

FOREST RESERVE IN INDIAN TERRITORY.

L E T T E R

FROM

THE SECRETARY OF THE INTERIOR,

TRANSMITTING,

WITH ACCOMPANYING DOCUMENTS, A RECOMMENDATION THAT THE INTERIOR DEPARTMENT BE AUTHORIZED TO ENTER INTO NEGOTIATIONS WITH THE CHOCTAW NATION IN RELATION TO ACQUISITION OF UNALLOTTED LAND DESIRABLE FOR A FOREST RESERVE IN INDIAN TERRITORY.

JANUARY 16, 1907.—Referred to the Committee on Indian Affairs and ordered to be printed, with illustrations.

DEPARTMENT OF THE INTERIOR,
Washington, January 15, 1907.

SIR: On January 8, 1907, the Secretary of Agriculture addressed a communication to the Secretary of the Interior relative to the area desirable for a forest reserve in southeastern Indian Territory. He advised the Secretary that the Forester, under his direction, had made a careful study and investigation of the matter and reported that the lands temporarily withdrawn from approval of allotment, as previously suggested by the Secretary of Agriculture, shown upon a map transmitted to the Department by letter of the Secretary of Agriculture, dated December 14, 1906, should be modified to include only the part colored green upon the map transmitted therewith. With said communication the Secretary of Agriculture transmitted three memoranda, namely:

1. Memorandum of principal correspondence concerning the proposed forest reserve in Indian Territory.
2. Memorandum concerning suspension of approval of allotments in southeastern Indian Territory.
3. A memorandum condensed from the other two.

On January 9, 1907, the Commissioner of Indian Affairs recommended that the proposed reservation be reduced in accordance with the suggestion of the Secretary of Agriculture, and—

that the withdrawal shall not in any way affect lands covered by allotment certificates heretofore issued or lands that have been selected in allotment by citizens of the Choctaw or Chickasaw nations, irrespective of whether the certificates have been issued.

On January 12, 1907, the Commissioner to the Five Civilized Tribes was advised that the withdrawal made by departmental letter of December 8, 1906, was modified, and—

that the lands within the limits of the map transmitted herewith, marked "green," which have not been duly allotted or selected by members of the Choctaw and Chickasaw nations, are reserved from allotment until March 4, 1907, unless previously changed or modified, in order that in the meantime Congress may consider the recommendation of the Agricultural Department that a national forest reserve be established within the area thus reserved. All previous withdrawals of land not reserved, as shown upon the map herewith transmitted, are hereby revoked.

On January 10, 1907, the Forester transmitted, at my request, a memorandum concerning a method of dealing with said proposed forest reserve in a way both to close up relations with separate Indians and furnish them a compensation for the property taken. He states that during the first period of five years the Forester should dispose of as much timber as can be sold without injury to the reserve in order that the individual Indians may receive as much return as possible before beginning on the fund for their general benefit.

The report and the Forester's memorandum mentioned therein were referred to the Commissioner of Indian Affairs for report on January 11, 1907, and under date of January 14 the Commissioner reported upon said papers and expressed the opinion—

that if any of the lands in the Choctaw Nation are to be segregated for forest purposes the Indian title should be extinguished and the Indians paid the appraised value thereof by the Government, and that title thereto should be taken in the name of the Government.

He further says that he would be in favor of canceling the allotments of land within the proposed forest reserve, and pay the allottees from the proceeds of the sale of the forest lands the appraised value of their improvements and the difference between the actual value of said allotments and of the lands they select in lieu thereof, were he not advised informally that the Department of Agriculture does not consider that allotments within the forest reservation will detract from its usefulness or interfere with the management and control thereof.

The Commissioner transmitted a draft of an item to be prepared authorizing the segregation of land for the purpose mentioned.

The Department is not prepared to recommend the enactment into law of the item submitted by the Commissioner of Indian Affairs, but is of the opinion that the Department should be authorized to enter into negotiations with the Choctaw tribe or nation looking to the acquisition of the unallotted land desirable for the forest reserve, should the Congress conclude that it is desirable to establish any reserve in said nation.

At the hearing before the Senate Select Committee on Indian Affairs to Investigate Conditions of the Five Civilized Tribes the question arose as to the authority of the Department to make a temporary withdrawal of any lands for a proposed forest reserve. At my request the matter was referred to the Assistant Attorney-General for the Interior Department to ascertain and report whether the action taken by the Secretary of the Interior withdrawing said lands was within the scope of the authority of the Secretary of the Interior. The Assistant Attorney-General submitted an elaborate memorandum report on the 3d instant, which, in my judgment, fully sustains the action of the

Department in withdrawing said lands. On the 9th instant said memorandum was transmitted to the chairman of said Senate committee. A copy of said letter of transmittal and a copy of the memorandum report of the Assistant Attorney-General are also transmitted herewith.

Copies of the communication of the Secretary of Agriculture and the memoranda transmitted therewith, together with copies of the report of the Acting Forester and the letter of Mr. Hackett addressed to the Forester, dated December 17, 1906, are herewith transmitted, together with a copy of the map furnished by the Secretary of Agriculture, upon which the diminished reservation is indicated in green. There are also inclosed copies of the letter of the Forester dated January 10, 1907, the memorandum referred to therein, and the report of the Commissioner of Indian Affairs, dated January 14, 1907, together with a copy of the draft of legislation recommended by the Commissioner.

The whole matter is submitted to Congress for such action as may be considered advisable in the premises.

Respectfully,

E. A. HITCHCOCK,
Secretary.

THE SPEAKER OF THE HOUSE OF REPRESENTATIVES.

DEPARTMENT OF AGRICULTURE,
OFFICE OF THE SECRETARY,
Washington, January 8, 1907.

SIR: The Forester under my direction has made further careful study and investigation of the area desirable for a forest reserve in southeastern Indian Territory and finds that the lands temporarily withdrawn from approval of allotments, as suggested by the boundary marked upon the map transmitted to you with my letter of December 14, should be modified to include only the land colored green on the inclosed map.

This will leave out the entire area formerly indicated in the Cherokee Nation and all the land within 20 miles of the Missouri, Kansas and Texas Railway.

The valleys indicated by crosshatching in red on the map are agricultural, and there is no reason why allotments should not be made upon such tracts.

I also have the honor to inclose for your consideration three memoranda:

1. Memorandum of principal correspondence concerning the proposed forest reserve in Indian Territory.
2. Memorandum concerning suspension of approval of allotments in southeastern Indian Territory.
3. A memorandum condensed from the other two.

I have the honor to be, sir, very respectfully, your obedient servant,

JAMES WILSON, *Secretary.*

THE SECRETARY OF THE INTERIOR.

EXHIBIT A.

MEMORANDUM OF PRINCIPAL CORRESPONDENCE CONCERNING PROPOSED FOREST RESERVE
IN INDIAN TERRITORY.

On January 24, 1903, Hon. Tams Bixby, acting chairman of the Dawes Commission, wrote to the Forester that there would be a very large tract of unallotted land in the Choctaw and Chickasaw nations, and within one year the question of establishing a forest reserve in Indian Territory might be taken up with the Choctaws and Chickasaws with hope of obtaining their acquiescence.

March 3, 1903, Jack Gordon, of Paris, Tex., wrote the Secretary of Agriculture about a proposed private game and timber reserve in the Choctaw Nation, and suggested that the United States establish a forest reserve in the same locality because of the appropriate conditions. The Secretary, March 9, 1903, referred him to the Forester, and from that time Gordon has kept up an intermittent correspondence with the Forester and the Secretary of the Interior on this subject.

On May 3, 1905, the Forester wrote Mr. Jack Gordon, of Paris, Tex., in reply to a letter concerning Gordon's proposed game preserve in Indian Territory, that it would require an act of Congress to give the Secretary of Agriculture authority to purchase any Indian lands for forest reserve purposes, and therefore no steps could be taken in the matter.

October 13, 1905, the Forester wrote Mr. John T. Bailey, Talihina, Ind. T., in reply to his letter of October 7, concerning a proposed forest reserve in the Indian Territory, that he was much interested, but that the land in question was under the jurisdiction of the Secretary of the Interior with whom Mr. Bailey should correspond on this subject.

On January 4, 1906, the Secretary of the Interior transmitted to the Secretary of Agriculture a letter of the Commissioner of Indian Affairs, dated December 22, 1905, inclosing a letter from J. George Wright, Indian inspector, for the Indian Territory, and a resolution of the Choctaw national council, asking that the Choctaw and Chickasaw nations be permitted to sell to Jack Gordon and his associates 100,000 acres of land for a game preserve. The letter of J. George Wright urged strongly that a national forest reserve be created instead.

On January 13, 1906, the Secretary of Agriculture reported to the Secretary of the Interior that the land described in the inclosure sent him with the letter of January 4 is especially valuable for forest reserve purposes. He asked that the Secretary of the Interior hold the matter under advisement until the forest assistant best acquainted with the tract of land could make a report. He also agreed with the recommendation of Indian Inspector J. George Wright that the whole matter should be held under advisement until after the Choctaw allotments were complete.

February 5, 1906.—Letter from Secretary of Agriculture to Secretary of the Interior said that the forest officer referred to in the letter of January 13, 1906, was not ready to make a direct recommendation, but that the Forest Service would have an expert examination and report made upon the area during the approaching field season. He also suggested that the Secretary of the Interior should hold the proposition of Jack Gordon and others under advisement in accordance with the recommendation of Indian Inspector J. George Wright, pending completion of Indian allotments.

On November 6 the Secretary of the Interior wrote the Secretary of Agriculture and said:

"In view of section 16 of the act of Congress approved April 26, 1906 (34 Stat. L., 137), the Department would appreciate the information contained in a report of an expert examination of these lands, with reference to their value as a timber reservation, at as early a date as it may be available."

Section 16 referred to provides for the sale of the residue of the unallotted lands.

November 22, 1906.—The Secretary of Agriculture informed the Secretary of the Interior that a report of the expert would be received during the first week in December, and requested that no allotments for the timbered portions of Choctaw and Cherokee lands be approved until his complete report is received.

November 23, 1906.—The Secretary of the Interior wrote the Secretary of Agriculture that he had requested the Commissioner of Indian Affairs for an immediate report, and that no patents of land within the tract described would be approved until the report of the forest inspector was received.

November 30, 1906.—The Acting Secretary of Agriculture amended the letter to the Secretary of the Interior, dated November 22, to request that the approval of all allotments containing timber located in the territory east and south of the Kiamichi River be suspended pending the report of the forest inspector.

December 3, 1906.—The Secretary of the Interior informed the Secretary of Agriculture that he would follow the suggestion of the letter of November 30, and that he had by wire instructed the Commissioner of the Five Civilized Tribes to suspend the approval of all allotments containing timber located on the territory east and south of the Kiamichi River.

December 7, 1906.—The Secretary of Agriculture suggested to the Secretary of the Interior that, pending further report, he continue the suspension of approval of Indian allotments upon the area marked upon a map inclosed in order that Congress might have an opportunity to take action toward the establishment of a forest reserve. The Secretary also gave the names of the following people who have unqualifiedly expressed their approval of the suggested national forest reserve:

"Principal Chief McCurtain of the Choctaw Nation.

"Indian Inspector J. George Wright.

"Hon. Tams Bixby, Commissioner of the Five Civilized Tribes.

"Mr. Peter C. Hudson, auditor of the Choctaw Nation.

"Mr. B. F. Hackett, United States Commissioner in Indian Territory.

"Judge T. C. Humphrey, of Atoka, Ind. T."

December 14, 1906.—The Secretary of Agriculture transmitted the forest inspector's report to the Secretary of the Interior, and suggested that it would be for the best interests of the Indians and the Government that a national forest reserve, with proper compensation to the Indians, be created within the boundaries on the maps transmitted; also, that the compensation could be provided from the receipts of the proposed forest reserve, without direct appropriation.

December 15, 1906.—A short supplemental report was made to the Secretary of the Interior.

December 18, 1906.—Mr. Loeb returned the forest inspector's report with the President's approval of the suggested plan to create a national forest reserve in southeastern Indian Territory, with full compensation to the Indians. The President fully understood that the suspension of the approval of allotments was merely a temporary matter and that the suggested plan could not be consummated unless Congress should specifically authorize it.

EXHIBIT B.

MEMORANDUM CONCERNING SUSPENSION OF APPROVAL OF ALLOTMENTS IN SOUTHEASTERN
INDIAN TERRITORY.

Congress is the guardian of all Indians who have not severed their tribal relations and become individual citizens of the United States. This guardianship is of a peculiar nature, because Congress does not need to account for its actions to any higher power. The court and the ordinary guardian acting together can dispose of the property of the ordinary ward without his consent. Congress in its relations to Indians is both court and trustee. Thus, leaving out of account the question of right and wrong, it can arbitrarily do with Indian land what it chooses. Treaties made with Indians have only the value of an expression of the wishes of the ward concerning his property. Such treaties can be abrogated at any time without further conference. (*Cherokee Nation v. Hitchcock*, 187 U. S., 294; *Lone Wolf v. Hitchcock*, 187 U. S., 553.)

Pursuant to this autocratic power, Congress, by laws (June 28, 1898, 30 Stat. L., 495; July 1, 1902, 32 Stat. L., 641; April 26, 1896 (1906), 34 Stat. L., 137), gave the Secretary of the Interior discretion to appraise, allot, and thereafter sell the residue of land undisposed of and unallotted. The specific grant of discretion to the Secretary is shown by such expressions as: "To begin as soon as the progress of the survey now being made by the United States Government will permit;" "As soon as practicable after the approval of the allotments;" "That when the allotments * * * have been made * * * the residue of land in each of the said nations not reserved or otherwise disposed of shall be reserved by the Secretary of the Interior under rules and regulations to be prescribed by him." It is plain from these expressions that Congress, far from specifically or peremptorily taking away from the executive arm of the Government the right to use discretion in the execution of these laws, endowed him with such discretion.

Not only do the laws quoted above give the Secretary discretion, but they impose upon him the duty of performing three acts (appraisal, allotment, and sale of residue), which bear the one upon the other and make it all the more necessary for him to supervise and, if advisable, interfere with the progress of allotment. Acting always in good faith, he must keep the necessity of the final sale in mind

while he is making the appraisal and the allotments. Therefore when he found by conference with the Department of Agriculture that a certain portion of the territory would be valuable for forest purposes, provided Congress saw fit to authorize such use with full compensation to the Indians, he had the discretionary power to temporarily turn the approval of allotments from that to other areas in order that the residue after allotment of an area greater than that proposed for the forest reserves might be available for sale to become a forest reserve, an advantage both to the Indians and the public. In doing this he suspended temporarily, not the operation of the law itself, not the continuation of allotments to the Indians, not even the receipt of application for allotments in the specified territory desired for forest reserve purposes, but merely the clerical work connected with the approval of allotments already applied for.

The Indians were not thus shut off from procuring or applying for allotments. They could, as they chose, await the revocation of the temporary suspension, if Congress should decide not to authorize acquisition for a forest reserve, or proceed at once to choose their allotments elsewhere. The arrangement that allotments should be even in value instead of in acreage made it perfectly just, as well as legal, that to carry out the arrangement for subsequent sale, allotments should be refused on certain areas especially desirable for sale purposes.

Unallotted Indian lands are, when intrusted by law to the control of the executive branch of the Government, as much or even more at the discretion of the administrative officer than the public lands, concerning the disposal of all of which there are laws quite as specific as those in question. The acts of the Secretary of the Interior are those of the President, who is charged by the Constitution not to execute the laws immediately, without thought, or blindly, but to execute them faithfully.

When the Secretary of the Interior halts temporarily the clerical action under a law, as in this case, he is not suspending the operation of that law in the sinister sense of "suspension," unless, indeed, he, as the President's representative, does not do so "faithfully;" that is, in good faith. He can not approve each allotment the second it is made, nor the moment, nor the hour, nor the day, nor perhaps the year, if there arises occasion to exercise the discretion allowed him by the law itself. If Congress doubts his good faith there is reason for censure; if not, Congress should consider the occasion for this temporary delay in executing its commands and accept or reject the opportunity to do what the Secretary of the Interior, the Secretary of Agriculture, the Forester, the principal chief of the Choctaw Nation, and many other competent judges of the situation in Indian Territory advise in good faith.

If Congress approves the proposition and acts favorably, it will itself suspend permanently the previous law as far as this area is concerned. If it disagrees definitely, the Secretary will, in due time, order allotments to proceed, and neither the law nor the Indians will have suffered one iota by the delay.

The Secretary has an almost endless array of precedents behind him, wherein the Executive arm has delayed action under different land laws, to give Congress opportunity to consider the effect of the law in question under special and perhaps unforeseen conditions, and to prevent the execution of the law from working harm. In this way there has arisen a common law of administrative practice which permits a delay in the execution of laws, limited only to the exercise of good faith and until Congress has had opportunity to act.

Congress has indorsed this practice both by ratifications, when it, without censure of the executive delay, passed laws suggested by the suspension, and by acquiescence, when it permitted the suspended condition of the law to continue unchallenged, in some instances for decades, to and including the present time.

The necessity of permitting the Executive in good faith to suspend action under, but not to abrogate, the laws is shown by the fact that Congress is not available, during long recesses, to modify its own acts to the best good of those concerned, while the Executive is in a state of never-ceasing watchfulness over the laws. A failure to suspend the operation of any law which definitely or by strong implication grants discretion to the Executive when such temporary suspension seems to the good of all concerned would be to fail to execute them faithfully, as the Constitution expressly commands.

EXHIBIT C.

January 24, 1903, the acting chairman of the Dawes Commission wrote the Forester that there would be much unallotted land left in the Chickasaw and Choctaw Nation and suggested establishing a national forest reserve in Indian Territory. Other voluntary correspondence of the same nature was received by the Forester. In 1905 Jack Gordon and others began a movement to secure a large private game preserve established on the lands in question which led to a recommendation to the Commissioner of Indian Affairs from J. G. Wright, Indian inspector for Indian Territory, that a forest reserve be provided for instead. On January 4, 1906, the Secretary of the Interior transmitted the recommendation with other letters to the Secretary of Agriculture, and asked him for recommendations. On January 13 the Secretary of Agriculture replied that the lands described would be valuable for a forest reserve. On November 6 the Secretary of the Interior asked the Secretary of Agriculture for an expert forest examination of the lands concerned.

The Secretary of Agriculture then sent an expert forest inspector to make this examination. This inspector, after making his examination, telegraphed from the field that the sentiment of the Indians and of prominent men in the Territory, except lumbermen who were purchasing the allotted lands from the Indians, was in favor of a forest reserve and of suspending action on allotments in the area described. Thereupon the Secretary of Agriculture suggested to the Secretary of the Interior that suspension of allotment be made, but he did not, of course, attempt to pass on the legal right of the Secretary of the Interior to do so.

On December 3 the Secretary of the Interior informed the Secretary of Agriculture that he had made a temporary suspension of allotments accordingly. On December 14 the Secretary of Agriculture transmitted to the Secretary of the Interior the forest inspector's report showing the area which would be of most use to the Indians if it were made into a forest reserve. The two Secretaries were then called before the Senate committee to discuss the desirability of legislation to create this forest reserve, with full compensation to the Indians. The committee questioned seriously the Secretary's legal right to suspend approval of allotments on any area in Indian Territory, even with the object of referring a question to Congress and giving Congress the time to pronounce upon it.

The Secretary of Agriculture does not pretend to pass on the legal phases of this question, but he believes the Secretary of the Interior's action legal. The Secretary of the Interior did not suspend a law of Congress, but merely delayed clerical action under the law. Applications for allotments were not suspended. The operation of the law itself was not suspended. The applicants could either await the termination of the temporary suspension or apply in other parts of the Territory. The law itself gives the Secretary discretion in making the allotments and provides that he must, using his discretion in so doing, sell the residue of the land after allotment has been completed. He had the right and the duty under the law to use discretion in determining what would be the best interest of the Indians and the public in making allotments. It was part of his duty to see to it that the lands which remained after allotment should be of the greatest value to the Indians, for whose benefit the law provides they are to be sold. The Secretary of Agriculture had suggested a method by which the value of the unallotted lands to the Indians could be increased. It was the duty of the Secretary of the Interior to examine and consider such a suggestion, and he did so. The suspension of allotment was necessary for that purpose.

The action of the Secretary of the Interior in this case was the action of the President, who, by direction of the Constitution, "shall take care that the laws be faithfully executed." The only limitation upon the Executive's discretion is faithfulness, by which surely is meant good faith. The Senate committee does not question the good faith of the Secretary. Unless the members of the committee raise this question or show that the law itself was peremptory as to time and place of allotment, they surely can not hold that his action was illegal. He has behind him hundreds of precedents of a more conspicuous nature, in which action under public-land laws and laws affecting Indian land has been suspended for specific areas by Executive order, both temporarily to await Congressional action and in some cases for decades. Congress can authorize or refuse to authorize the Secretary of Agriculture to purchase these lands from the Indians for a forest reserve. In the latter case the Secretary of the Interior must, if he considers it best for the interests affected by the law, order the continuation of allotments in the area involved. If at any time he considers it best for the Indians, he can terminate the suspension. But whether he does so or not, the interests of the Indians under the law and in the exercise of a wise executive discretion in carrying out that law are in his hands.

EXHIBIT D.

A BILL To provide for the disposal of Indian land chiefly valuable for the timber thereon.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the President of the United States may, in his discretion, by proclamation set apart and reserve as national forest reserves or parts thereof, any unallotted Indian lands not disposed of at the date of any such proclamation, and chiefly valuable for the timber thereon; and lands thus proclaimed shall thereafter, except for specific limitations herein contained, be subject to all the laws, rules, and regulations governing national forest reserves the same as though proclaimed under authority of section twenty-four of an Act approved March third, eight-en hundred and ninety-one, entitled "An Act to repeal timber culture laws, and for other purposes." *Provided,* That immediately after any such proclamation the value of Indian land thus created into a forest reserve shall be appraised by three appraisers, appointed, one by the Secretary of the Interior, one by the Secretary of Agriculture, and a third by the Indians directly interested, in a way to be prescribed by the Commissioner of Indian Affairs, such appraised value to be reimbursed to the Indians in the following manner: If the proclamation creates any Indian land into a separate forest reserve, the gross proceeds therefrom, except any portion provided by law to be paid to States or Territories, is hereby appropriated, to be applied, under the direction of the Secretary of the Interior, to the payment of the appraised value of said land until the total value has been reimbursed to the Indians affected by the proclamation; if, however, any Indian land is made part of an existing forest reserve, such portion of the gross proceeds from that entire reserve, after deducting any payments provided by law for States or Territories, is hereby appropriated to be applied to reimbursement of the Indians directly affected by the proclamation as is represented by the ratio between the area of the Indian lands included therein and the total area of the reserve; all payments from the proceeds of forest reserves under this proviso to be made at the end of each fiscal year from and after the passage of this Act: *Provided further,* That no interest shall be allowed upon said appraised values prior to the payment of money to any Indian fund in the Treasury under this Act, such interest being totally accounted for by the expenditures of the Government incident to the care and administration of the Indian's timberland thus created into forest reserves: *And provided further,* That the addition to the Uinta Forest Reserve created by proclamation of the President dated July fourteenth, nineteen hundred and five, shall be appraised as soon as possible after the passage of this Act in the manner provided herein for other Indian lands; and the Indians affected by said proclamation shall be reimbursed in the same manner as is herein provided in the case of other Indian lands.

UNITED STATES DEPARTMENT OF AGRICULTURE, FOREST SERVICE,
Washington, December 28, 1906.

DEAR SIR: In the absence of the Forester and at his direction, I have the honor to report in detail concerning the history, purpose, and legal bearing of the suggestion which you made to the Secretary of the Interior in your letter of December 14, transmitting the report of Forest Inspector W. T. Cox on the proposed forest reserve in southeastern Indian Territory.

Inclosed (marked "Exhibit A") is a memorandum of the principal correspondence concerning this proposed forest reserve, which not only shows that the idea originated outside the Forest Service, but also in the locality where the proposed reserve is needed.

Since January 24, 1903, when the acting chairman of the Dawes Commission suggested the need of this forest reserve, there has been a constant agitation to have the mountainous timberland in the Choctaw Nation reserved. This idea has been indorsed, either as a private game and timber preserve or as a national forest reserve, by the council of the Choctaw Nation and many prominent men who live in the Territory.

As a result of this agitation the idea grew that all Indian land chiefly valuable for its timber should be made into forest reserves with full compensation to the Indians at an appraised value. A suggested bill to that effect was drawn in the Forest Service and, if passed, would be to the benefit equally of the public and the Indians. (Copy inclosed, marked "Exhibit D.")

In a letter dated November 6, 1906, the Secretary of the Interior reminded you of a promise in your letter of February 5, 1906, that the Forest Service would have an examination of the area in question during the field season of 1906. A competent forest inspector was immediately sent to Indian Territory, whose report you transmitted to the Secretary of the Interior December 14, 1906.

While the inspector was in Indian Territory he consulted many of the most prominent men in the locality and found them enthusiastic for a forest reserve. He also found that the land under consideration was being allotted rapidly at the suggestion of interested lumbermen, who were buying the allotments at a price ruinous to the Indians' interests. Upon your request, therefore, the Secretary of the Interior ordered temporary suspension of allotments in that region. The request was based upon the approval of the project as expressed to the forest inspector by—

Principal Chief McCurtain, of the Choctaw Nation.

Indian Inspector J. George Wright.

Hon. Tams Bixby, Commissioner of the Five Civilized Tribes.

Mr. Peter C. Hudson, auditor of the Choctaw Nation.

Mr. B. F. Hackett, United States Commissioner in Indian Territory.

Judge T. C. Humphrey, of Atoka, Ind. T.

The plan to create the proposed forest reserve in southeastern Indian Territory and to pay for it by turning over to the Indians its entire proceeds until payment is complete was made for these reasons:

(1) The land in question has value for forest purposes only, and the Indians themselves are very desirous of having it so used, which will be to their direct advantage.

(2) The public welfare requires this reserve to insure a permanent supply of timber and to conserve the water supply, as well as to prevent disastrous floods. The Kiamichi River and Little River, which, among others, rise in the proposed reserve and are tributaries of the Red River, not infrequently cause floods disastrous to cotton plantations and other property along the valley of the Red River, in the States of Texas, Arkansas, and Louisiana. It is clearly understood by the thoughtful people affected that if the forests in question are further destroyed the damage by floods will be appallingly increased. The people and the Government have already spent great sums in building levees to protect the fertile farming lands along the Red River. The creation and protection of the proposed forest reserve will, without drain upon either the local taxpayer or the National Treasury, prevent the necessity of much future outlay, and the proposed protective reforestation will diminish the danger and expense already existent.

I inclose, as a suggestion concerning the legal aspect of the suspension of allotments, a memorandum (marked "Exhibit B"). After all allotments in the Choctaw Nation are complete there will remain considerably over 2,000,000 acres which, under the treaty and the law, must be sold for the benefit of the Indians. The plan which you proposed affects only the nonarable part of this residue, and the Secretary of the Interior in temporarily suspending allotments was only saving in a compact body for the benefit of the Indians part of that land which can not be legally allotted in any event. I also inclose (marked "Exhibit C") a condensed summary of the whole case.

To sum up, the Forester has the honor to suggest:

1. That the area within which the approval of allotments is suspended be diminished by restoring to allotment all land belonging to the Cherokee Nation and reducing the suspended area in the Choctaw Nation so that it shall cover only the land shown in green on the inclosed map. This seems advisable: (a) Because it has been found that the Cherokees will need all their land for allotment; (b) because it is claimed that land included within a national forest reserve nearer than 20 miles from the Missouri, Kansas and Texas Railway is subject to selection under a railroad land grant; (c) because, on further investigation, it is found that the reduced area contains nearly all the land most suitable for the forest reserve.

2. That the suspension of approval of allotments will not interfere with any leases of mineral lands or allotments already made within the indicated area, and that any unallotted tillable lands can, in the near future, be made subject to allotment as fast as their character can be determined by examination on the ground.

3. That the outcry against suspension of allotments comes chiefly from those who want to get the timber land from the Indians at a nominal price. In partial evidence of this, I inclose a letter from Hon. B. F. Hackett, who has been familiar with this section for the last thirty years and has acted as United States commissioner and marshal.

I have the honor to suggest that Mr. Hackett's letter be forwarded to the Secretary of the Interior for his information after you have considered it.

Very respectfully,

OVERTON W. PRICE,
Associate Forester.

THE SECRETARY OF AGRICULTURE.

OFFICE OF UNITED STATES COMMISSIONER,
CENTRAL DISTRICT, INDIAN TERRITORY,
Antlers, Ind. T., December 17, 1906.

DEAR SIR: I am in receipt of yours of the 11th instant in reference to the timber reserve here in the Territory. I am sorry to say the matter is meeting with much opposition, from a source, however, that is purely based on selfishness. There are a lot of people in this country (as there are in all countries) that would exploit the Kingdom of Heaven if thereby they could make money out of it. The land grafter (you heard of him when in this country) and the millionaire lumber and timber man are the opponents, and they are working all the schemes known to the manipulator of truth to induce the people to remonstrate against it. They have circulated all kinds of lies about the Government going to segregate all the lands between the Arkansas River and Red River, thereby ruining the towns, and all manner of reports like this to scare the people. They are filling the public press with all such misrepresentations to get their opposition against it. It has borne its fruit at the little towns on the borders of the proposed reserve; hundreds of men that favored it at first say now, "Oh, it will ruin our town," etc.

If the Department cares to know, they will find, by a little investigation, that behind all of the opposition is just a few men that want to make money out of the timber and sale of this land. I am sorry to say it, but it is true, there is at least one man in this country in the public service that is dealing in these lands in a way that don't look nice under the circumstances.

I inclose herein a couple of articles I wrote on this matter in 1901. These articles were widely copied by the press at that time, but these are the only ones I have left, and you may return them after you have done with them. I sent to the President several days ago petitions I prepared (a copy of which you have), with something near one hundred names signed to them. I learn from reliable sources that several others which had been numerous signed had been intercepted and destroyed. I believe it.

If there is anything further that I can do to help the matter along, I will gladly do it. Command me freely if you need my services. Wishing you a merry Christmas and a happy New Year,

I am, sincerely yours,

B. F. HACKETT.

WM. T. COX, Esq.,
Forest Service, Washington, D. C.

UNITED STATES DEPARTMENT OF AGRICULTURE,
OFFICE OF THE FORESTER,
Washington, January 10, 1907.

DEAR MR. SECRETARY: As you request I inclose a memorandum concerning a method of dealing with the proposed forest reserve in southeast Indian Territory in a way both to close up relations with separate Indians and furnish them a compensation for the property taken.

During the first period of five years the Forester should certainly dispose of as much timber as can be sold without injury to the reserve, in order that the individual Indians may receive as much return as possible before beginning on the fund for their general benefit.

Very sincerely, yours,

GIFFORD PINCHOT,
Forester.

The SECRETARY OF THE INTERIOR.

[Memorandum.]

In view of the Indians' desire to close up their relations with the Government as soon as possible, it is recommended that a national forest reserve be established within the area shown on the last map transmitted, to be administered by the United States Forest Service; the entire receipts from all its resources to go to the fund of said Indians for a period of five years, and thereafter for a period of twenty years to the general benefit of the Indians as the Secretary of the Interior may direct, and after that time the receipts to be treated under the general laws concerning the forest reserve special fund, by which 10 per cent of the gross receipts will go to Oklahoma for the benefit of schools and roads in the counties in which the reserve is situated.

DEPARTMENT OF THE INTERIOR,
Washington, January 9, 1907.

DEAR SIR: Pursuant to your request and my promise when before your committee this morning, I herewith transmit for examination and consideration by your committee a memorandum report and opinion submitted to me on the 3d instant by the Assistant Attorney-General for this Department, at my request, in the matter of suspension of the approval of Indian allotments within certain limits in the southeast part of Indian Territory. I need only add that I have given this memorandum opinion very careful consideration and feel confident that under the authorities cited I did not exceed my lawful power as Secretary of the Interior in taking the action referred to.

Very respectfully,

E. A. HITCHCOCK, *Secretary.*

HON. CLARENCE D. CLARK,
Chairman Select Committee to Investigate the Affairs of the Five Civilized Tribes, United States Senate.

MEMORANDUM OPINION.

November 23, 1906, the following telegram was sent to the Commissioner to the Five Civilized Tribes:

"Upon request of Secretary Wilson, issue no allotment certificates for land within the limits designated by Jack Gordon for game preserve and suspend preparation, execution, and recording of patents for any such land until further advised."

"E. A. HITCHCOCK."

On the same day a letter was addressed to the Commissioner to the Five Civilized Tribes stating that the Department was in receipt of a letter from the Secretary of Agriculture, dated November 22, 1906, to the following effect: "The member of the Forest Service who is engaged in examining the lands in the Indian Territory for which Mr. Jack Gordon has made application to purchase for a game preserve recommends that all allotments in the timber portion of the Choctaw and Cherokee (evidently Chickasaw) lands be suspended. I have the honor, therefore, to request that no allotments of such lands be approved pending his complete report, which will be received during the first week of December," and confirming the telegram of that date.

December 3, 1906, the following telegram was sent to the Commissioner to the Five Civilized Tribes:

"Upon request of Acting Secretary Hays, 30th ultimo, departmental telegram 23d ultimo, extended to all lands containing timber in Choctaw Nation east and south of Kiamichi River. Letter follows."

On the same day a letter was addressed by the Secretary of the Interior to the Commissioner to the Five Civilized Tribes confirmatory of the telegram of that date.

December 5, 1906, a telegram was sent to the Commissioner of the Five Civilized Tribes by the First Assistant Secretary of the Interior, as follows:

"Answering telegram 4th instant, referring to departmental telegrams November 23 and December 3, allow no selections of land containing pine timber value estimated and appraised by Commission within the territory described in telegram of 3d instant."

December 8, 1906, the Secretary of the Interior addressed a letter to the Commissioner to the Five Civilized Tribes, as follows:

"There is inclosed for your information copy of a letter addressed to the Department by the Secretary of Agriculture, dated December 7, 1906, together with the map transmitted therewith, and you are requested to suspend all selections and the issuance of patents within the area indicated on the inclosed map until further advised."

A question having been raised as to the authority of the Secretary of the Interior to direct the suspension of the preparation and execution of patents under the allot-

ment selections for these lands within the Indian Territory, there is submitted herewith an expression of the views of the Department as to the law which it is believed justified these several orders.

In order that it may be better understood how these several directions for the suspension of action within the Territory above described came to be issued, it is necessary to briefly review the correspondence that has passed between the two Departments and others bearing upon these lands. An abstract of this correspondence here follows:

On January 24, 1903, the acting chairman of the Dawes Commission wrote to the Forester that there would be a very large tract of unallotted land in the Choctaw and Chickasaw nations, and within one year the question of establishing a forest reserve in Indian Territory might be taken up with the Choctaws and Chickasaws with hope of obtaining their acquiescence.

October 13, 1905, the Forester wrote Mr. John T. Bailey, Talihina, Ind. T., in reply to his letter of October 7 concerning a proposed forest reserve in the Indian Territory, that he was much interested, but that the land in question was under the jurisdiction of the Secretary of the Interior and that Mr. Bailey should correspond with the Secretary on the subject.

On May 3, 1905, the Forester wrote Mr. Jack Gordon, of Paris, Tex., in reply to a letter concerning Gordon's proposed game preserve in Indian Territory, that it would require an act of Congress to give the Secretary of Agriculture authority to purchase any private lands for forest reserve purposes, and therefore no steps could be taken in the matter.

On January 4, 1906, the Secretary of the Interior transmitted to the Secretary of Agriculture a letter of the Commissioner of Indian Affairs, dated December 22, 1905, inclosing a resolution of the Choctaw national council asking that the Choctaw and Chickasaw nations be permitted to sell to Jack Gordon and his associates 100,000 acres of land for a game preserve.

On January 13, 1906, the Secretary of Agriculture reported to the Secretary of the Interior that the land described in the inclosures sent him with the letter of January 4 is especially valuable for forest reserve purposes. He asked that the Secretary of the Interior hold the matter under advisement until the forest assistant best acquainted with the tract of land could make a report. He also agreed with the recommendation of the United States Indian inspector of the Indian Territory that the whole matter should be held under advisement until after the Choctaw allotments were complete.

February 5, 1906.—Letter from the Secretary of Agriculture to the Secretary of the Interior said that the forest officer referred to in the letter of January 13, 1906, was not ready to make a direct recommendation, but the Secretary promised that the Forest Service would have an expert examination and report made upon the area during the approaching field season. He also suggested that the Secretary of the Interior should hold the proposition of Jack Gordon and others under advisement in accordance with the recommendation of the United States Indian inspector pending completion of Indian allotments.

On November 6 the Secretary of the Interior wrote the Secretary of Agriculture and said:

"In view of section 16 of the act of Congress approved April 26, 1906 (34 Stat. L., 137), the Department would appreciate the information contained in a report of an expert examination of these lands, with reference to their value as a timber reservation, at as early a date as it may be available."

Section 16 referred to provides for the sale of the residue of the unallotted lands.

November 22, 1906.—The Secretary of Agriculture informed the Secretary of the Interior that a report of the expert would be received during the first week in December, and requested that no allotments for the timbered portions of Choctaw and Cherokee lands be approved until his complete report is received.

November 23, 1906.—The Secretary of the Interior wrote the Secretary of Agriculture that he had requested of the Commissioner of Indian Affairs an immediate report and that no patents of lands within the tract described would be approved until the report of the forest inspector was received.

November 30, 1906.—The Acting Secretary of Agriculture amended the letter to the Secretary of the Interior, dated November 22, to request that the approval of all allotments containing timber located in the territory east and south of the Kiamichi River be suspended pending the report of the forest inspector.

December 3, 1906.—The Secretary of the Interior informed the Secretary of Agriculture that he would follow the suggestion of the letter of November 30, and that he had, by wire, instructed the Commissioner to the Five Civilized Tribes to suspend the approval of all allotments containing timber located on the territory east and south of the Kiamichi River.

December 7, 1906.—The Secretary of Agriculture suggested to the Secretary of the Interior that he continue the suspension of approval of Indian allotments upon the area marked upon a map inclosed in order that Congress might have an opportunity to take action toward the establishment of a forest reserve. The Secretary also gave the names of the following people who have unqualifiedly expressed their approval of the suggested national forest reserve:

Principal Chief McCurtain, of the Choctaw Nation.

Indian Inspector J. George Wright.

Hon. Tams Bixby, Commissioner to the Five Civilized Tribes.

Mr. Peter C. Hudson, auditor of the Choctaw Nation.

Mr. B. F. Hackett, United States commissioner in Indian Territory.

Judge T. C. Humphrey, of Atoka, Ind. T.

December 14, 1906.—The Secretary of Agriculture transmitted the forest inspector's report to the Secretary of the Interior, and suggested that it would be for the best interests of the Indians and the Government that a national forest reserve, with proper compensation to the Indians, be created within the boundaries indicated on the maps transmitted; also, that the compensation could be provided from the receipts of the proposed forest reserve, without direct appropriation.

In a report from the United States Indian inspector for the Indian Territory of November 10, 1906, on the character of the lands involved in the proposed purchase of Mr. Jack Gordon in the southeastern part of the Choctaw Nation, it is stated that none of the lands referred to are fit for agricultural purposes, although several Indians have been allotted certain tracts. No Indians are living on such allotments, which undoubtedly had been secured in the interest of outside parties, who desired to subsequently purchase the lands for hunting or for the pine timber located thereon.

The inspector also says that the tract of land comprised within certain indicated lines on the two maps submitted may be considered the roughest, rockiest, and most mountainous in the Indian Territory, absolutely unfit for agricultural purposes, the valleys being in many instances mere gulches containing rocks and boulders—mountains rising abruptly on each side from the creek beds. In some places where the valleys are wide there is but little if any soil. Two or three white settlers were found on this land who rented from the Indians and who have small clearings. The inspector also called attention to the fact that the Choctaw and Chickasaw nations, through their national councils, have, by resolutions which have been forwarded to the Department, indorsed this proposed sale and recommend this land for disposition at not less than its appraised value.

The following extract is taken from the report of the Acting Director of the Geological Survey dated November 23, 1906:

"In conclusion I desire to state that aside from the question of mineral deposits that these lands may contain, or their agricultural or grazing character, the problem of the preservation and disposition of the forest lands is of supreme importance. These forests deserve special consideration, since the United States Bureau of Forestry is, and has been for some time, engaged in devising means of extending the native forest in the regions of Oklahoma and Indian Territory. The Kiamichi Mountains are but a small part of the stony, mountainous forest lands in the southeastern Choctaw Nation, the most of which are public Indian domain. That all of these public lands are of little value except for the forest, and should be preserved for the future inhabitants of the region, is worthy of careful consideration. The income to be derived from these forests, properly conducted, would, without doubt, more than pay the appraised value of the lands, and at the same time the forest may be kept intact for the continued enjoyment and profitable use of the inhabitants in the future."

The following extract and report of Forest Inspector W. T. Cox is also worthy of consideration:

"Unless a reserve is created, timber at the rate it is now being acquired is certain within two or three years to pass into the hands of a few large timber companies, chief of which are the Chicago Lumber and Coal Company and the Southern Trust Company. The prices being paid for stumpage are exceedingly low. Oak has scarcely any value in the back districts, and estimates made by cruisers are invariably far below the actual stand. The Indians will therefore under present conditions receive practically nothing for their valuable timber holdings, and monopoly of timber in the territory will be certain."

Mr. Cox also reports that Principal Chief McCurtain, of the Choctaw Nation, is in favor of the Government buying all unallotted timber lands and administering them according to the regulations now in force on western reserves, it being stated that there is bound to remain, after all allotments are completed and advertised sales made, a large amount of rough mountain land which will be only a source of trouble, complications, and expense. He also states that Inspector Wright, Hon. Tams Bixby, of

the Dawes Commission; Peter J. Hudson, auditor of the Choctaw Nation; Mr. B. F. Hackett, United States commissioner at Antlers, and Judge Humphrey, of Atoka, are all in favor of a reserve. The forest inspector recommends that all unallotted lands within the lines indicated on the accompanying map should be purchased at the value placed upon lands and timber by the Dawes Commission.

It should be said at the outset that it is perfectly apparent from an examination of the correspondence above noted that the action of the Secretary of the Interior was taken with a view to submitting to Congress the propriety of making some provision that would not only protect these lands from the spoliation of the timber, but also to provide for due compensation to the Indians, it being understood that further legislation would be necessary to authorize such action. Indeed, a bill was prepared during the first session of the present Congress looking toward this end and indicating the views of the Secretary of Agriculture, copy of which is attached hereto, marked "Appendix A."

The orders under consideration necessarily include within the exterior limits of the lands affected thereby many tracts that have been patented, many that have been selected, and for which allotment certificates have issued. As to all such lands it is needless to say that the orders above mentioned can have no effect to change their status, nor was it contemplated by said orders that such result would follow. But as to all lands that may have been selected, but for which no allotment certificates have been issued, and as to lands that remain unselected the orders are intended to be operative, and the question therefore to be now considered is whether the Secretary of the Interior is vested under the law with the authority to make such orders for the purposes hereinbefore indicated.

By section 441 of the Revised Statutes "the Secretary of the Interior is charged with the supervision of public business relating to the following subjects: * * * Third. The Indians."

By section 463 of the Revised Statutes it is further provided: "The Commissioner of Indian Affairs shall, under the direction of the Secretary of the Interior, and agreeably to such regulations as the President may prescribe, have the management of all Indian affairs and of all matters arising out of Indian relations."

By this express provision Congress has confided to the Secretary of the Interior a general supervisory authority in all matters involving the rights of Indians who yet maintain their tribal relations. The right of Congress to thus legislate with respect to Indian affairs and its absolute control therein is no longer a question for discussion. (*Cherokee Nation v. Hitchcock*, 187 U. S., 294; *Lone Wolf v. Hitchcock*, 187 U. S., 553.)

The action of the Secretary of the Interior in the execution of the duties thus imposed upon him, "agreeably to such regulations as the President may prescribe," is the action of the President. (*United States v. Blendauer*, 122 Fed. Rep., 703; *Wilcox v. Jackson*, 13 Peters, 498; *Wolcott v. Des Moines Company*, 5 Wallace, 681; *Wolsey v. Chapman*, 101 U. S., 755.)

Even were there not express provision thus made for the Secretary's authority in these matters, yet he might, under the general authority conferred in the creation of his Department, have exercised his discretion in the execution of the laws falling within the domain of his office. Speaking upon this power that rests with the head of the Department, the Supreme Court said, in the case of the *United States v. Macdaniel* (7 Peters, 1):

"It is insisted that as there was no law which authorized the appointment of the defendant his services can constitute no legal claim for compensation, though it might authorize the equitable interposition of the legislature. That usage, without law or against law, can never lay the foundation of a legal claim, and none other can be set off against a demand by the Government.

"A practical knowledge of the action of any one of the great departments of the Government must convince every person that the head of a department, in the distribution of its duties and responsibilities, is often compelled to exercise his discretion. He is limited in the exercise of his powers by the law, but it does not follow that he must show a statutory provision for everything he does. No government could be administered on such principles. To attempt to regulate by law the minute movements of every part of the complicated machinery of government would evince a most unpardonable ignorance on the subject. While the great outlines of its movements may be marked out and limitations imposed on the exercise of its powers, there are numberless things which must be done that can neither be anticipated nor defined and which are essential to the proper action of the Government. Hence, of necessity, usages have been established in every department of the Government which have become a kind of common law and regulate the rights and duties of

those who act within their respective limits. And no change of such usages can have a retrospective effect, but must be limited to the future.

"Usages can not alter the law, but it is evidence of the construction given to it, and must be considered binding on past transactions."

But there is not wanting specific legislation amply sufficient to justify the Secretary of the Interior in suspending temporarily the execution of a law where he believes the interests of the public or of those the subject of such legislation demand the further attention of Congress, with a view to the better protection of all interests, both public and individual.

So far as the legislation providing for the distribution of the lands in the Indian Territory and the breaking up of the tribal relations is concerned, ample authority in the way of general supervision has been conferred upon the Secretary. Sometimes this authority is conferred by words requiring his approval of the acts of those engaged in the work of distributing the lands and property of the several communities among the individuals and in other cases specifically giving him a general directory authority. See sections 11, 12, 15, and 21 of the act of June 28, 1898 (30 Stat. L., 495); also sections 11, 14, 25, 30, 48, 55, 58, and 63 of the act of July 1, 1902 (32 Stat. L., 641).

Similar provisions in other legislation with respect to these Indians and their property might be easily referred to, but this suffices to show the general tendency of Congress to repose in the Interior Department the controlling power over the execution of the laws providing for the dissolution of Indian Territorial rights.

The Attorney-General, in an opinion rendered May 22, 1905 (25 Op., 460), discussing the duty imposed upon the Secretary of the Interior under legislation of this character in connection with the issuance of Indian patents, said:

"In view of the broad and general powers conferred upon the Secretary of the Interior in relation to the public lands and Indian affairs and the comprehensive supervision expressly given him by the acts of 1898 and 1902 concerning the matters therein dealt with, considered in connection with the contemporaneous and subsequent indications of Congressional intent, I can not conceive that Congress, in confirming the agreement recited in the act of 1898 above quoted, which contains in itself nothing inconsistent with the necessity for the approval of the patents by you, intended a course should be pursued in this instance different from your practice in matters of this nature."

It will be seen from what the Attorney-General said that he held in mind the analogy which necessarily exists between the authority of the Executive to control public lands for public purposes and the exercise of a similar authority by the Secretary of the Interior over Indian lands for purposes consistent with the interests of the Indians. This analogy follows as a matter of course from the legislation which confers upon the Secretary of the Interior authority over the public lands of the United States and gives him complete jurisdiction over their survey and disposition, acting primarily through the Commissioner of the General Land Office. (Secs. 441 and 453 of the Rev. Stats.)

The decisions of the Federal courts, including the United States Supreme Court, are uniform in the recognition of the validity of all orders of withdrawal made by the Secretary of the Interior, in the execution of the public land laws, for purposes consistent with the disposition of the lands subject thereto. A few citations of the holdings of the courts along these lines are furnished herewith:

Where a withdrawal of public lands along a railroad in aid of which a grant has been made by Congress is made by the chief officers of the land department in advance of the definite location of the road, that the lands may be preserved for the satisfaction of the grant, such withdrawal, if not made in opposition to the terms of the grant or other Congressional enactment, is a reservation by competent authority, and removes the lands embraced therein from the category of public lands, and excludes them from subsequent railroad land grants, containing no clear declaration of an intention to include them, though the withdrawal may have been ill advised, it is not required for the satisfaction of the grant. (*Northern Lumber Co. v. O'Brien*, 139 Fed., 614 (1905).)

The President has authority at any time before the issuance of patent to withdraw public lands from sale and to declare them reserved for public purposes. (*Russian-American Packing Co. v. U. S.*, 39 Ct. Cls., 460 (1904).)

A proclamation setting apart public lands as a forest reservation under act March 3, 1891 (26 Stat. L., 1103), need not be signed by the President, but, if made by the Secretary of the Interior, will be presumed to have been by direction of the President. (*United States v. Blendauer*, 122 Fed., 703 (1903).)

The President of the United States had power, in 1842 and 1849, by Executive order and without a special act of Congress authorizing him to do so, to reserve part of the public domain on the north end of Amelia Island, in the State of Florida, for a military reservation. (*Florida Town Imp. Co. v. Bigalsky*, 33 So. 450 (1902).)

The Secretary of the Interior can withdraw public lands from settlement and market at will, and it is immaterial what may be the basis of the order of withdrawal, or what public lands it may affect. (*O'Connor v. Gertgens*, 89 N. W., 866; 85 Minn., 481 (1902).)

Where no right to withdraw indemnity lands of a railroad grant from settlement existed under the granting act until losses within the place limits were ascertained and selections made, but an order of withdrawal was made in 1872, and one settling on the land in 1886 filed a claim in 1887, after the withdrawal was canceled, and attempted selections by the railroad prior to such filing had been ineffectual, because not specifying losses in the place limits, in an action by the railroad to recover the property a judgment for defendant was proper. (*Northern Pacific Rwy. Co. v. Spray*, 67 Pac., 377 (1901).)

The act of Congress granting certain lands to the Northern Pacific Railroad Company did not deprive the Executive Department of the power to withdraw from entry land within the limits of the grant. (*Hewitt v. Schultz*, 76 N. W., 230; 7 N. Dak., 601.)

The President acts, in many cases, through the heads of departments; and the Secretary of War, having directed a section of land to be reserved for military purposes, the court presumed it to have been done by the direction of the President, and held it to be, by law, his act. (*Wilcox v. Jackson*, 13 Pet., 498; *U. S. v. Tichenor*, 12 Fed., 415. See *Wolcott v. Des Moines Company*, 5 Wall., 681, 688-689.)

According to the practice of the Government, as recognized by Congress, the President may reserve from sale and set apart for public uses, parcels of land belonging to the United States. And he may modify, by reducing or enlarging it, a reservation previously made. (*Grisar v. McDowell*, 6 Wall., 364.)

The order of the Secretary of the Interior of April 6, 1850, directing that the lands on the Des Moines River above the Raccoon Fork be reserved from sale, was, in contemplation of law, the order of the President, and had the same effect as a proclamation mentioned in said act of 1841. (*Wolsey v. Chapman*, 101 U. S., 755.)

A reservation of public land from entry, made by the Department of the Interior as coming within the limits of a railroad grant, operates to withdraw the land from homestead entries, even if found afterwards not to come within such limits. (147 U. S., 531; *Hamblin v. Western Land Co.*)

The President of the United States can, by proclamation or executive order, reserve a part of the public domain for a specific lawful purpose. (*United States v. Payne*, 8 Fed., 883.)

The withdrawal by the Secretary in aid of the grant to the State of Wisconsin was valid, and operated to withdraw the odd-numbered sections within its limits from disposal by the land officers of the Government under the general land laws. The act of the Secretary was in fact a reservation. (*Northern Pacific R. R. Co. v. Musser-Saunry Co.*, 168 U. S., 607.)

From several of these authorities it would appear that the operative effect of the withdrawal was not in any way dependent upon the absolute necessity for its having been made, notably the decision of the Supreme Court in the case of *Wolsey v. Chapman*, 101 U. S., 755, where an order of the Secretary of the Interior directing that the lands on the Des Moines River above the Raccoon Fork should be reserved from sale was in contemplation of law the order of the President, and it was fully effective to reserve lands from the operation of the preemption law, although, as a matter of fact, there was no grant above the Raccoon Fork, and hence no occasion for the order of withdrawal. A similar doctrine is also found in the case of the *Northern Lumber Company v. O'Brien*, 139 Fed. Rep., 614.

The history of withdrawals in connection with the early railroad land grants will show that very often withdrawals were made of large amounts of territory in anticipation of probable legislation. Illustration of this is found in the records in the Land Office, with respect to withdrawals in Iowa, made by telegrams on May 10, 1856, addressed to Dubuque, Sioux City, Chariton, Des Moines, Fort Dodge, and Council Bluffs land districts, substantially directing the withdrawal of all the lands in these districts. On May 15, 1856, letters were addressed to these local officers explaining that the telegrams of the 10th were to withdraw from sale lands granted the State by act of Congress which had passed both houses, for four railroads from the Mississippi to the Missouri River, said bill not having been approved until the 15th, and directing the continuance of the reservation until further orders.

An excellent illustration of the exercise of Executive discretion in the execution of the public land laws is found in the action of the President of the United States, who, by his proclamation of August 19, 1893, in providing for the opening of the land within the Cherokee Outlet and Tonkawa and Pawnee reserves, reserved section 13 in each township for university, agricultural colleges, and normal schools "subject to the action of Congress." There was not only no direct authority for these reserves, but the law under which the lands were opened to entry specifically provided for the disposition of said section with others, under the general provisions of the act of March 3, 1893 (27 Stat. L., 612), which did not in any manner contemplate the exercise of the authority of the President to withdraw said lands, even temporarily, from disposition. Notwithstanding this, Congress subsequently, by act of May 4, 1894 (28 Stat. L., 71), ratified and affirmed this action of the President in so reserving section 13 from disposition.

A case well illustrating the broad supervisory authority of the Secretary of the Interior in dealing with the public lands is found in *Williams v. United States* (138 U. S., 514). This case involved, among other things, a construction of section 2 of the act of June 16, 1880 (21 Stat. L., 287), making a grant to the State of Nevada and also providing that when the lands had been selected the selection should be certified to said State by the Commissioner of the General Land Office and "approved by the Secretary of the Interior." In passing upon this feature of the case the court said:

"The certification after selection by the State is to be approved by the Secretary of the Interior. This is no mere formal act. It gives to him no mere arbitrary discretion; but it does give power to prevent such a monstrous injustice as was sought to be accomplished by these proceedings. It gives the power to the Secretary to deny this application of the State and refuse to approve its selection, and hold the title in General Government until, within the limits of existing law or by special act of Congress, a party who, misinformed and misunderstanding its rights, has placed such large improvements on the property shall be enabled to obtain title from the Government.

"We would not be misunderstood in respect to this matter. We do not mean to imply that any arbitrary discretion is vested in the Secretary; but we hold that the statute requiring approval by the Secretary of the Interior was intended to vest a discretion in him by which wrongs like this could be righted and equitable considerations, so significant and impressive as this, given full force. It is obvious, it is common knowledge, that in the administration of such large and varied interests as are intrusted to the Land Department, matters not foreseen, equities not anticipated, and which are therefore not provided for by express statute, may sometimes arise, and, therefore, that the Secretary of the Interior is given that superintending and supervising power which will enable him, in the face of these unexpected contingencies, to do justice."

The language of the court in this case is of peculiar interest in so far as it construes the effect to be given to the provision that the selections of a State were not effective until they had received the approval of the Secretary of the Interior. The power of approval vested in the Secretary of the Interior authority and laid upon him the duty of determining whether the law had been properly executed and that all rights were properly considered in the making of said selections and their certification to him for approval. This bears directly upon the consideration of the matter we now have before us, for the reason that at every important step taken in the dissolution of the Indian tribal relations and the distribution of their property, the approval of the Secretary is required. By placing this supervisory authority in the hands of the Secretary of the Interior, he is enabled to finally review the actions of his subordinates and thus determine whether or not the law has been properly executed. From this it necessarily follows if, in the progress of work, it shall be discovered that the interest of the Indians, considered either tribally or individually, require further consideration by Congress, that it is the duty of the Secretary to immediately call the attention of Congress to the situation, and, in the meantime, suspend the further execution of the law, so far at least as it may operate to remove the subject-matter from the control of Congress.

What has been heretofore said with respect to the Secretary's supervisory authority in respect to the land within the Indian Territory covered by these several orders of withdrawal, has been largely based upon the general legislation whereby it is believed that he was fully warranted in taking the action under consideration. In addition, however, to such legislation the provisions of section 16 of the act of April 26, 1906 (34 Stat. L., 137-143), should not be overlooked. This section provides as follows:

"That when allotments as provided by this and other acts of Congress have been

made to all members and freedmen of the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes, the residue of lands in each of said nations not reserved or otherwise disposed of shall be sold by the Secretary of the Interior, under rules and regulations to be prescribed by him, and the proceeds of such sales deposited in the United States Treasury to the credit of the respective tribes. In the disposition of the unallotted lands of the Choctaw and Chickasaw nations, each Choctaw and Chickasaw freedman shall be entitled to a preference right, under such rules and regulations as the Secretary of the Interior may prescribe, to purchase at the appraised value enough land to equal, with that already allotted to him, forty acres in area. If any such purchaser fails to make payment within the time prescribed by said rules and regulations, then such tract or parcel of land shall revert to the said Indian tribes and be sold as other surplus land thereof. The Secretary of the Interior is hereby authorized to sell, whenever in his judgment it may be desirable, any of the unallotted land in the Choctaw and Chickasaw nations which is not principally valuable for mining, agricultural, or timber purposes, in tracts of not exceeding six hundred and forty acres to any one person, for a fair and reasonable price, not less than the present appraised value. Conveyances of land sold under the provisions of this section shall be executed, recorded, and delivered in like manner and with like effect as herein provided for other conveyances: *Provided further*, That agricultural lands shall be sold in tracts of not exceeding one hundred and sixty acres to any one person."

From this section it will appear that the Secretary of the Interior, under such rules and regulations as he may adopt, may sell the residue of unallotted lands left to the several Indian nations, the proceeds to be turned in to the credit of the respective tribes, and further, that he is given specific authority "whenever in his judgment it may be desirable," to sell any of the unallotted land in the Choctaw and Chickasaw nations, not principally valuable for mining, agricultural, or timber purposes, in tracts of not exceeding 640 acres to any one person, for a fair and reasonable price, not less than the present appraised value. From these provisions it will be seen that Congress fully contemplated conferring upon the Secretary an exceedingly broad discretion in the disposal of unallotted lands, and particularly within the Choctaw and Chickasaw nations. This being so and the matter being confided to the discretion of the Secretary, it is not incumbent upon him to exercise his discretion with respect to the sale so far as to carrying into execution these provisions until, in his judgment, the entire subject is thoroughly understood, not only by him but also by Congress.

If he may, within this discretion, sell bodies of land to the extent of 640 acres to any one person he may also, in the interest of securing the best results to the Indians, as well as to the general public, delay such sales until he can submit the matter to Congress with a statement of the conditions which in his judgment make such submission advisable. It is not infrequent—in fact it may properly be said to be the rule—that in the execution of laws conditions grow up or are presented that were not and could not be foreseen. This is peculiarly true when the legislation relative to so new and complicated a matter as the administration of the affairs of the Five Civilized Tribes. When such a situation confronts the executive officer it is not only his right but his duty to advise Congress thereof that it may determine as to the necessity for remedial or additional legislation. If continued action under existing law would have the effect of removing the matter beyond the jurisdiction of Congress, thus defeating any possibility of remedying the evil and protecting interests entitled to protection, the power to temporarily suspend action in the premises is absolutely necessary to make of any avail the presentation of the matter to Congress. Whatever power is necessary to enable an executive officer to properly and effectually discharge a duty devolving upon him is necessarily presumed to rest in him.

APPENDIX A.

A BILL To provide for the disposal of Indian land chiefly valuable for the timber thereon.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the President of the United States may, in his discretion, by proclamation set apart and reserve as national forest reserves, or parts thereof, any unallotted Indian lands not disposed of at the date of any such proclamation and chiefly valuable for the timber thereon; and lands thus proclaimed shall thereafter, except for specific limitations herein contained, be subject to all the laws, rules, and regulations governing national forest reserves the same as though proclaimed under

authority of section twenty-four of an act approved March third, eighteen hundred and ninety-one, entitled "An act to repeal timber-culture laws, and for other purposes:" *Provided*, That immediately after any such proclamation the value of Indian land thus created into a forest reserve shall be appraised by three appraisers appointed, one by the Secretary of the Interior, one by the Secretary of Agriculture, and a third by the Indians directly interested, in a way to be prescribed by the Commissioner of Indian Affairs, such appraised value to be reimbursed to the Indians in the following manner: If the proclamation creates any Indian land into a separate forest reserve, the gross proceeds therefrom, except any portion provided by law to be paid to States or Territories, is hereby appropriated, to be applied, under the direction of the Secretary of the Interior, to the payment of the appraised value of said land until the total value has been reimbursed to the Indians affected by the proclamation. If, however, any Indian land is made part of an existing forest reserve, such portion of the gross proceeds from that entire reserve, after deducting any payments provided by law for States or Territories, is hereby appropriated to be applied to reimbursement of the Indians directly affected by the proclamation, as is represented by the ratio between the area of the Indian lands included therein and the total area of the reserve; all payments from the proceeds of forest reserves under this proviso to be made at the end of each fiscal year from and after the passage of this act: *Provided further*, That no interest shall be allowed upon said appraised values prior to the payment of money to any Indian fund in the Treasury under this act, such interest being totally accounted for by the expenditures of the Government incident to the care and administration of the Indians' timber land thus created into forest reserves: *And provided further*, That the addition to the Uinta Forest Reserve, created by proclamation of the President, dated July fourteenth, nineteen hundred and five, shall be appraised as soon as possible after the passage of this act in the manner provided herein for other Indian lands, and the Indians affected by said proclamation shall be reimbursed in the same manner as is herein provided in the case of other Indian lands.

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
Washington, January 14, 1907.

SIR: The Office is in receipt of Departmental letter of January 11, 1907, transmitting, for immediate report, a communication from Hon. Gifford Pinchot, Forester, Department of Agriculture, dated January 10, forwarding a memorandum concerning a method of dealing with the proposed forest reservation in the southeastern part of the Indian Territory. The memorandum is as follows:

In view of the Indians' desire to close up their relations with the Government as soon as possible, it is recommended that a national forest reserve be established within the area shown on the last map transmitted, to be administered by the United States Forest Service; the entire receipts from all its resources to go to the fund of said Indians for a period of five years, and thereafter for a period of twenty years to the general benefit of the Indians as the Secretary of the Interior may direct, and after that time the receipts to be treated under the general laws concerning the forest-reserve special fund, by which 10 per cent of the gross receipts will go to Oklahoma for the benefit of schools and roads in the counties in which the reserve is situated.

From Mr. Pinchot's communication it seems that the memorandum above quoted was furnished at the request of the Department.

It is my opinion that if any of the lands in the Choctaw Nation are to be segregated for forest purposes the Indian title should be extinguished and the Indians paid the appraised value thereof by the Government, and that title thereto should be taken in the name of the Government. It appears from the records of this office that some of the lands within the proposed forest reserve have been selected as allotments by Choctaw and Chickasaw Indians, and I would favor cancelling such allotments and paying the allottees from the proceeds of

the sale of the forest lands the appraised value of their improvements and the difference between the actual value of such allotments and of the lands they select in lieu thereof, were I not informally advised that the Department of Agriculture does not consider that allotments within the forest reservation will in any way detract from its usefulness or interfere with the management and control thereof. I have, therefore, caused a draft of an item to be prepared, authorizing the segregation of land for the purpose mentioned. It can be preceded by a proper enacting clause and treated as a separate bill, or it may be made a part of another bill. I inclose it in triplicate and recommend that you transmit copies thereof to the proper committees of the Congress with your favorable recommendation if it meets with your views.

Very respectfully,

F. E. LEUPP,
Commissioner.

THE SECRETARY OF THE INTERIOR.

That the Secretary of the Interior is hereby authorized to segregate and reserve from allotment, for a forest reserve in the Choctaw Nation, Indian Territory, the land shown in green on a certain map of the Indian Territory forwarded to the said Secretary by the Commissioner of Indian Affairs on January ninth, nineteen hundred and seven, a copy of which map is on file in the office of the Commissioner of Indian Affairs.

That the lands so segregated and reserved shall be appraised at their true value by a committee to consist of three persons, one of whom shall be appointed by the President, one by the principal chief of the Choctaw Nation, and one by the governor of the Chickasaw Nation; and the appraised value of said lands, when approved by the Secretary of the Interior, shall be paid, out of any money in the Treasury of the United States not otherwise appropriated, and placed to the credit of the Choctaw and Chickasaw tribes on the books of the Treasury Department. Title to the lands so reserved shall be taken in the name of the United States, and shall be conveyed in the same manner as title to lands allotted to citizens of the Choctaw and Chickasaw nations is conveyed. If the principal chief of the Choctaw Nation, or the governor of the Chickasaw Nation, fails, neglects, or refuses to appoint a member of the committee within a time limit to be fixed by the Secretary of the Interior, the President shall have authority to make such appointment.

That the forest reserve shall be administered by the United States Forest Service; and ten per centum of the gross receipts arising therefrom shall be paid to the State or Territory within the geographical limits of which the Indian Territory may be incorporated, for the benefit of the schools and roads in the counties in which the forest reserve is situate.