50TH CONGRESS, 2d Session. } SENATE. { EX. DOC. No. 22.

LETTER

FROM

THE SECRETARY OF THE INTERIOR,

TRANSMITTING,

In response to Senate resolution of December 5, 1888, information relative to leases of lands in the Indian Territory.

DECEMBER 27, 1888.—Referred to the Committee on Indian Affairs and ordered to be printed.

DEPARTMENT OF THE INTERIOR,
Washington, December 14, 1888.

SIR: I have the honor to acknowledge the receipt of a resolution of the Senate, dated December 5, 1888, in words as follows:

Resolved, That the Secretary of the Interior be directed to inform the Senate what, if any, leases for lands, mineral or otherwise, in the Indian Territory are now existing; whether the same, or any of them, were made under legal authority, and whether any of them, and, if so, which ones, have been approved by the Secretary of the Interior or other authority in his Department.

In response thereto I have the honor to transmit herewith copy of a communication of the 13th instant from the Commissioner of Indian Affairs, with its accompanying papers, which furnishes all the information required by the resolution that is found upon the records of his office.

Regarding certain of the proposed leases mentioned on the schedule accompanying the Commissioner's letter as having been submitted to this Department, I have the honor to transmit a copy of letter written to the Attorney-General, and also copy of an opinion rendered by the Attorney-General in reply thereto, on October 14, 1886, wherein he holds that "the mining leases therein referred to are not such as may properly receive the approval of the Department of the Interior under existing laws."

In view of this opinion, the alleged leases submitted to the Department were placed on file without further action, except in the case of the lease by the Choctaw and Chickasaw Nations with G. A. Witte *et al.* (No. 12 on the schedule), which was on June 1, 1888, returned to Hon. J. S. Sherman, House of Representatives, by whom it was informally presented to the Department.

Very respectfully,

WM. F. VILAS,
Secretary.

The PRESIDENT PRO TEMPORE OF THE SENATE.

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
Washington, December 13, 1888.

SIR: I have the honor to acknowledge the receipt by Department reference, "for proper attention and early report," of the following resolution of the Senate, adopted December 5, 1888:

Resolved, That the Secretary of the Interior be directed to inform the Senate what, if any, leases for lands, mineral or otherwise, in the Indian Territory are now existing; whether the same, or any of them, were made under legal authority, and whether any of them, and, if so, which ones, have been approved by the Secretary of the Interior or other authority in his Department.

In compliance with your directions, I have the honor to transmit herewith—

(1) Schedule of contracts between the Choctaw and Chickasaw Nations by their duly appointed agents, and foreign corporations and non-citizens, and also between citizens and corporations of said nations and foreign corporations or non-citizens, for mining coal in the Choctaw Nation.

Previous to July 21, 1885, it was the custom of this office and the Department to approve contracts for mining purposes in the Choctaw Nation, when properly executed in conformity with the requirements of Section 2103 of the Revised Statutes, such action being required by a law of the Choctaws in order to give such contract validity.

Since that date, in view of the opinion of the Attorney-General in regard to leases or other alienation of Indian lands, no agreements of this character have been approved by this office, being regarded as in the nature of leases.

(2) Schedule of certain leases of lands in the Indian Territory for grazing purposes.

This schedule embraces all grazing leases, not heretofore reported to the Senate, in Senate Ex. Doc. No. 54, Forty-eighth Congress, first session, Senate Ex. Doc. No. 17, Forty-eighth Congress, second session, and Senate Report 1278, Forty-ninth Congress, first session, now in existence, which have been reported to this office by the agents in charge of the respective reservations in the Indian Territory.

None of these leases have been approved by this office, and none are on file.

Three licenses, issued June 2, 18, and 19, 1888, respectively, by Robert B. Ross, treasurer of the Cherokee Nation, under the act of the Cherokee council, approved February 8, 1888, to citizens of that nation, to use the three Salt Springs located on the lands of the nation, west of the Arkansas River and south of Kansas, for the term of ten years, were referred to this office, by the Department for report, July 12, 1888.

These licenses were issued to B. W. Alberty, H. H. Trott and R. I. Blakeny, and Robert Knight, respectively, under the act of Congress approved August 7, 1882 (22 Stats., 349), but have not yet received the approval of the Department, for the reason that plats of the salines, properly connected with the public surveys, have not been furnished by the nation.

Very respectfully, your obedient servant,

JOHN H. OBERLY,
Commissioner.

The SECRETARY OF THE INTERIOR.

Schedule of contracts for mining coal in the Choctaw Nation, Indian Territory, of record in the Indian Office.

No.	Date.	Lessors.	Lessees.	Mine or locality.	Term.	Remarks.
1	Apr. 23, 1883	Choctaw and Chickasaw nations.	Osage Coal and Mining Company.	Tobucksy County	Six years	Approved by Commissioner of Indian Affairs Sept. 24, 1883. Approved by Secretary of Interior Sept. 25, 1883.
2	June 26, 1883	do	W. O. Hartshorne	Poteau coal mines	do	Approved by Commissioner of Indian Affairs July 5, 1884. Approved by Secretary of Interior July 9, 1884.
3	Nov. 27, 1883	do	Atoka Coal and Mining Company.	Tobucksy County	Terminates March 15, 1890.	Approved by Commissioner of Indian Affairs Nov. 26, 1884 Approved by Secretary of Interior Nov. 29, 1884.
4	Oct. 11, 1884	do	Missouri Pacific Railway Company.	do	Six years	Approved by Commissioner of Indian Affairs Feb. 20, 1885. Approved by Secretary of Interior Feb. 24, 1885.
5	Unknown	do	L. W. Bryan	Sugarloaf County	Unknown	Returned to Indian agent May 7, 1887, without approval.
6	Jan. 22, 1886	Mrs. Lizzie Sloan *et al*	Osage Coal and Mining Company.	Norman coal claim	Six years	Submitted to Secretary Interior May 25, 1886, with recommendation that opinion of Attorney-General be asked as to whether this contract is within the meaning of his opinion of July 21, 1885.
7	do	Mrs. Margaret McKinney *et al.*	do	Joshua Pusley coal claim	do	Do.
8	do	T. J. Phillips *et al*	do	Isam Jefferson coal claim	do	Do.
9	do	N. B. Ainsworth *et al*	do	Simpson coal claims Nos. 1, 2, 3, 4, 5, and 6.	do	Do.
10	do	J. J. McAlester and wife	do	J. J. McAlester or No. 9 claim.	do	Do.
11	Nov. 1, 1886	Choctaw and Chickasaw nations.	Red River Mining Company	Blue County	Unknown	Submitted to Secretary of Interior Jan. 26, 1887, without recommendation.
12	Jan. 14, 1888	do	G. A. Witte *et al*	Kavanaugh mountains	do	Returned to Secretary of Interior May 31, 1888, without approval.
13	Feb. 21, 1887	Arbuckle Coal Company	C. R. Smith & Co	Pickens and Tishomingo Counties.	Twenty yr's	Contracts No 13 and 14 cover the same mines, and a controversy between the parties in interest has been investigated by a special agent of the Indian Office. The contracts have not been presented for approval.
14	July 19, 1888	Anadarko Coal and Mining Company.	Tuckerman & Bodine	do	do	

Schedule of leases purported to have been made by certain Indian tribes of lands in the Indian Territory for grazing purposes, subsequent to February 7, 1885, and not heretofore reported to the Senate Committee on Indian Affairs.

No.	Date.	By what tribe made.	To whom made.	Description and location of lands.	Acres.	Term.	Annual rental.
1*	1885. July 8	Kickapoo...	N. B. Childs and S. F. Scott.	Kickapoo Reserve..	190,000	5 years..	$5,000
1†	...do	Tonkawa ...	The Cowley Co. Cattle Company.	Part of Oakland Reserve.	45,000	10 years.	1,125
2†	...do	....do	Holton, Hill & Thomas.	....do	35,000	...do	875

* Reported to Indian Office by Sac and Fox agent, September 30, 1885.
† Reported to Indian Office by Ponca, etc., agent, October 9, 1885.

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
Washington, May 25, 1886.

SIR: I am in receipt by Department reference, for report, of a letter from Messrs. Britton & Gray, attorneys-at-law, dated the 19th ultimo, submitting for approval sundry executed agreements between the Osage Coal and Mining Company, a corporation of the State of Missouri, and certain citizens of the Choctaw Nation, for the mining of coal therein, as follows:

(1) Agreement, dated January 22, 1886, with Mrs. Lizzie Sloan and N. B. Sloan, her husband, *et al.*, owners of the "Norman Coal Claim." (Five parts.)

(2) Agreement, same date, with Mrs. Margaret McKinney and B. F. C. McKinney, her husband, *et al.*, owners of the "Joshua Pusley Coal Claim." (Five parts.)

(3) Agreement, same date, with T. J. Phillips and wife *et al.*, owners of the "Isam Jefferson Coal Claim." (Five parts.)

(4) Agreement, same date, with N. B. Ainsworth, T. J. Phillips, *et al.*, owners of the "Simpson Coal Claims Nos. 1, 2, 3, 4, 5, and 6." (Four parts.)

(5) Agreement, same date, with J. J. McAlester and wife, owners of the "J. J. McAlester," or "No. 9 Claim." (Two parts.)

Upon examination of the agreements in question I find that they severally provide that the Osage Coal and Mining Company, its successors and assigns, shall have "the exclusive right and privilege, for and during the full term of six years from date, of quarrying, mining, digging, and removing coal, boring or otherwise prospecting for same" on certain tracts or parcels of land in the Choctaw Nation therein more particularly described, and severally known by the designations above mentioned, with "the right to use, occupy, and control all of said lands for erecting tenement buildings upon same to be occupied by its employés, and for such other buildings and superstructures as may be necessary for properly opening up, developing and working said coal mine or mines, with the further right of surface use for all necessary tracks and such shafts or other openings as may be required for the economical and efficient working of the same."

Also that the Osage Coal and Mining Company, its successors, etc., shall have "the right to cut and use any of the timber on said lands for building houses, or other works in, above, and about said mines, and for use in said mines," with "the use of all stone and such other materials as may be found thereon for the same purposes, when necessary for the operation and development of said mines."

In consideration whereof the Osage Coal and Mining Company agrees to pay to the several parties named in said contracts, respectively, alleged owners of said coal claims, certain royalties on all coal mined therefrom at the rate, time, and in the proportions therein severally mentioned and set forth.

The agreement contains a further stipulation that the Osage Coal and Mining Company has thereunder "the right to control the surface occupancy of the lands hereinbefore described, and that no buildings shall be erected or occupied thereon without the consent of said second party" (meaning the said Osage Coal and Mining Company).

Under the N. B. Ainsworth agreement (No. 4 *supra*) the Osage Coal and Mining Company is additionally granted a right of way for, and the privilege of operating, a branch railway from such point on the main line or branches of the Missouri, Kansas and Texas Railway as may hereafter be selected by said company, to the mines located on the claims thereinbefore described, in so far as the parties in interest have the right to grant the right of way under the Choctaw laws and constitution.

Heretofore it appears to have been the practice of the Department (in accordance with the views expressed by Mr. Secretary Delano July 23, 1875, and by Mr. Secretary Chandler December 10, 1875, and January 29, 1878, touching the rights of the Choctaws and Chickasaws in the matter of the mining of coal and the cutting of timber on their lands) to have affixed its approval to agreements of this character, when executed in conformity with the internal laws of those nations.

I am very much inclined to doubt, however, whether, having a due regard to the opinion recently expressed by the present honorable Attorney-General upon the subject of Indian leases, the Department can consistently longer do so.

In his opinion rendered July 21, 1885, Mr. Attorney-General Garland, after reciting the right of the United States Government, and its settled policy from a very early date, to regulate and control the alienation or other disposition by Indians, and especially by Indian nations or tribes, of their lands, the earlier acts of Congress bearing upon the question, and the provisions of the act of 1834, as reproduced in section 2116 of the Revised Statutes, declaring that "no purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity unless the same be made by treaty or convention entered into pursuant to the Constitution," held as follows:

"This statutory provision is very general and comprehensive. Its operation does not depend upon the nature or extent of the title to the land which the tribe or nation may hold. Whether such title be a fee-simple or a right of occupancy merely is not material; in either case the statute applies. * * * Whatever the right or title may be, each of these tribes or nations is precluded, by the force and effect of the statute, from alienating or leasing any part of its reservation, or imparting any interest or claim in and to the same, without the consent of the Government of the United States. A lease of the land for grazing purposes is as clearly within the statute as a lease for any other, or for general purposes, and the duration of the term is immaterial. One who enters with cattle or other live stock upon an Indian reservation under a lease of that description, made in violation of the statute, is an intruder, and may be removed therefrom as such, notwithstanding his entry is with consent of the tribe. Such consent may exempt him from the penalty imposed by section 2117, Revised Statutes, for taking his stock there, but it can not validate the lease, or confer upon him any legal right whatever to remain on the land, and to this extent, and no further, was the decision of Judge Brewer in United States *v.* Hunter, 21 Fed. Rep., 615."

* * * * * * *

"I submit that the power of the Department to authorize such leases to be made, or that of the President or the Secretary to approve or to make the same, if it exists at all, must rest upon some *law* and therefore be derived from either a treaty or statutory provision. * * * The Revised Statutes contain provisions regulating contracts or agreements with Indians, and prescribing how they shall be executed and approved (see section 2103), but those provisions do not include contracts of the character described in section 2116, hereinbefore mentioned. No general power appears to be conferred by statute upon either the President or Secretary, or any other officer of the Government, to make, authorize, or approve leases of lands by Indian tribes; and the absence of such power was doubtless one of the main considerations which led to the adoption of the act of February 19, 1875, chapter 90, 'to authorize the Seneca Nation of New York Indians to lease lands within the Cattaraugus and Allegany Reservations, and to confirm existing leases.' The act just cited is moreover significant, as showing that in the view of Congress, Indian tribes can not lease their reservations without the authority of some law of the United States." * * *

It would seem that that which, under the opinion of the honorable Attorney-General, is prohibited to an Indian nation or tribe in respect of its lands is equally prohibited to the individual members deriving title from such nation. The nation or tribe is incapable of conferring any title or delegating any authority which it does not itself possess.

If this be so, the question then arises, Do the agreements now under consideration constitute "leases" or conveyances "of any title or claim" to Indian lands, within the contemplation of the statute, and hence within the meaning of the said opinion of the honorable Attorney-General?

A "lease" is defined by Bouvier to be "a species of contract for the possession and profits of lands and tenements, either for life or for a certain period of time, or during the pleasure of the parties."

To this definition the agreements appear to answer, and to be as much leases as if the technical phraseology made use of in the ordinary form of lease had been employed.

Acting, however, upon the suggestion of Mr. Assistant Attorney-General Montgomery, to whom I informally referred the question, I have the honor to recommend that the opinion of the honorable Attorney-General be requested—whether the agree-

ments properly fall within the contemplation of the statute, and hence within the meaning of his opinion rendered July 21, 1885, in regard to leases or other alienation of Indian lands.

I return Messrs. Britton & Gray's letter, with its inclosures.

Very respectfully, your obedient servant,

A. B. UPSHAW,
Acting Commissioner.

The SECRETARY OF THE INTERIOR.

DEPARTMENT OF THE INTERIOR,
Washington, October 8, 1886.

SIR: I have the honor to transmit herewith a report of 5th August, 1886, from the Commissioner of Indian Affairs, with accompanying papers, relating to agreements made between citizens of the Choctaw Nation of Indians in the Indian Territory and the Osage Coal and Mining Company, a corporation of the State of Missouri, for the mining of coal, etc., in said nation.

Attention is respectfully invited to the briefs and arguments of counsel, which are herewith inclosed.

I respectfully request that you will favor this Department with your opinion as to whether these agreements are such as may properly receive the approval of this Department under existing laws.

As the agreements in question are identical in form and are numerous, but one of them, that of the Osage Coal and Mining Company with Mrs. Lizzie Sloan and her husband, owners of the Norwood Coal Claim, is inclosed.

The return of the papers is respectfully requested.

I have the honor to be, very respectfully,

L. Q. C. LAMAR,
Secretary.

The ATTORNEY-GENERAL.

DEPARTMENT OF JUSTICE,
Washington, October 14, 1886.

SIR: Yours of the 8th instant is received. You transmit a report of the Commissioner of Indian Affairs relating to agreements made between citizens of the Choctaw Nation of Indians, in the Indian Territory, and the Osage Coal and Mining Company, a corporation of the State of Missouri, for the mining of coal, etc., in said nation. One of the agreements is inclosed. An opinion is requested as to whether these agreements are such as may properly receive the approval of the Department of the Interior under existing laws.

A similar question arose heretofore as to the authority of the Interior Department to approve leases of land for grazing purposes entered into by the Indians of the Cherokee, Cheyenne, Arapaho, Kiowa, and Comanche tribes, in their respective reservations in the Indian Territory. The question of the power of the Department of the Interior to authorize leases to be made for grazing purposes was submitted to the Attorney-General, and in his opinion of July 21, 1885, it is said:

"I submit that the power of the Department to authorize such leases to be made, or that of the President or the Secretary to approve or to make the same, if it exists at all, must rest upon some *law*, and therefore be derived from either a treaty or statutory provision. I am not aware of any treaty provision, applicable to the particular reservations in question, that confers such powers. The Revised Statutes contain provisions regulating contracts or agreements with Indians, and prescribing how they shall be executed and approved (see section 2103), but those provisions do not include contracts of the character described in section 2116 hereinbefore mentioned. No general power appears to be conferred by statute upon either the President or Secretary, or any other officer of the Government, to make, authorize, or approve leases of lands held by Indian tribes; and the absence of such power was doubtless one of the main considerations which led to the adoption of the act of February 19, 1875, chapter 90, 'to authorize the Seneca Nation of New York Indians to lease lands within the Cattaraugus and Allegany Reservations, and to confirm existing leases.' The act just cited is, moreover, significant, as showing that, in the view of Congress, Indian tribes can not lease their reservations without the authority of some law of the United States."

No laws have been enacted by Congress upon the subject since the publication of the above opinion. The law has not, therefore, conferred any express power upon the President or Secretary to approve the mining leases referred to, and no such authority can be implied.

Upon an examination of the statutes and treaties, I feel justified in coming to the conclusion that it was the intention of Congress that the inhibition contained in section 2116, Revised Statutes, should have the same application to individual Indians that it has to the Indian nations and tribes.

I am of the opinion, therefore, that the mining leases referred to are not such as may properly receive the approval of the Department of the Interior, under existing laws.

I am, sir, very respectfully,

A. H. GARLAND,
Attorney-General.

THE SECRETARY OF THE INTERIOR.