

March 5, 1937

Memorandum in re: S. 670, 75th Cong., 1st Sess.,
entitled "An Act authorizing an appropriation
for payment to the Osage Tribe of Indians
on account of their lands sold by the United
States."

This bill proposes to appropriate and place in the Treasury of the United States to the credit of the Osage Tribe the sum of \$776,742.03, this being the amount expended by the United States for the benefit of Indian tribes other than the Osages out of the net proceeds of \$776,931.58 received by the United States from the sales of lands under article 1 of the treaty of September 29, 1865, with the Osage Tribe. The proposed report of the Secretary of the Interior, correctly recites the facts in connection with this claim. Whether under the facts as found by the Court of Claims a moral obligation rests upon the Government to reimburse the Osage Tribe is, as stated by Attorney General Mitchell in a letter to Senator Frazier upon this subject, "a matter of legislative policy for Congress to determine and does not require any expression of opinion from this Department."

The letter of Attorney General Mitchell, just referred to, was written in response to a request from Senator Frazier as chairman of the Committee on Indian Affairs of the Senate for an opinion on the merits of S. 2352 of the 72nd Congress, 1st Session, which bill is referred to in the proposed report of the Secretary of the Interior on page 3 thereof. In reply to the request Attorney General Mitchell suggested that inasmuch as the claim had already been the subject of adjudication in the Court of Claims:

If the Congress concludes to make a payment to the Indians and is interested in ascertaining the net amount owing to them, the proper course would be to pass a statute making a reference to the Court of Claims with a

request to it to ascertain, from the evidence already before it in the other case and such additional evidence as the Indians or the United States may present, the net amount realized by the United States from the sale of Osage lands under the treaty and deposited in the Civilization Fund, less any legal and equitable set-offs and counterclaims, including gratuities, and report its findings to Congress, whereupon the Congress may enact legislation to provide for payment accordingly.

In its findings in this case (66 Ct. Cls. 64, 74) the Court of Claims found the facts with reference to nine "counterclaims and set-offs", and held (page 82) in effect that three of them (Items 1, 2, and 3, amounting to \$21,613.42) would have been allowed if judgment had been awarded in favor of the tribe; that two of them, (Items 5 and 6, amounting to \$315,732.42) "are not satisfactorily established and would in any event be rejected;" and that two of them (Items 8 and 9, amounting to \$198,452.34), "being for expenditures for education for individual Indians at schools, are not within the meaning of the special set and can not be considered in any event as an off-set against the Osage Tribe as a tribe."

As to Items 5 and 6, which the court said were not satisfactorily established and would in any event be rejected, the proof relied upon by the Government was the report of the Comptroller General. In subsequent cases in the Court of Claims the report of the Comptroller General was accepted as sufficient proof to sustain the allowance by the Court of Claims of millions of dollars of gratuity off-sets. As to Items 8 and 9, which represent the cost to the Government of educating Osage children in non-reservation Indian schools, and which were rejected by the court as being for the benefit of individuals of the tribe and not for the benefit of the tribe as a whole, it is here pointed out that in subsequent cases under acts containing similar provisions with reference to off-sets, expenditures of this nature amounting to hundreds of thousands of dollars have been sustained by the Court of Claims as proper off-sets.

These seven items of off-set amount in all to \$535,798.18.

In view of the evident purpose of Congress as expressed in section 2 of the Second Deficiency Appropriation Act, fiscal year 1935 (49 Stats. 571, 596), that the claims of Indian tribes against the United States shall be reduced by the amounts expended by the Government gratuitously on their behalf, it is suggested that this matter should be called to the attention of Congress.

Respectfully,

George T. Stermont,
Attorney.