyed approximately 60,000 acres on both sides of the Arkansas river immediately south of the southern Kansas boundary. This map shows in the northeast corner of section 13 the 21.40 acre island in the Arkansas river that became part of the new Kaw reservation. Map reproduced courtesy of the National Archives.
or title was reserved or retained by the Kaw tribe.\textsuperscript{16} It may in fact be demonstrated that the Kaw tribe retained interest and title to the entire Arkansas bordering on their reservation. One approach is to challenge U.S. v. Brewer-Elliott directly by presenting new evidence of navi-
gability for the segment of the river in question. A second is to consider tribal intention to
reserve river ownership at the time of allotment in 1902. Since the allotment statute is silent on
this point, other evidence becomes critical, as do the views of the Kaws, who to this day
support oral accounts regarding intent to re-
serve common ownership after 1902.\textsuperscript{17} The third method, and primary focus of this article,
is to recount the events surrounding creation of
the reservation boundaries under the statute of
1872, and the legal transference of the reserva-
tion to the Kaw nation 11 years later.

It is important to understand that by the
statute of 1872 the Osages simply allowed the
Kaws to settle within the physical limits of
their reservation. Nothing was said regarding
the actual settlement of Kaws beyond the
Osages' boundary west of the 96th meridian,
except that the total acreage could not exceed
160 acres for each member of the tribe.\textsuperscript{18} In
other words, the Kaws were not legally con-
strained to the western and southern Osage
lines and could in fact select lands west of the
middle Arkansas channel as provided in Ar-
ticle 16 of the Cherokee treaty of 1866.\textsuperscript{19} This
was the conclusion of Charles C. Royce, whose
compilation of Indian land cessions in the 19th
century has served as a guide for the Indian
Claims Commission in the 20th century, and
who determined that the legal boundary of the
Kaw reservation was the west bank of the Ar-

kansas.\textsuperscript{20} The sequence of events up to 1902
corroborate his findings and tell us much about

the haphazard and even deleterious manner in
which the government dealt with tribal water
rights in the Indian territory.

As early as 1809 it was clear that the Kaw
lands in Kansas would be relinquished. In the
spring of that year a nefarious treaty sponsored
by a combination of white traders, railroad
interests, and six Kaw leaders (each of whom
was promised a quarter section of land for his
cooperation), was rejected by Interior Secretary
J. D. Cox. This combination had been at odds
with white squatters, and in short order the
squatters overran the remaining Kaw lands on
the Neosho.\textsuperscript{21} So bad was the situation
that newly appointed Kaw Agent Mahlon Stubbs
reported that the Kaws had lost confidence in
white men of any class or station.\textsuperscript{22}

Anticipating the removal statute of 1872, the
U.S. Land Office dispatched surveyor Ehud N.
Darling to the Indian territory in the fall of
1871. During the months of November and
December, 1871, and January, 1872, Darling
surveyed townships 27, 28 and most of 29
north, range east of the Indian meridian—ap-
proximately 60,000 acres of land on both sides
of the Arkansas river immediately south of the
southern Kansas boundary. His location of
township 29, range 4 east is of critical
importance to the question of Kaw water rights,
for in the near center of section 13 near the Kansas
line, Darling surveyed an island in the Ar-

kansas riverbed aggregating 21.40 acres. In his
field notes, titled "Meanders of an Island lying
partly in Kansas and partly in the Indian Ter-
itory," Darling entered the following description:
"Low sandy banks, Soil second rate, Timber Cottonwood."\textsuperscript{23} The island, its soil,
and its timber thus became a legally rec-
ognized part of the Cherokee cession estab-
lished in 1866 for the settlement of Indians
friendly to the United States.

\textsuperscript{16} Charles Fuh to the secretary of interior, May 14, 1933, M.27096 (copy), office of solicitor, division of Indian affairs, U. S.
Department of Interior, Washington.

\textsuperscript{17} Interview with Jesse Moholah, Jr., October 14, 1978.

\textsuperscript{18} U. S. Statutes at Large, 1871-1872, p. 229.

\textsuperscript{19} Kappel, Indian Affairs, v. 2, p. 947.

\textsuperscript{20} Charles C. Royce, "Indian Land Cessions in the United
States," Bureau of American Ethnology, Eighth Annual Report,
1896-1897 (1899), pt. 2, p. 836. Royce's description is as follows:
"Beginning at a point on the right bank of the Arkansas river where
the southern line of Kansas crosses said river; thence down said
river to a point where the township line between townships 26 and
27 crosses said river; thence E. on said township line to a point due
S. from the center of section 32, thence N. to the section line
between sections 29 and 32, thence E. to a point due S. of the
center of section 27, thence N. to the state line of Kansas,
thence W. along said state line to place of beginning.

\textsuperscript{21} "Agreement Made and Concluded at the Kaw Agency, Kan-
sas, on the Thirteenth Day of March, One Thousand Eight Hunder-
dred and Sixty-nine, and J. D. Cox to President of the United
States, April 5, 1869." "Documents Relating to the Negotiation of
Ratified and Unratified Treaties, Unratified Treaties, 1868-1869,
Micromint T484, roll 10, Record Group 75, National Archives.

\textsuperscript{22} Mahlon Stubbs to Enoch Hoag, January 6, 1870, office of
Indian affairs, "Letters Received," Kansas agency, microfilm M304,
roll 388, \textit{ibid.}

\textsuperscript{23} Maps of townships 27, 28, and part of 29 north, range 29
east of the Indian meridian, "strictly conformable to the field notes
of survey thereof on file in the office of the surveyor general, March
30, 1873," land division, folio no. 1, \textit{ibid.;} field notes of the
survey of lands in the Indian territory, under joint contract dated
Washington, D. C., December 3, 1870, by Ehud N. Darling, U. S.
surveyor, pt. L. v. 24, pp. 474-475, Eastern state office, Bureau of
Federal emigration agents Thomas Stanley and Uriah Spray accompanied a delegation of Kaw leaders to the Indian territory for the purpose of locating a reservation that would meet the needs of the tribe. This map of the "New Kansas Indian Reservation," platted by Stanley and Spray in September, 1872, shows that a substantial portion of the Arkansas river flowed through the reservation. The heavy broken lines indicate the reservation boundaries as determined by the Cherokee indenture of June 14, 1883. Map reproduced courtesy of the National Archives.
In the meantime, the Kaw leadership visited the Indian territory for the purpose of locating a reservation that would meet the needs of their people. Their preference was the lower Caney river valley near the eastern boundary of the Osage reservation; the government, on the other hand, preferred a location west of the Arkansas and north of the Salt fork. Federal emigration agents Thomas Stanley and Uriah Spray, who accompanied the Kaw delegation to the Indian territory, reported on September 9, 1872, that the Kaws were intractable in their demand for “plenty of water and timber,” and that a compromise location had been agreed upon:

Commencing at a point where the Arkansas River crosses the south line of the state of Kansas, and follow said river to its junction with the Big Beaver. Thence east until it crosses the section line 4 mi. east of the Range line between 4 & 5. Thence North on said section line to the place of beginning—comprising an area of about 102.400 acres, and being about 16 miles north & south and ten miles east and west.  

According to an accompanying plat of the “Proposed new home of the Kaw or Kansas Indians,” the western boundary of this reservation crossed the Arkansas river at three points. As dispatched by Stanley and Spray to Supt. Enoch Hoag on September 9, received by Hoag less than three weeks later, and sent on to Washington on October 23, 1872, the plat displayed several cabins inhabited by unidentified persons, a heavily timbered area along the Arkansas, several springs, various tributaries of the Arkansas, roads to the “Cana” country and Osage agency, and most important of all, sections 14, 23, and 26 in township 28, range 23 east, whose lands abutted on both banks of the Arkansas. A substantial portion of the Arkansas flowed through the reservation, and it was this configuration that the Kaw leaders initially had of their new Indian territory reservation, based on actual observation under federal supervision in the summer of 1872.

ADMINISTRATIVE changes in the Indian office in Washington delayed immediate action on the Stanley and Spray report. Indian Commissioner Francis A. Walker resigned his post on December 12, 1872, and it was not until April 3, 1873, that Edward Parmalee Smith took the oath of office as his successor. In the interim H. R. Clum served as the acting commissioner. Writing to Superintendent Hoag on February 27, 1873, Clum acknowledged receipt of the Stanley and Spray report and instructed Hoag to have a written agreement executed between the chiefs and headmen of the Kaws and Osages that conformed to the plat drawn up the previous fall. This was quickly done, but less than a month later Hoag received a second letter from Clum, informing him that “an error in the computation of the lands embraced in the agreements” had been made. Stanley and Spray had miscalculated the tribal population and consequently the total acreage required to provide the maximum of 160 acres for each tribal member. Hoag was instructed to return the original agreement and negotiate a new one based on a reduction of 2,263 from the original 102,400 acres platted in the fall of 1872. Significantly, the excess acreage was taken from the eastern and southeastern borders of the reservation, or in an area far removed from the Arkansas.

Of the 627 Kaws enumerated by the government in 1872, only 533 completed the journey to the Arkansas river reservation in the spring of 1873. Those remaining in Kansas either abandoned the tribe or opted for tax-exempt allotments under the federal statute of May 8, 1872. Little planning took place in advance of removal. Log cabins were erected for the convenience of agency officials, but the Kaws were left to look after their immediate needs. They constructed bark and sapling lodges along the banks of the Arkansas and Beaver creek, and engaged in hunting, fishing, and the planting of gardens. While government officials made plans for a grist mill, manual-boarding house, and mission school (to be funded from the proceeds of their land sales in Kansas), the

25. Ibid.
27. Robert M. Kvasnicka and Herman J. Voita, eds., The Commissioners of Indian Affairs, 1864-1877 (Lincoln: University of Nebraska Press, 1970), pp. 139, 143.
28. H. R. Clum to Enoch Hoag, February 27, 1873, letters relating to land and civilization, “Letters Sent,” office of Indian affairs, microfilm, M51, roll 110, Record Group 75, National Archives.
Washunagah became principal chief of the Kansas in 1885 after the tribe was located on the new reservation in Indian territory. A member of the Picasuny Band, he was chief at the time the Kaw's reservation lands were allotted in 1902. Following his death in 1908, tribal cohesion disintegrated rapidly.

majority of the Kaws resisted change and viewed their new home as a place where finally they would be secure from the squatters, land sharks and alien Indians who had troubled them so much in the past.31

Until money was available from the sale of their Kansas lands, this presumed security was tenuous at best. As will be recalled, the statute of June 5, 1872, assured the Kaws only an occupancy right to a portion of the Cherokee lands; ownership in the legal sense was another matter. In fact, until a formal indenture of transference had been concluded, there was nothing to prevent the government from unilaterally moving the Kaws elsewhere. On all sides the availability of money was crucial.

The enormous speculation in Kaw land scrip prevented any quick disposal of their former Kansas domain. The act of May 8, 1872, provided for the sale of ceded lands under the treaty of October 5, 1859, and the distribution of the proceeds on a per capita basis. The act of June 23, 1874, provided for the sale of certain trust lands to actual settlers; the act of July 5, 1876, provided for sale of the remaining lands, with part of the proceeds to go to the tribe in common, part to be credited to the tribal fund in the federal treasury at five percent, and part to be used for providing homes in Indian territory; and the act of March 16, 1880, extended the time payment of settlers for Kaw trust and diminished reservation lands in Kansas.32 With well-entrenched squatters and powerful railroad interests pulling at cross purposes, income from actual land sales was slow in coming, and it was not until the early 1880's that enough money was available for the Kaws to provide the requisite cash for legal title to their new reservation.33

The sequence of actions leading to legal title began with Article 16 of the Cherokee treaty of 1866. It was under this agreement that the Kaws, Osages, Nez Perces, Poncas, Pawnees, Tonkawas, and Oto-Missourias occupied portions of the Cherokee outlet, a 60 mile-wide stretch of land extending from the 96th to the 100th meridian.34 But whereas the latter five tribes were established west of the Arkansas, the Kaws and Osages selected lands on the opposite bank. From the Kansas boundary to the northeastern corner of the Ponca reservation near present Ponca City, no additional reserves were created. Until formally opened to white settlement by executive order in September, 1893, the area was a vast range land that after 1883 was leased by the Cherokee to the non-Indian Cherokee Strip Livestock Association, but which prior to that date was illegally grazed by cattle owned by white ranchers mainly from Kansas and Texas.


33. A description of these transactions is available in the general accounting office, "In re. Petition of the Kansas or Kaw Tribe of Indians, Court of Claims No. 664," signed by E. B. Smith, Indian tribal claims secretary, audit division, and J. B. McCarty, comptroller general of the United States, November 22, 1890, pp. 125-245, Indian Trust Accounting Division, General Services Administration, Falls Church, Va.

This lawless activity encouraged white squatters to enter the outlet and even cross over the Arkansas to locate claims and build cabins on the Kaw and Osage reservations that still were the property of the Cherokee nation. "Under pretense of grazing stock, for which they pay no tax," reported Indian Commissioner J. D. C. Atkins to the secretary of interior, "the squatters defy all authority to move them." Clearly, a legal transfer of reservation land title was essential to the maintenance of law and order.³⁵

Congress finally responded in the general appropriation act of March 3, 1883, by providing:

That the sum of three hundred thousand dollars is hereby appropriated, to be paid into the treasury of the Cherokee Nation, out of the funds due under appraisement for Cherokee lands west of the Arkansas River, which sum shall be expended as the acts of the Cherokee legislature direct, this amount to be immediately available: Provided, That the Cherokee Nation, through its proper authorities, shall execute conveyances, satisfactory to the Secretary of the Interior, to the United States in trust only for the benefit of the Pawnee, Ponca, Nez Perces, Otoes and Missourias, Osages [and Kansas] now occupying said tract, as they respectively occupy the same before the payment of said sum of money.³⁶

Less than two months later, on June 14, 1883, the conveyances were executed by Dennis W. Bushyhead, principal chief of the Cherokees, with the assistance of Cherokee delegates Richard M. Wolfe and Robert B. Ross. Citing the 1866 treaty, the removal statute of June 5, 1872, the action of the Cherokee National Council of May 8, 1883, the general appropriation act of March 3, 1883, and actual payment of $70,000.12 derived from land sales in Kansas, the Kaws were given legal title to the 100,137.30-acre reservation along the Arkansas. In the indenture the requisite full and fractional townships on the east bank of the Arkansas were legally described, and included in the conveyance were assurances that the Kaws were receiving "all and singular hereditaments and appurtenances belonging, or in any wise appertaining to the lands hereby granted."²⁷


³⁶ U.S. Statutes at Large, 1882-1883, p. 624.

³⁷ "Indenture...of June 14, 1883," Record Group 75, National Archives; see also, "Closed claims no. T-64," Indian Trust Accounting Division, General Services Administration, p. 224; and "Indian Reserves: Oniulda-Pipestone (Osage file)," Record Group 49, National Archives.

This Kaw Indian school dormitory was built in the early 20th century after the original building was destroyed by fire. It was located in Washungah, Okla., the reservation town named for the tribe's chief. The site has now been inundated by the flood pool of the Kaw Reservoir.
Because the conveyance was between the Cherokees and the United States in trust for the Kaw, representatives of the Kaws were not present at the actual execution of the instrument. Indeed, it was not until the following July 26 that Kaw-Osage Agent L. J. Miles was sent a certified copy of the transaction, with instructions to "explain to the Indians the nature and purposes of the instrument." There is every reason to believe that until Miles described the deed of June 14, the Kaws assumed that the boundaries of their reservation were precisely those platted by Stanley and Spray in the summer of 1872.\(^\text{38}\) Certainly it is clear that between 1872 and 1883, and even up to the date of allotment in 1902, the Kaws considered the Arkansas river from bank to bank as part of their Indian territory reservation. And by their formal action on March 3, 1883, the government and Cherokee nation accepted this position as well. As Darling's survey of 1871 had indicated, there were large and well-timbered islands in the riverbed, and to protect Kaw ownership of these (and the river as a whole), an important "Note" was made a legal part of the indenture of 1883. Written directly below the plat outlining their altered reservation boundaries, and constituting significant evidence of tribal ownership, the "Note" read:

The islands in the Arkansas River opposite to the lands described in the foregoing instrument, except Beaver and Turkey islands, in Townships twenty (23) north, of Range three (3) east, which are covered by and embraced in instruments of conveyance, even date heretofore, executed by the Cherokee Nation of Indians, conveying certain lands to the United States, for the Osage and Missouri tribe of Indians—are part and parcel of the lands set apart for the Osage and Kansas tribes of Indians, and are covered by and embraced in this plat and the foregoing deed of conveyance.\(^\text{39}\)

The government's purchase of the remaining lands in the Cherokee outlet in 1893 eliminated all Cherokee claims to the Arkansas from its right bank to the main channel.\(^\text{40}\) Just over a decade later major oil reserves were tapped some 25 miles northwest of Tulsa; by then, Alameda Oil Company's number one well near Bartlesville, Okla. terr., on the eastern border of the Osage nation had flowed 40 barrels of oil in 19 minutes, what one writer has termed "the best well yet struck in the United States outside of Texas." \(^\text{41}\) Clearly, the economic complexion of what by then was Oklahoma territory was changing, and because it was then possible to drill oil and gas wells in the beds of inland waterways, legal ownership of virtually every foot of the Arkansas riverbed was of critical importance.

In response to a resolution of the Kaw Tribal Council and pressure exerted by Kansas Cong. Charles Curtis (a mixed-blood member of the Kaw tribe), congress passed the Kaw allotment act on July 1, 1902. No mention was made of the Arkansas river. That same year Walter E. Stumph was advised that he had been selected to "retrace the original township, section and quarter-section lines and re-establish such corners on the Kaw Reservation, Oklahoma Territory." Again, nothing was said about the Arkansas. Stumph's only authority was to re-establish the lines of the earlier Darling survey and replace stone markers destroyed or misplaced by cattle grazing.\(^\text{42}\)

But Failure to mention the Arkansas River did not go unnoticed. On December 17, 1901, anticipating passage of the allotment act, W. B. Brooks of Ponca City wrote the Indian office, inquiring if an island in the Arkansas could be allotted to an Indian. In response, Indian Commissioner W. A. Jones advised "that this office knows of no reason why an island in the Arkansas river should not be allotted to an Indian. The matter would depend," he continued, "upon whether the island is Indian land subject to allotment and whether the prospective allottee is entitled to take an allotment." \(^\text{43}\) Several weeks later the question came up in a different context. Because there was confusion and disagreement as to whether

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Charles Curtis (1860-1938), Kansas congressman and senator, and vice-president during the Hoover administration, was an eighth-blood Kaw who had never resided on the Indian territory reserve. A member of the powerful house committee on Indian affairs, Curtis sponsored the Curtis act of 1898 and was largely responsible for the passage of the Kaw allotment act of 1902. For his efforts Congressman Curtis and his three children received approximately 1,625 acres of allotment and surplus land.

allotments selected from pasture land could be plowed for cultivation, the commissioner of the general land office informed the Indian office that this could be done, but only so long as the allotments in question did not interfere with the common water privileges of pastures. Waterways remained common property and individual privilege could not interfere with the rights of the tribe as a whole. With this understanding the Kaws speedily selected their allotments, none of which extended beyond the left (or east) bank of the Arkansas.

There were, however, continuing questions raised regarding island title. Although an inquiry in December, 1901, called attention to an island adjacent to fractional township 26 north, range 4 east (the Osage township immediately south of the Kaw reservation), the evidence cited in Commissioner Jones's decision applied to the Kaw situation as well. Citing the deed of June 14, 1883, Jones ruled that because "the Cherokee Nation was legally possessed of these islands and the right to convey them, it would appear that the present ownership of all except Beaver and Turkey islands by the Osage [and Kaw] Nation[s] is not open to dispute." Less than three months later, just prior to Stumpf's retracing of the Darling boundaries, Jones ordered George H. Delane of Ponca City "to get off an island (with improvements) because it belongs to the Osage reservation." 45

Obviously, the relationship between island ownership and clear title to the Arkansas river could not be ignored. While passage of the Osage allotment act on June 28, 1906, provided the immediate setting, the unavoidable need to resurvey the fractional Osage lots along the river directly below the Kaw lots served as the catalyst for title clarification. 46 In response to an urgent letter from the Osage allotting commission, reporting that one island contained 30

44. Commissioner of the general land office to O. A. Mitscher, February 12, 1902, ibid.

45. The allotments with appropriate legal descriptions of ownership are displayed in a photo-lithographic survey "Map of Kay County, Oklahoma," copyrighted in 1905 by The Republican News-Journal, Newkirk, Okla. The map displays the same large island near the Kansas line surveyed by Darling in 1871; it also shows a ferry in section 15, township 27, range 4 east, a bridge in section 23, township 27, range 4 east; and another just north of the Kaw City townsite—all across the Arkansas.

46. W. A. Jones to O. A. Mitscher, December 18, 1901, and Jones to George H. Delane, February 27, 1906, "Letters Sent" commissioner of Indian affairs, Civilization and Land Division, letter books 512, 514, Record Group 75, National Archives.

47. U. S. Statutes at Large, 1905-1907, pp. 539-545.
Kaw lake, in the middle Arkansas river valley, is the only major federal reservoir on the river between John Martin reservoir in eastern Colorado and Keystone reservoir just west of Tulsa. Authorized by the flood control act of 1962, the present conservation pool, extending north from the damsite near Ponca City to Arkansas City, covers approximately 20 miles of the now inundated Arkansas river that is claimed by the Kaw tribe of Oklahoma. This map of the Kaw dam and reservoir also shows the area of the former Kaw reservation. It is reproduced from *The Kaw People* by William E. Unrau (Phoenix: Indian Tribal Series, 1975).
acres more than indicated in the 1871 survey, the land office recommended to the secretary of interior that all lots bordering on the river be resurveyed at tribal expense. Acting Secretary T. Ryan concurred immediately, and in instructions to the U.S. surveyor, Abner F. Dunnington, the land office instructed Dunnington to "remeander the Arkansas River where it forms the boundary of the reservation." The commissioner provided Dunnington with a summary of federal court decisions regarding the location of meander lines along navigable waterways, and the problems of defining riparian land ownership bordering on streams altered by avulsion and/or accretion. But the core of his instructions dealt with the river boundary. Based on the Cherokee deed of 1883, Dunnington was told that because of the island property thereto attached, "the right bank of the Arkansas River at high water mark as it ran in 1872, when boundaries were defined by statute, became the reservation where said river formed a part thereof." Whether islands of a permanent character had been previously surveyed mattered not. "Applications have been filed at various times for the survey of unsurveyed islands in the Arkansas River," continued the commissioner, "but applicants have invariably been informed that the islands belonged to the Osage Nation." As further evidence in support of the land office's ruling, Dunnington was advised that "in the disposal of the public lands on the right bank of the river, the descriptions given by the plats of surveys in 1871 have been followed, and as the meander lines were run at high water mark, where the channel of the river remains the same as when surveyed." In short, the Arkansas river from bank to bank was property of the Osages dating back to 1872, and as a yardstick under similar circumstances, the ruling of the land office by reasonable inference applied to the Kaw nation as well. That their islands were not then solicited by outside interests mattered not.

UNTIL resources of marketable value were discovered in the bed of the Arkansas, no significant challenge was directed against the Interior Department's ruling. The change came in 1913, when it became apparent that oil and gas leases developed in the river near Cleveland, Okla., were commercially productive. Located in eight different sections of township 21 north, approximately 45 miles southeast of the Kaw reservation, the leases had been granted by the state of Oklahoma in consideration for royalties specified in the leases. One year later, the United States as trustee for the Osage nation claimed that the riverbed and minerals therein were property of the tribe, and brought suit against the parties to whom the leases had been granted. The defendants' response was that the Arkansas was a navigable stream and that the titles to the leases were thereby vested in the state of Oklahoma and thus wholly valid. The United States, on the other hand, asserted that the river "was not and never had been navigable," and that the leases were invalid. Four years later, on February 21, 1918, the federal court for the Western district of Oklahoma found for the plaintiff. The judgment was sustained by the Eighth circuit court of appeals two years later, and by the U. S. supreme court in 1922.

The Kaws, of course, were not party to the U.S. v. Brewer-Elliott litigation, nor was the section of the Arkansas within their reservation then at issue. But because in 1935 Acting Solicitor Fahy failed to take notice of the land office's reaffirmation in 1932 of its 1907 ruling regarding tribal ownership of the river, and chose rather to rely on the U.S. v. Brewer-Elliott ruling in his adverse decision regarding the Kaw-Donahoe oil and gas lease, an appraisal of the U.S. v. Brewer-Elliott reasoning is essential to an understanding of Kaw water rights to the middle Arkansas.

Central to Judge John H. Coterall's 1918 decision is the cavalier manner in which he


51. In response to a request for an opinion regarding Arkansas Island ownership, dated June 8, 1932, the land office's legal division took precisely the same position that the commissioner of the general land office had communicated to U.S. Surveyor Dunnington in 1907—See W. S. Binley, Chief, Division E, to Chief, Division C, titled "Memorandum for Division C," June 15, 1932. "Indian Reserves: Oneida-Pipistone (Osage File)," Record Group 49, National Archives.
treated tribal ownership of the islands. Conceding that the plat and note attached to the deed of 1883 "were effectively incorporated in the deed by reference," Cotterel nevertheless dismissed the action as inconsequential. In defiance, or better yet, ignorance of the official surveys conducted by the land office, he concluded that "the inclusion of the islands in the deed can be relevant in this case only if it tends to throw light on the title to the bed of the river." Then, in an unveiled effort to determine ownership primarily on navigability, he stated, "Assuming that the deed in that respect has a permissible bearing, the inference would be that the bed was not meant to be conveyed, although a resultant title would attach to it, as far as the middle of the main channel of the river, if it was not navigable." And navigability was an issue of "fact," one where a purely legal test could not be accepted. "It will be deemed navigable," said Judge Cotterel, "when used or susceptible of use, in its ordinary condition, as a highway of trade and travel in the customary modes on water." 52

A TROUBLESOME roadblock to disproving navigability was the position taken by the War Department and its office of engineers, dating back to the 19th century. In 1895, for example, the chief of engineers advised the Kaw-Osage Agent H. B. Freeman at Pawhuska, "I beg to advise you that the Arkansas River is a navigable waterway of the United States and the jurisdiction of the government extends over its whole navigable course." 53 Later that same year the same office informed the attorney general of Oklahoma territory, "There can be no doubt that the [Arkansas] river is a navigable water of the United States." 54 On March 26, 1906, the chief of engineers informed E. L. Spencer of Wichita that the Arkansas was considered navigable at that point, 55 and 16 years later, in response to a request from the Eighth circuit court in Oklahoma, the War Department informed the Justice Department that based on the laws of congress and decisions of the federal courts the Arkansas in Osage county, Ok-

53. Chief of engineers to H. B. Freeman, Record Group 77, National Archives.
54. H. M. Adams to T. F. McMechan, September 11, 1895, ibid.
55. Chief of engineers to E. L. Spencer, March 26, 1906, ibid.
This photograph of the Arkansas valley was taken before it was flooded by the Kaw dam. The site of relocated Kaw City is on the left. To the right are the "Kaw Bottoms" and the town of Washunah. The bridge in the background formerly connected the Kaw reservation with nonreservation area. Rivers and water have spiritual and temporal value to the Kaws who had always sought to settle on the banks of life-sustaining rivers and streams. Photograph by the author.

lakoma, was navigable "in fact." In 1914, the year the government brought suit in U.S. v. Brewer-Elliott, the corps of engineers ruled that the Arkansas was navigable from its mouth up to Wichita, and that drilling derricks causing obstruction to "free navigation" must be removed.

Because rulings of this sort undermined the government's case in a $20,000,000 suit, it was inevitable that the Justice Department would bring pressure on the War Department engineers to alter their position. But this they flatly refused on August 19 and September 16, 1914, and again on March 18, 1915. To a request for another survey they patiently reviewed their data and insisted that another study was unwarranted. Nothing in the official records and scientific studies indicated that the Arkansas was other than navigable.

Nevertheless, the Justice Department unilaterally determined, on August 6, 1915, that the Arkansas was nonnavigable from Three Forks near Fort Gibson, Okla., to its source in the Colorado Rockies. There then followed several memos from Pres. Woodrow Wilson to the War Department, encouraging the latter to cooperate more fully with the Justice Department in its prosecution, and a flurry of conflicting correspondence between executive departments and congress over the question of navigability. Finally, on November 24, 1916, newly appointed Secretary of War Newton D. Baker capitulated to the attorney general with the announcement that the head of navigation was at Three Forks. Based on what Baker called "the records of his Department," the ruling meant that titles along the Kaw and Osage reservations extended to the main thread of the channel only, and were the riparian property of the Kaw-Osage allottees or their successors in interest.

Secretary Baker's new ruling was, of course, supportive of Judge Cotteral's decision of 1918. What is distressing is that, given Cotteral's insistence on "navigability in fact" as

56. Acting secretary of war to attorney general of the United States, October 11, 1911. ibid.
57. Charles D. Townsend to chief of engineers, June 19, 1914. ibid.
the over-powering consideration, so little attention was given to evidence of past navigation and travel above Three Forks. Here the historian of Indian water rights is obliged to redress the balance.

In a short but important article published in 1979, James H. Thomas and Carl N. Tyson documented numerous examples of navigation on the Arkansas above Three Forks. They include the journeys of Benard de la Harpe in 1719-1721 and the Mallet brothers in 1739; the descent of the Arkansas to the Mississippi by James Wilkinson in 1806 and Ezekial Williams in 1811; the shipment of corn, potatoes, and flour from Arkansas City to Little Rock in 1876; a report indicating that in 1876 flat boats were leaving Arkansas City almost every day loaded with flour for the Indian agencies and Fort Smith, Ark.; a report in 1877 of a flatboat loaded with corn leaving Arkansas City for the Pawnee agency across from the Osage reservation; a shipment of wheat by flatboat from Arkansas City to Little Rock in 1878, which at Fort Smith was priced 20 cents a bushel above the Kansas price; an engine-driven boat that plied the Arkansas down past the Kaw agency and back to Arkansas City in 1878; the trip that same year of the 65-ton steamboat Aunt Sally from Little Rock to Arkansas City and back to Little Rock, followed by Albert Pruden and O. J. Palmer’s engine-powered ferry that hauled 700 bushels of wheat from southern Kansas to Little Rock that same season; the transportation of 1,000 bushels of wheat aboard the steamboat Cherokee from Arkansas City to Little Rock in 1879; the delivery of 2,000 pounds of flour from Arkansas City to the Kaw agency by the 21-ton Kansas Mills in 1885, and the hauling of 30,000 pounds of wheat on the same craft’s bow and another 90,000 pounds of wheat on three spike-shaped barges pushed in front from Arkansas City to Fort Smith and Little Rock in 1886.

Additional evidence of navigation is readily available. Prior to the Louisiana Purchase of 1803, American and French fur companies operating out of New Orleans utilized the middle and lower Arkansas as a commercial artery in a trade amounting to $20,000 annually. In the 1820’s, A. P. Chouteau reported that from his post on the Verdigris River near Three Forks he was sending 40-ton crafts up the Arkansas for several hundred miles. A crew of 13 moved the entire stock of a drug store aboard a 35-foot vessel from Wichita to Fort Smith in the summer of 1877. The following year the steamboat Arkansas Traveler, after a voyage from Arkansas City past the Kaw agency, returned to Harmon’s Landing in southern Kansas with plans for hauling freight “to a point about eight miles east of Pawnee Agency.” In the spring of 1879 Capt. H. B. Pruden took a ferryboat loaded with 12,000 pounds of potatoes from Arkansas City to the same agency, and a month later, in a letter to a newspaper in Winfield, T. E. Berry reported that the steamer Dardanelle, operated by Cotton Brothers & Co. of Dardanelle, Ark., had landed with a load of freight at Pawnee and was planning to take on wheat for their mill in Arkansas. The following season Amos Walton told a Wichita paper he was owner and operator of a steam ferry in Indian territory that had just completed a journey up the Arkansas to the mouth of the Walnut, down to Fort Smith (with a stop at the Kaw agency) and then back to Fort Gibson.

The diversity of the commerce is well illustrated in a correspondence from the Fort Smith Independent to the Arkansas City Traveler, in the spring of 1881. “We have two little steamers now running from Ft. Smith to points above in the Indian Territory,” reported the Independent. “This line has a lively and increasing trade between Fort Smith and the upper landings in merchandise, lumber, corn, hides, cotton seed, baled cotton and hay, and from twelve to twenty passengers each trip. Commodore Huff has recently placed on the line a new boat—the Fort Smith—designed to run in the trade between Fort Smith and Arkansas City, Kansas.” And that the trade remained profitable for several more years can be seen in an 1885 report indicating that Jack

62. Ibid., p. 513.
63. Arkansas City Traveler, July 4, 1877.
64. Ibid., May 22, 1878.
65. Ibid., April 2, 1879.
66. Cowley County Telegram, Winfield, April 30, 1879.
67. Wichita Eagle, May 6, 1880.
68. Arkansas City Traveler, April 20, 1881.
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Stubbs and L. W. Stockwell of Wichita had loaded 8,000 pounds of potatoes for the Ponca agency and various accoutrements for the Indian territory. The boys, reported the Vinita Indian Chieftain, "will doubtless have a pleasant trip." 60

TO CONCLUDE that the middle Arkansas was nonnavigable in fact is to ignore evidence to the contrary. Commercial traffic continued adjacent to the Kaw, Osage, and Pawnee reservations so long as it was not obstructed by bridges and then displaced by railroads. In the spring of 1884, for example, Maj. M. B. Adams of the U.S. corps of engineers and his crew were forced to remove the cabin from their boat in order to pass under the west Arkansas river bridge at Arkansas City. 70 At Tulsa the situation was worse, as T. S. Moorhead reported to the secretary of war in 1885:

Your attention is respectfully called to the obstruction to navigation in the Arkansas River at the village of Tulsa, Creek Nation. The St. Louis & San Francisco RR Co. are operating & using a temporary pile bridge across the river which in its present location and conditions collects large quantities of drift, floating logs, etc., in short making the river almost impassable. I was enabled to get through with the new steel steamboat KANSAS MILLERS only after three days of labor and the risk of losing the boat, to say nothing of the lives endangered. The RR Co. proposes replacing this old bridge by a new iron structure but have made no provision for a draw bridge. 71

In December, 1901, the Pawnee (Okla. terr.) county commissioners contracted to construct bridges across the Arkansas at Ralston, Jeffrie's crossing, and Hominy creek, 72 and by early February, 1904, two bridges had been completed at Kaw City, Okla. terr., just across the Kaw reservation. 73 None of these included draws. Even as far south as Fort Gibson the War Department recommended that the Ozark and Cherokee railroad be allowed to construct a fixed bridge, on grounds that to require a draw would create "an unnecessary hardship on the Company." 74

These and similar obstructions from Wichita to Little Rock were important deterrents to navigation, but in the final analysis it was railroad construction—much of it with federal and local assistance—that marked the demise of commercial navigation of the Arkansas. By 1873 the Missouri, Kansas and Texas railroad had completed a line from Checotopa to the Red river by way of Muskogee, Okla. terr. The Atlantic and Pacific reached Tulsa in 1882, the Chicago, Rock Island and Pacific completed its line to the Chickasaw nation in 1890. By the time the "Unassigned Lands" were opened to settlement in 1889, the Atchison, Topeka and Santa Fe had reached Guthrie, Okla. terr., and the Kansas and Arkansas Valley railroad had built beyond Three Forks. By 1900 these companies and their many feeder lines operated over more than 2,000 miles of track in present Oklahoma. Technology, enterprise, and public assistance had obliterated the Arkansas river traffic. 75

For a significant period prior to Kaw allotment the Arkansas was used for commercial travel and communication. That portion bordering their reservation was tribal property in 1872 and it remained so in 1902. No portion of the river or its islands was divided among individual Kaw allottees, and because of its demonstrated navigability, it remains property of the Kaw tribe to this day. The U.S. v. Brewer-Elliott ruling to the contrary, the case for Kaw rights to the middle Arkansas is commendable.

69. Indian Chieftan, Vinita, I. T., January 1, 1885.
70. Arkansas City Trader, May 7, 1884.
71. T. S. Moorhead to secretary of war, July 18, 1885, Record Group 77, National Archives.
74. A. Mackenzie to secretary of war, July 10, 1902, Record Group 77, National Archives.