

LETTER

FROM THE

SECRETARY OF THE INTERIOR,

INCLOSING

Opinion of Commissioner of Indian Affairs relative to proposed amendment to Indian appropriation bill advancing \$500,000 to Cherokee Nation on account of lands of theirs sold by the United States.

APRIL 23, 1880.—Referred to the Committee on Appropriations and ordered to be printed.

DEPARTMENT OF THE INTERIOR,
Washington, April 21, 1880.

SIR: Acknowledging receipt of your letter of the 14th instant, I have the honor to inclose herewith letter from the Commissioner of Indian Affairs of this date with reference to the same, and to respectfully invite attention to the questions involved, with a view to their adjustment by Congress.

I am, sir, very respectfully,

C. SCHURZ,
Secretary.

HON. RICHARD COKE,
United States Senate.

DEPARTMENT OF THE INTERIOR,
Office of Indian Affairs, April 20, 1880.

SIR: I am in receipt, by your reference for report, of a letter dated the 14th instant from the Hon. Richard Coke, chairman of the Senate Committee on Indian Affairs, inclosing, with accompanying papers, a draft of an amendment to be attached to the Indian appropriation bill, providing for an appropriation of \$500,000 for the relief of the Cherokee Nation, to be paid to them out of the funds arising from the sale of their lands in the Indian Territory.

The amendment is accompanied by a letter from the Cherokee delegates and a copy of an act of the Cherokee Council, from which it appears that, owing to the failure of the crops in the Cherokee Nation, many of their people are liable to suffer for want of provisions before the coming harvest, and that said delegates have been directed to request aid from the government by way of a loan to the amount named, the same to be reimbursed from the sales of the Cherokee lands west of the Arkansas River when such sale shall have been effected.

While it is not my desire in any manner to delay or prevent any just measure of relief to the Cherokees of the Indian Territory, who are doubtless suffering from the failure of their crops as set forth in the aforesaid act and accompanying papers, there are some features of the question under consideration which should have been determined long ago by the department, or some other competent authority, to which I deem it to be my duty to invite your attention.

As early as the year 1802, the United States, by convention with the State of Georgia, agreed to extinguish the Indian title to the lands within said State, the Cherokees at that time holding by original possession an extensive territory east of the Mississippi River, embracing a portion of Northern Georgia, Alabama, and Eastern Tennessee, and also a large portion of Western North Carolina, which had been ceded, in lieu of a gold payment, to the Cherokees residing in said State by act of the legislature thereof in consideration of military services rendered to that colony during the revolutionary war, and which cession had been affirmed by the supreme court of North Carolina as a grant in fee-simple (3 Hawks, page 163).

In pursuance of the policy of the government to remove the Cherokees in accordance with its agreement, a delegation of the Cherokees visited the country west of the Mississippi River in 1809, and selected a home within the limits of the present State of Arkansas, to which a portion of the tribe removed. By treaty of July 8, 1817, the Cherokees ceded to the United States a portion of their territory in Georgia and North Carolina, and the United States gave to them as much land in the locality selected in Arkansas.

By treaty of May 8, 1828, it was provided that whereas the United States was desirous to secure "to the Cherokee Nation of Indians, as well those living within the limits of the Territory of Arkansas as those of their friends and brothers who reside in the States east of the Mississippi, * * a permanent home, * * * the United States agree to possess the Cherokees and to guarantee to them forever * * seven million acres of land," the boundaries of which are defined and substantially embraced in the present limits of their nation in Indian Territory, and in addition to which the United States further guaranteed "to the Cherokee Nation a perpetual outlet west, and a free and undisturbed use of all the country west of the western boundary of the described territory, and as far west as the sovereignty of the United States and their right of soil extend." There was embraced in the foregoing cessions about fourteen million acres of land.

The subsequent treaty of 1833 affirmed the provisions of the foregoing treaty, and by the treaty of December 29, 1835, with the Cherokees east of the Mississippi and certain delegates from those living west, the Cherokees ceded all their lands east of the Mississippi to the United States in consideration of five million dollars and a guarantee to the nation of the country ceded to them by the treaty of 1828. In view of the fact that the country ceded as above was considered insufficient for the accommodation of the whole Cherokee people, the United States sold to them, in consideration of five hundred thousand dollars, an additional tract of land estimated to contain eight hundred thousand acres. Provision was made for the investment of a portion of the five million proceeds in the "public stocks of the country, for the benefit of the whole Cherokee Nation who shall remove to the lands assigned by this treaty to the Cherokee Nation west of the Mississippi." The balance of the said five million dollars, after making certain payments, was to be equally divided between all the people belonging to the Cherokee Nation east.

It was also provided that the Cherokees should remove within two years. Dissensions subsequently arose regarding the proper division of the funds arising under the above-named treaty. It is proper to remark in this connection that wide-spread dissensions existed among the Cherokee people at the date and subsequent to the treaty of 1835, which was supplemented by the treaty of 1836, and then ratified by the Senate. These treaties were, in reality, negotiated between the United States and what was known as the treaty party, embracing but a small portion of the Cherokee people. The Cherokees of North Carolina were not present and took no part in the negotiation, neither did the non-treaty, or Ross, party which embraced the bulk of the Cherokee Nation east of the Mississippi.

Pending, and within two years subsequent to the treaty of 1835, the treaty party removed to the Cherokee country, west. Subsequent to the expiration of the two years within which they were to remove, the Ross party which declined to conform to the provisions of the treaty, were, by military force, gathered together and removed. The North Carolina Cherokees, or the bulk of them, took refuge in the mountains and declined successfully to remove. In the execution of the treaty of 1835, however, the department held them to be an integral part of the Cherokee Nation, and their presence in council when the treaty was ratified consequently unnecessary; that their title to the land ceded to them by the legislature of North Carolina, was a usufructuary right, held by them in common with the whole nation, and that the treaty being with the Nation these lands were included in the cession by the Cherokees in 1835, and the title passed from the Cherokees by virtue thereof.

In the distribution of the funds arising under the treaty of 1835, and in pursuance of the compromise effected among the discordant elements of the Cherokee Nation by the treaty of 1846, a *per capita* payment was made to the Cherokees of North Carolina. It has since been held by the national authorities of the Cherokees west, that with this distribution the claims of the North Carolina Cherokees were satisfied and determined, unless they should remove west. This proposition has all along been denied by the Cherokees of North Carolina, about two thousand in number, who claim that they are entitled to their proportionate share of the benefits, both in money and lands, arising from said treaty, and it is to this question that I desire particularly to invite your attention.

There can be no doubt that in conducting the negotiation with the Cherokee people it was the intention of the government to secure the removal of the whole of them to the country west of the Mississippi. As has been shown, but a limited number of them removed voluntarily within the two years fixed by the treaty; the bulk of them was forcibly removed after the expiration of the time limited. The Cherokees of North Carolina have never removed, and their right to remain has been recognized by the government in the act of 1848, creating a fund for their removal whenever they may see fit to avail themselves of the privilege. At the date of the negotiation of the treaty of 1836, W. H. Thomas, an authorized agent of the North Carolina Cherokees, visited Washington, where the negotiations were in progress, for the purpose of protecting their interests under the treaty. To affect this an agreement was entered into between Thomas on behalf of the North Carolina Cherokees and all but four of the signers of the treaty, representing the other portions of the nation, in which it was admitted that the North Carolina Cherokees were entitled to an equal share, proportionate to their numbers, in all the lands belonging to the Cherokee Nation of Indians, and to all sums of money in the possession of the President of the United States for the

use of and annuity due from the United States to the Cherokee Nation of Indians. The agreement provided that a census should be taken of the Cherokees in North Carolina and certified to the President, who "is requested to pay them their proportionate share of all sums arising from the transfer or sale of the common property as mentioned in the first article."

ARTICLE 4. Should a division of the lands west of the Mississippi, belonging to the Cherokee Nation as a common property, take place, the above Cherokees shall be entitled to their share to be laid off for them.

The lands named in the above article have not been divided. A considerable portion, however, has been sold. Have, then, the Cherokees east a legal or equitable interest in the proceeds arising from such sales?

A copy of this agreement was, on the 4th of July, 1836, immediately after the ratification of the treaty, submitted to the Commissioner of Indian Affairs, with the request that the decision of "Hon. Lewis Cass, Secretary of War, should be had as to the correctness of the construction of the delegates of the provisions of the twelfth article of the treaty of 1835." In his answer, under date of July 19, 1836, the Commissioner says:

I am instructed to inform you that it is the impression of the department that the Cherokees in North Carolina have an interest proportionate to their numbers in all the stipulations of that treaty.

It could not, in my judgment, either in law or equity, have been held otherwise. The government had arbitrarily declared them subject to removal at the will of the Executive. To secure them in their rights, and against the dangers of this position, and also from motives of self-interest, the Cherokees, parties to the treaty, entered into the above-named agreement with them. The agreement admits that the North Carolina Cherokees had an equal interest, proportionate to their numbers, in the property of the nation. That interest they were held to have passed to the United States by the treaty of 1835-'36. They must, therefore, have acquired an equal interest in the consideration paid. Equity requires it and the treaty must have contemplated it. As a natural right, by virtue of their being Cherokees, they had a common title to the national lands and funds. The nation sold the lands, and took in payment therefor the lands west of the Mississippi, and the national funds as they now are. The treaty is with the Cherokee Nation, and could not have divested a single Cherokee of his interest in the national property, without a special provision for that purpose. There is no provision divesting the North Carolina Cherokees of their interest in the consideration paid. The agreement, therefore, is an acknowledgment of an existing natural right, and as such was, and is, binding upon the Cherokee Nation and national authorities. And in so far as the United States is the guardian and trustee of the Cherokee people, it is binding on the government, obliging the exercise of that guardianship in behalf of all the people, and the discharge of the trusts created by the treaty, to the equal benefit of every individual of the nation, in accordance with the interpretation put upon it by the parties in whose interest the trusts were created.

The status of the North Carolina Cherokees and their rights to a distributive portion of the proceeds of former treaties was fully discussed pending the treaty of 1846, and no other conclusion can be drawn than that said treaty was entered into with the full understanding that said Indians were a part of the Cherokee Nation, and as such entitled to all the benefits of that and of the treaty of 1835. For a full discussion of these matters see Indian Congressional document, vol. 34, doc. 185; re-

port Commissioner of Indian Affairs, March 31, 1846; *id.*, vol. 35, doc. 289, in which he says "the treaty of 1835 being the law of the land the Executive has no authority to consider the Cherokee Indians yet remaining in North Carolina in any other light than as parties to that treaty in common with the rest of the tribe East at that time." See also opinions Attorney-General, vol. 3, page 299, wherein, in speaking of these Indians, the honorable Attorney-General says:

Consequently, the reservations are to be given up to the United States and they seem in justice to be as well entitled to indemnification as either of the other classes.

Also, *id.*, vol. 4, page 437:

The Executive of the United States must therefore regard the treaty of New Echota [treaty of 1835] as binding on the whole Cherokee tribe, and the Indians, whether in Georgia, Alabama, Tennessee, or North Carolina, are bound by its provisions. As a necessary consequence they are entitled to its advantages.

It cannot rightfully be held that they have forfeited their interests under former treaties, as clearly defined above, on account of their failure to remove West within the two years, the government having recognized their right to remain, as before stated, in the passage of the act of July 29, 1848, and a pro rata share of the surplus funds under the treaty of 1835, having been paid to them in 1852, under an express opinion of the Attorney-General, "that to require them to remove west of the Mississippi as a condition precedent to a payment, would be without authority of law, and a breach of the faith of the treaties of 1835 and 1846." (Opinions of Att'y-Gen'l, vol. 5, page —.)

It having, through recent enactments and otherwise, apparently become the policy of the department to allow the Cherokees of North Carolina to occupy permanently their present home, I am of the opinion that they are entitled to their proportionate share, at least, of the funds arising from the sales of these lands. There *may* be a question as to their right, without removal, to a proper distributive share of the interest annually arising from the Cherokee national fund, as created by the treaty of 1835-'36; but as to the former proposition, I have no doubt.

There has been received from the sales of these lands over \$2,783,800.

In the limited time allowed for the preparation of this report, I can state only by estimation what disposition has been made of the proceeds. In the vicinity of \$1,700,000 has been carried to their national funds, or placed to their credit, at interest, in the Treasury. The balance has been paid to the Western Cherokees, or disbursed for their benefit, in accordance with law, including, also, the interest on the same. No part of it has been paid to the Eastern Cherokees.

In view of these facts, I have the honor to recommend that such steps be taken as may be deemed advisable by the department or Congress, for the determination of the question involved herein, and that, if it be considered that the North Carolina Cherokees are entitled to any of the proceeds arising from the Cherokee funds or the sale of lands, that in making provisions for a distribution, as requested by the Cherokee Nation, the rights of the Eastern Cherokees be protected, and a pro rata distribution be made to them.

The letter of Senator Coke, and accompanying papers, are herewith inclosed.

Very respectfully, your obedient servant,

R. E. TROWBRIDGE,

Commissioner.

The Hon. the SECRETARY OF THE INTERIOR.

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