THE SECRETARY OF THE INTERIOR

WASHINGTON

APR 12 1937

Honorable Will Rogers,
Chairman, Committee on Indian Affairs,
House of Representatives.

My dear Mr. Chairman:

Further reference is made to your request for a report on H. R. 3611, authorizing an appropriation for payment to the Osage Tribe of Indians on account of land sold by the United States. This bill relates to the same subject matter appearing in S. 670, passed by the Senate on February 11, 1937, and now pending before your Committee.

Article 1 of the treaty of September 29, 1865 (14 Stat. L., 687), provides that the Osage Indians "do hereby grant and sell to the United States" the lands described therein (then follows a description of the lands), and

> "in consideration of the grant and sale to them of the above described lands, the United States agree to pay the sum of three hundred thousand dollars, which sum shall be placed to the credit of said tribe of Indians in the treasury of the United States, and interest thereon at the rate of five per centum per annum shall be paid to said tribes semi-annually, in money, clothing, provisions, or such articles of utility as the Secretary of the Interior may from time to time direct."

It was further provided that the lands should be surveyed and sold under the direction of the Secretary of the Interior and that-

> * * * "after reimbursing the United States the cost of said survey and sale, and the said sum of three hundred thousand dollars placed to the credit of the Indians, the remaining proceeds of sales shall be placed in the Treasury of the United States to the credit of the 'Civilization Fund', to be used, under the direction of the Secretary of the Interior, for the education and civilization of Indian tribes residing within the limits of the United States."

The net amount received from the sale of the lands and credited to the "Civilization fund" was $776,931.58. Of this amount, only $189.55 was expended for the Osages, the major portion ($776,493.25) having been used for the benefit of Indian tribes throughout the country other than the Osages. The balance remaining after such expenditures, $248.78, was covered into the surplus fund of the Treasury on April 15, 1911. The difference between the net receipts of $776,931.58 and the amount expended for the Osages, $189.55, or $776,742.03, is the amount named in the bill.

This claim was adjudicated by the United States Court of Claims under the jurisdictional act of February 6, 1921 (41 Stat. L., 1097). The court found that at the time of the negotiation of the treaty of 1865, the Osages were, with few exceptions, full-blood blanket Indians who did not understand or speak English; that, possibly with one exception, all the signers of the treaty were in this category, and could not write their names; that their vocabulary was very limited, and it is unlikely that an interpreter could have explained the treaty, comprising 17 articles and 7 or 8 printed pages, in the three hours devoted to the purpose, so that they could have understood it; that the Osages would not knowingly have agreed to the expenditure of funds derived from the sale of their lands for the benefit of hostile tribes, such as the Cherokees, Cheyennes, and Pawnees; that it is fair to assume they understood the words "Indian tribes" to mean the Osages to the exclusion of other tribes; and this is the only instance where the United States has applied the proceeds of the sale of lands of one tribe to the benefit of others. (66 Ct. Cl., 64)

The court further found that in 1876, when the Osages first learned that this money was being used for other tribes, they strenuously protested to their agent, who reported that after careful inquiry he found no member of the tribe who would admit having understood this provision to include other tribes, but on the contrary all claimed to have accepted it as applying exclusively to the Osages, and that he believed they were overreached and did not knowingly make this large contribution, aggregating many thousand dollars, to the support of other tribes. Proceeding, the court said, in effect, that however this may be, the language of the treaty was unambiguous; that it was an outright sale and conveyance of the lands to the United States for the sum of $300,000, which was duly paid; and that it had no authority to reform an Indian treaty.

A bill (S. 2352, 72d Congress, 1st Session), to amend the jurisdictional act so as to authorize the court to determine the amount received by the United States from the sale of the lands under Article 1 of the treaty and enter judgment for the Osage Indians thereon, passed the Senate but did not become law. In concluding its report (No. 605) on the bill, the Senate Committee on Indian Affairs said-

> "In view of the above cited findings of the Court of Claims affirmatively showing that the ignorant full-blood Osage Indians did not knowingly agree to dispose of their treaty lands at the suggestion of the Government and apply the proceeds therefrom to the benefit of all Indians in the United States, including enemies with whom they were at war at the time, and to that extent relieving the United States from its obligations toward all Indians in general to use its own funds for their benefit; and as this instance is the only one in the history of treaty making with the Indians, as found by the court, that the lands belonging to one tribe were sold and the proceeds used or expended for the benefit of other Indian tribes who had no interest in Osage lands and which other Indian tribes had lands of their own, your committee believe that equity and justice and fair dealing demand that reimbursement be made to the Osages, and therefore favorably report the bill and recommend that it be passed."

Then, a bill similar to S. 2352 (S. 1948) was introduced during the First Session of the 73d Congress. In this Department's report thereon it was stated in part as follows:

> "However, it is believed that a situation of this kind, involving a moral obligation on the part of the United States toward its Indian wards, to pay a specific amount in money, is primarily for consideration by Congress rather than by the Court of Claims. The validity of the claim is admitted, and it is not the function of the Court of Claims to reform a treaty. In the circumstances, therefore, a direct appropriation by Congress will obviate the circuitous procedure, delay, and expense, necessarily incident to court action, because an appropriation therefor would have to be made eventually, should the court find in favor of the Indians."

Accordingly, a substitute bill was suggested, authorizing a direct appropriation for the purpose, which, however, likewise did not become law. The present bill (H. R. 3611) is similar to the substitute, except as to Section 4 covering the matter of attorneys' fees, which will be discussed further on in this report.

In form and according to its strict terms, unquestionably the provision in Article 1 of the treaty is an outright sale of the lands to the United States for the sum of $300,000. If the Indians did not so understand it, there was no meeting of the minds of the parties, and hence no agreement. If they did understand it, they were clearly imposed upon, as shown by the fact that the United States received from the sale of the lands over one million dollars, or more than three times the $300,000 which is paid the Indians therefor. It is fundamental, of course, that a guardian or trustee should not make any profit out of the relationship.

As to the matter of attorneys' fees, Section 4 of the suggested substitute for S. 1948 authorized the Secretary of the Interior to pay such fees and expenses as he might deem reasonable on a quantum meruit basis, not, however, to exceed a total of five per cent of the appropriation. Section 4 of the present bill (H. R. 3611) authorizes and directs the Secretary of the Interior to pay out of said appropriation when made the fees and expenses of the attorneys of record in accordance with their contract approved by the Secretary of the Interior on May 5, 1931.

The original contract under which the suit was brought was on a contingent basis, while the contract approved May 5, 1931, provides that the attorneys shall receive an amount equal to ten per cent of the first $500,000, five per cent on the next $250,000, two and one-half per cent of any additional amount; and that in the event Congress settles the matter by direct appropriation and sees fit to fix the compensation, the attorneys agree to accept the same. The appropriation suggested is in the sum of $776,742.03. If the appropriation is made, on the basis of the sliding scale of the contract the fee would be as follows:

10% on	$500,000.00	$50,000.00
5% "	250,000.00	12,500.00
2½% "	26,742.03	668.55
	$776,742.03	$63,168.55

The maximum fee of 5% allowable under Section 4 of the substitute bill amounts to $38,837.10 or $24,331.45 less than under the approved contract on the sliding scale basis, as above. It is true that the attorneys worked on this basis for about 25 years; that they carried it through the Court of Claims; and that they have not thus far received any compensation. However, the court's decision was adverse; and in agreeing to handle the case on a contingent basis the attorneys necessarily took the risk involved, of possibly not receiving any compensation.

In my judgment, therefore, a fee of not to exceed 5%, or a total of $38,837.10 would be ample compensation for the services rendered by the attorneys in this case. In this connection, it should be noted that under the approved contract they agree to accept such compensation as Congress might provide in the event a direct appropriation is made. Accordingly, I suggest that Section 4 of the bill be amended to read as follows:

> "The Secretary of the Interior is hereby authorized to pay, out of said appropriation when made, such fees and expenses as he may deem reasonable, on a quantum meruit basis, to the attorneys of record holding an approved contract in this case, not, however, to exceed a total of 5 per cent of the amount appropriated hereunder."

An identical bill (S. 2375, 74th Congress, 1st Session) passed the Senate on April 15, 1935 (Report No. 464), and the companion House bill (H. R. 6682) was favorably reported by the Committee under date of April 19, 1935 (Report No. 741), but neither bill became law.

The Bureau of the Budget has advised "that neither the proposed legislation nor your favorable report thereon would be in accord with the program of the President." With the Budget report was enclosed a copy of a letter from the Attorney General, from which I quote the following:

> "The records of this Department indicate that the Government has an equitable set-off against this claim in the sum of $535,798.18. * * * * * * * * * * * * * * * *
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> "In view of the foregoing circumstances, I suggest that a recommendation be made to the Senate Committee on Indian Affairs that the bill be amended so as to allow the United States credit for the set-off and to provide for the payment of only the difference between the amount of the claim and the amount of the set-off."

In considering this claim, however, the Court of Claims found the facts with reference to nine counter-claims and set-offs, and held in effect that three of them, amounting to $21,613.42, should be considered gratuities and would, therefore, have been allowed if judgment had been awarded in favor of the tribe; but that the other six counter-claims could not be considered in any event as an off-set against the Osage tribe (66 C. Cls. 64, 74, 82).

Sincerely yours,

(Sgd.) CHARLES WEST

Acting Secretary of the Interior.