Congressional No. 17641

IN THE

United States Court of Claims

THE CHOCTAW AND CHICKASAW NATIONS OF INDIANS,

Plaintiffs,

vs.

THE UNITED STATES OF AMERICA,

Defendant.

SUPPLEMENT

to

"Brief of the Chickasaw Nation of Indians, Answering 'Defendant's Statement Setting Forth Gratuities'."

WILLIAM H. FULLER
and
MELVEN CORINSH,
Special Attorneys, Chickasaw Nation.

OUTLINE OF BRIEF.

CITATIONS.

Treaties:

Acts of Congress:

Court Decisions:

Official Reports and Records:

In the United States Court of Claims

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A complete "OUTLINE OF BRIEF" (together with citations of *Treaties, Laws, Court Decisions* and *Official Records and Reports),* appears upon the preceding lettered pages, showing the arrangement of subjects, by divisions and sub-divisions, with appropriate references to the pages of the Brief where such subjects are treated and such citations appear.

(Throughout this Brief, certain parts of quotations from Treaties, Laws, Court Decisions and Official Records and Reports, have been *italicized,* for emphasis; and such *italics are ours).*

This case was placed upon the October Calendar for final argument and submission, upon the issues arising out of so-called *"Gratuities"*, and also the *"net amount the Government received from the lands involved in this case"*, authorized by the Order of this Honorable Court of June 1, 1936, (and after the final argument and submission of the case, *upon the main issues,* on May 5, 1936).

To be ready to comply with the commands of the Court in placing the case on the October Calendar, the Special Attorneys for the Choctaw and Chickasaw Nations hurried the preparation and printing of their *Briefs* answering the *"Statement"* of the Attorney General setting forth so-called *"Gratuities"*, and also prepared and filed their printed "Statement" upon *"Net Proceeds"*, and all were duly filed; and such Special Attorneys came on to Washington and appeared before the court on October 4, 1937, and announced that they were ready to argue and finally submit the case upon such issues.

At that time, the Attorneys for the United States moved that the case go over to the December Calendar; and, upon consideration, the court ordered that it be placed upon the November Calendar.

In the hurried preparation of the "BRIEF OF THE CHICKASAW NATION ANSWERING 'DEFENDANT'S STATEMENT SETTING FORTH GRATUITIES' ", (heretofore printed and filed, and running from pages 506 to 616, inclusive, of the printed Record) the Special Attorneys for the Chickasaw

Nation did not have available, prior to coming on to Washington, all of the Laws, Court Decisions and official Records and Reports which bear upon the issues of so-called "Gratuities", and, since arriving at Washington, the same have been procured.

The purpose of this *"Supplement"* is merely to set out such authorities, for such information and use as they may be; and a copy of the same has been furnished the Attorneys for the United States; for their information and use, in the preparation of their *Reply Brief* and in oral argument, when the case comes to be finally argued and submitted in November.

I.

SECTION 2 OF THE SECOND DEFICIENCY APPROPRIATION ACT OF CONGRESS OF AUGUST 12, 1935 (49 Stat., 571-96).

In our Answer Brief (page 510, printed Record), upon the subject of the Act of 1935, we stated that its passage was resisted by the Commissioner of Indian Affairs because of its *general terms,* and because it contained no definitions of expenditures allowable, or not allowable, as "Gratuities", under the Treaties and Laws applying to particular Nations or Tribes.

Since then we have found other *views and understandings* of *responsible officials of the United States* charged with the duty of administering the affairs of the Five Civilized Tribes, bearing upon the *Treaty obligations and undertakings* of the United States to make *"no charge or claim"* for the moneys so expended; and upon other important phases of the case; and the same are set out below.

This Act contains no such definitions; nor does it make any distinction between the *Five Civilized Tribes* (to which it, *alone,* applies, since *all the other Tribes* are excluded) and the *Western or Reservation Indians.*

It leaves to the Court the determination of what expenditures are, or are not, "Gratuities"; and we respectfully contend that it take into consideration the Treaties and laws applicable to the Five Civilized Tribes, and the binding force of the *Treaty obligations and undertakings* thereunder.

In these circumstances, therefore are we not justified in setting out such views and understandings, for such use and information as they may be, in assisting the court to arrive at fair and just definitions, since Congress has failed and refused to go far enough to furnish such definitions?

It has been shown that in no cases heretofore decided, has this Honorable Court arrived at such definitions, as to the Five Civilized Tribes; and is it not reasonable to suggest that these views and understandings of these responsible officials of the United States would be tremendously helpful to the court, in the instant case and in all other Five Civilized Tribes cases, in arriving at correct definitions as to what expenditures are, or are not, allowable *"Gratuities"*, in the light of the *Treaty obligations and undertakings* of the United States.

The authorities now cited and quoted comprise the views and understandings of (a) the Commissioner of Indian Affairs, (b) the General Accounting Office, (c) the Law Officers of the Indian Office and the Interior Department, and (d) Honorable W. W. Hastings, a Member of Congress from Oklahoma from 1907 to 1935.

(a) *The views and understandings of Commissioner of Indian Affairs relating to so-called "Gratuities".*

When the Act of 1935 was under consideration, Honorable John Collier, Commissioner of Indian Affairs, was heard before the Senate Committee on Appropriations.

He expressed the deepest concern that legislation upon so-called "Gratuities" should be seriously considered, in *general terms,* without, at the same time taking into consideration the Treaties and laws applying to particular Nations or Tribes, and without defining what expenditures were, or were not, allowable "Gratuities", in the light of such Treaties and laws.

(From "Hearings before the Sub-committee of the Committee on Appropriations, United States Senate, Seventy-Fourth Congress, First Session, on H. R. 8554, Second Deficiency Appropriation Bill for 1935", pages 102-110.)

INDIAN CLAIMS.

STATEMENT OF JOHN COLLIER, COMMISSIONER, BUREAU OF INDIAN AFFAIRS, DEPARTMENT OF THE INTERIOR.

"Senator ADAMS. We suggested that you come, Mr. Collier, by reason of this provision that comes over in this bill, with which you are familiar, with reference to the matters pertaining to Indian claims.

"Commissioner COLLIER. I want to say that the Department feels very strongly—and we think we can show you in detail—that this section, as drawn, would have a disastrous effect—practically an annihilating effect—on the claims of a large number of tribes, existing and to come. It would have an effect of doing vast injustice to a large number of tribes."

* * * * * * *

"What I desire to point out is this, that from time to time Congress has passed jurisdictional

acts, allowing Indians to go into the Court of Claims. It has considered the circumstances of each case, and that is why a variety of rules have been enacted in the past."

* * * * * * *

"In those cases, Congress, knowing the facts, has restricted the set-off claims of the Government in order that justice may be done."

"What we object to is the blanket language, here, that makes no discrimination between one type of case and another, that pays no attention to the circumstances of the particular case."

"Senator HAYDEN. What was your suggestion about a change in the text?

"Commissioner COLLIER. Mr. Chairman, I can make a suggestion but I may say that there is no one language that will cover all cases possible."

* * * * * * *

"Senator HALE. I suggest the Department draw what it considers would be a proper amendment to cover this matter.

"Senator HAYDEN. Senator Thomas submitted some language here, that has gone into the record. Do you have a copy?

"Commissioner COLLIER. We do not have a copy. We are in accord with it. I would like to submit a brief, Mr. Chairman, the time being so short. It is a small matter, prepared by the Solicitor's office, which I think is very illuminating.

"Senator HALE. Does it also suggest an amendment?

"Commissioner COLLIER. I will put it this way, Senator: If necessary yes; but I do not, my-

self, believe that any *omnibus language* can cover the variety of cases. I think they ought to be determined *in the light of the particular circumstances,* and any omnibus language would at least have this effect. It would force a large number of cases that are almost ready for trial, back into the General Accounting Office for a long period of further research and further compilation, and further cost to the Government, and adding years of delay to the trials—any omnibus language, because we would not suggest omnibus language excluding set-offs, because there ought to be set-offs but *there is no omnibus language about set-offs that covers the facts of all the tribes;* but, if it be desired to enact something, we already are in accord with Senator Thomas' amendment."

The Commissioner then presented a "MEMORANDUM ON THE SET-OFF OF GRATUITIES", and the following are excerpts bearing upon such issues:

> "*Blanket legislation* requiring the Court of Claims to offset against any claim of any Indian tribe now or hereafter filed all sums expended gratuitously by the United States for the benefit of the tribe *would prove unwise, unworkable,* a burden to the Government, and *disastrous to the Indian claimants,* because of the following facts:
>
> "The requirement of the set-off or gratuities is unworkable and impractical, *since gratuities have nowhere been defined.*"
>
> * * * * * * *
>
> "Numerous important cases, such as those presented by the Five Civilized Tribes, *do not involve gratuities.*"
>
> * * * * * * *

> "The set-off of all sums expended by the United States masses against the claimant all sums conceivably beneficial to the claimant spent by the United States at any time in its history.
>
> "This violates the basic theory of litigation in that it permits the defeat of a particular, just claim by the presentation of matter which is wholly irrelevant and in no way connected with the question of the merit of the claim.
>
> "A similar provision occurs in connection with no other type of litigation. Even litigation involving private claims before the Court of Claims follows the normal rule of law that the merit of the complaint depends upon the circumstances surrounding the particular transaction sued upon".
>
> * * * * * * *
>
> "The inequity of the set-off of gratuities *has been recognized by past Congresses* who have refused to attach such a provision to particular jurisdictional acts, *as in those for the Five Civilized Tribes,* or at least have limited gratuities to those occurring after the date of the law or treaty sued upon."

It will be noted that the Commissioner particularly referred to the cases of the Five Civilized Tribes and said that they *"do not involve gratuities";* and that *"past Congresses have refused to attach such a provision"* ("Gratuities") to Five Civilized Tribes cases.

By this, the Commissioner meant to say that it was well known to him, and to all other officials of the United States having the administration of Five Tribes affairs that the United States had agreed to di-

They do, and such *findings and conclusions* will have, we think, a tremendous bearing upon such issues, in the instant case and in the other Five Tribes cases.

It should be remembered that the *findings and conclusions* contained in the *main Reports* were made *before the issues of so-called "Gratuities" arose;* and the findings and conclusions in the *Supplemental Report* upon so-called *"Gratuities"* were made *after those issues arose.*

The *main Report* in the case of *"Chickasaw Nation* v. *United States"* has been examined and it appears that the General Accounting Office *finds and concludes* that the *very moneys under consideration* were expended by the United States, in pursuance of its *Treaty obligations and undertakings* to divide and distribute the Tribal estates, in preparation for Oklahoma Statehood. The findings and conclusions in the *main Report* upon the case of *"Choctaw Nation* v. *United States"*, No. K-260 are exactly the same.

In the *"Supplemental Report"* specially relating to so-called "Gratuities", prepared *after the issues of so-called "Gratuities" arose,* the General Accounting Office reported the expenditures under consideration as *"other than Treaty Appropriations".*

This, and this alone, is all that even purports to be proof in support of the contentions of the United States that such expenditures are allowable as *"Gratuities".*

We have most strenuously contended that the General Accounting Office had no power and author-

ity to make findings and to reach conclusions, to any extent whatsoever, since that was, alone, the province of the court.

Since, however, it has done so, *once when there was nothing at stake,* and *next when there was everything at stake,* and that such findings and conclusions are *wholly conflicting,* and *as far apart as the poles,* which, we inquire, is entitled to the greatest weight, if weight is to be given to either?

As showing that the findings and conclusions of the General Accounting Office, in the *two Reports* and upon the *same subject,* are in *direct conflict and wholly irreconcilable,* we cite and quote certain pertinent parts of the *main Report* in *"Chickasaw Nation* v. *United States"*, No. K-544.

On page 432 it sets out the Act of Congress of March 3, 1893, (27 Stat., 765) providing for the appointment of a Commission to enter into Treaties with the Five Civilized Tribes for the division and distribution of the Tribal estates in preparation for *"the ultimate creation of a State or States of the Union which shall embrace the lands within said Indian Territory".*

It then says (pages 434-5):

"In accordance with this aforesaid Act, Commissioners were appointed, who entered into separate Agreements with the aforesaid Tribes or Nations of Indians, including the Choctaw and Chickasaw Nations. Said agreements *provided generally that the United States should bear the expense of the administration or division of the*

tribal estates, which involved the allotment of the lands in severalty; the *survey, appraisement and sale of certain lands;* the *survey and sale of townsites;* the *leasing of certain mineral and oil lands.*"

"*In carrying out said projects,* there was also *considerable expense incurred by the United States* in the *removal of objectionable persons from allotments;* the *removal of restrictions from the alienation of lands of certain allottees;* the *investigation of leases fraudulently obtained;* and *other expenses including pay of Commissioners, Superintendents, Inspectors, Attorneys* and *Miscellaneous employees.*"

"An examination of the records of the General Accounting Office discloses that during the years 1894 to 1929, there was disbursed by the United States *for the aforesaid purposes,* for the joint benefit of the Choctaw and Chickasaw Nations, and for the benefit of the said Nations jointly with other Indians, a total of $8,286,254.08, the details of which have not been included in this Report. However, there is set out in the following statement the names of the appropriations under which said disbursements were made, which, in most instances, *indicate the main purposes of the disbursement,* together with the amounts disbursed for the joint benefit of the Choctaw and Chickasaw Nations of Indians and the amounts disbursed for the benefit of said Nations jointly with the other Five Civilized Tribes."

Then follows, on pages 436-7, tabulations of such expenditures.

Then, on page 438 of the Report, it is said:

"The *first agreement* entered into with the Choctaw and Chickasaw Nations of Indians, *pursuant to the aforesaid Act of Congress of March 3, 1893,* was ratified by Act of June 28, 1898."

The "Atoka Agreement" (Section 29 of the Act of June 28, 1898; 30 Stat., 495) is then set out.

Then, on page 453 of the Report, it is said:

"*The Commissioners appointed pursuant to the Act of March 3, 1893, supra,* negotiated a *second agreement* generally referred to as the Supplementary Agreement, with the Choctaw and Chickasaw Nations and ratified by Act of July 1, 1902."

Then follows the text of the "Supplementary Agreement", (Act of July 1, 1902; 32 Stat., 641).

The Report then quotes the Act of Congress of April 26, 1906 (34 Stat., 137) and says (pages 500-01):

"*Pursuant to the aforesaid acts and agreements,* the United States *completed the rolls* of the (Choctaw and) Chickasaw Indians; *allotted lands in severalty* to said Indians; *surveyed, appraised* and *sub-divided* certain townsites into town lots and *disposed* of same; *collected royalties* on coal and asphalt mined from lands segregated for that purpose; *leased and sold* lands and property belonging to the (Choctaw and) Chickasaw Nation; and *distributed the funds* arising therefrom."

Since the United States *must rely,* and *has relied* upon these General Accounting Office Reports for its proof of allowable "Gratuities", why, we inquire, has it not seen fit to file and stress *both Reports* (the *main*

Report as well as *Supplementary Report),* since *both Reports* originated from the *same source* and cover the *same subjects?*

Why not (by filing and stressing both *Reports)* give us and the court the benefit of the *findings and conclusions* of the General Accounting Office both *before* and *after* the subject of so-called "Gratuities" arose?

We can conceive of nothing entitled to more weight and possessing more probative force and power, in support of our contentions that the moneys under consideration are not "Gratuities" and not allowable as such, in the instant case, that *these clear, calm and dispassionate findings and conclusions* of the *very agency* upon which the United States relies, that the *very moneys* here involved were expended by the United States under Treaties or Agreements which *"provided generally that the United States should bear the expense of the administration and division of the tribal estates;"* that, *"in carrying out said projects"* the United States did actually do, and pay for, the things enumerated in the Treaties, and for which *"no charge or claim"* would be made against the Indian Nations.

Since these things are so clearly and fairly set out in the *parent Reports,* (made up at a time when so-called "Gratuities" had never been heard of in the Five Civilized Tribes cases) why, we inquire, were these *findings and conclusions* wholly ignored when the "Supplemental Report" came to be made up?

In the "Supplemental Report" (which, *alone,* has been filed and used by the United States, in the instant case) the *findings and conclusions* contained in the *main or parent Reports* are nowhere referred to, and the General Accounting Office (with many millions of dollars of so-called "Gratuities" at stake) contents itself with the *general findings and conclusions* that such moneys were *"other than Treaty appropriations".*

We have now placed before the court the essential parts of the *two Reports;* and they are submitted without further comment for such bearing as they may have upon the issues of so-called "Gratuities", in the instant case.

(c) *The views and understandings of the law officers of the Interior Department and the Indian Office relating to so-called "Gratuities".*

In presenting these views and understandings of the responsible officials of the United States having direct charge of the administration of Indian affairs, we only have in mind that they may be helpful to the court in defining allowable "Gratuities"—a duty forced upon it because Congress, in the passage of the Act of 1935, failed to furnish such definitions, in the light of the applicable Treaties and laws governing each Nation or Tribe.

Feeling that the passage of this Act (Section 2 of the Second Deficiency Appropriation Act of 1935; 49 Stat., 571-96), was a cruel injustice to the Choctaw and Chickasaw Nations, in that it applied only to the

Five Civilized Tribes, without, at the same time, defining allowable "Gratuities" (in the light of the *Treaty obligations and undertakings* of the United States to divide and distribute the Tribal estates, *at its own expense,* in preparation for Oklahoma Statehood, and that *"no charge or claim"* for such expenditures would ever be made by the United States), an effort was made, in the 75th Congress, 1st Session, to repeal that Act, so that Congress might then pass a *new Act* defining allowable "Gratuities" in the Five Tribes cases.

An amendment to the Interior Department Appropriation Bill (H. R. 6958), was presented, as follows:

> "Provided further, That Section 2 of the Act of Congress approved August 12, 1935 (49 Stat., 571) shall not apply to the Five Civilized Tribes."

This amendment was adopted by the Senate Appropriations Committee and was incorporated into the Bill.

Then, the Bill, with this amendment, passed the Senate.

The House disagreed, and the Conference Committee was appointed.

However, because of the fact that it was *new legislation* in an Appropriation Bill, a separate vote upon this item was necessary upon the Conference Report, under the Rules; and, upon separate vote in the House, it was defeated.

(The debate upon this amendment appears upon pages 9323-29 of the Congressional Record of July 15, 1937).

It is interesting to note that this amendment failed because it was *new legislation* in an Appropriation Bill, whereas the Act of 1935 was *passed, in the same way,* being *new legislation* in the Second Deficiency Act of that year.

Having failed in the effort to repeal the Act of 1935, the Attorneys for the Choctaw and Chickasaw Nation then conferred with the law officers of the Interior Department and the Indian Office, in the preparation and passage of a Resolution clarifying and defining so-called "Gratuities", in the Indian cases.

Representatives of the Interior Department and the Indian Office were designated, and several conferences were held with them.

The result was the drafting of such a Resolution, and its introduction in both Houses of Congress (S. J. Resolution 167; and H. J. Resolution 400).

Both Resolutions are identical, and the following is the text of both:

JOINT RESOLUTION.

Defining and classifying gratuity expenditures or disbursements allowable as offsets in favor of the United States and against claims of Indian nations, tribes, or bands.

Whereas section 2 of the Act of August 12, 1935 (49 Stat. 602), declares that moneys expended gratuitiously by the United States for the benefit of Indian tribes or bands shall be offset against any amount found to be due any such tribe or band, without completely defining gratuity expenditures; and

Whereas there are many pending and outstanding Indian claims against the United States in which offsets will be claimed for gratuities; and there exists such uncertainty as to what constitutes gratuites that settlement of such claims have been unsatisfactory to the Indians and expensive to the United States; and

Whereas it is the purpose of this resolution to define and classify gratuity expenditures so that the settlement of Indian claims may be expedited: Therefore be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That wherever provision is made in any Act of Congress now or hereafter in force for an offset in favor of the United States against the claim of any Indian nation, tribe, or band, of moneys expended gratuitously by the United States for the benefit of any such nation, tribe, or band, whether for judgment against the United States or for report of findings of fact and conclusions to Congress, there shall be included in such offset only so much of such money, properties, or things of value advanced or expended by the United States as can be shown by competent evidence to have been expended or advanced for the benefit of the *entire nation, tribe, or band* as distinguished from advancements or expenditures benefiting *part of the tribal membership only; Provided,* That where such an advancement or expenditure has been made under Act of Congress for the benefit of a group of Indian nations, tribes. or bands, no apportionment for the purpose of offset shall be made among the several Indian nations, tribes, or bands *unless and until it is shown by competent evidence* the amount of

moneys or properties advanced or expended for the benefit of the *particular nation, tribe, or band against whom the offset is claimed or asserted,* and the purposes for which such advancements or expenditures were made.

No advancement or expenditures falling within the following classifications shall be allowed as offsets against any nation, tribe, band, or group of Indians:

(1) Any moneys disbursed by the United States *in the discharge of its obligations under any treaty or agreement* with any Indian nation, tribe, or band or *incidental to the performance of its said treaty or agreement obligations.*

(2) Any moneys or properties advanced to any Indian nation, tribe, or band, or to the individual members thereof, under any law of the United States providing for relief, assistance, or social security, passed subsequent to March 4, 1933.

(3) Any expenditures made prior to the date of the law, treaty, agreement, or Executive order under which the claim arose.

(4) Any expenditure by the United States in the administration of Indian property or the affairs of the Indians where the *Acts of Congress making such appropriation do not provide for reimbursement;* or where reimbursement heretofore required has not been made, or otherwise adjusted, including pay of superintendents, agents, or other employees, the cost of transportation, insurance and distribution of treaty goods, supplies, and annuities, and the expenses of Indian delegations brought to the seat of the government at, by, or through the request of any of its officers.

(5) Any expenditures made pursuant to the Act of June 18, 1934 (48 Stat. 984), as amended, and the Act of June 26, 1936 (49 Stat. 1967).

While this proposed Resolution conforms, in all respects to the *views and understandings of the law officers of the Interior Department and the Indian Office,* it could not be brought to final passage because of the lateness of the Session of Congress.

This proposed Resolution merely seeks to have Congress define and clarify allowable "Gratuities", in the light of the *Treaty obligations and undertakings* of the United States, which, according to Assistant Attorney General Blair, is *"solely for the determination of the Congress."*

That may, or may not, be true, yet the exercise of that function, by Congress, would certainly have been fair and just to the Indians, and would have vastly simplified the issues, relating to so-called "Gratuities", in this and all other Indian cases.

Since it has not seen fit to do so, it now becomes the sole province of this Honorable Court to define and clarify what "Gratuities" are allowable, and what are not allowable, taking into consideration, as we respectfully contend, the *weight and binding force* of the *Treaties and laws* governing the *particular Nation or Tribe* whose case is under consideration.

If the proposed Resolution had been passed (or if the original Act of 1935 had gone as far as Assistant Attorney General Blair and the law officers of the

Interior Department and the Indian Office all said it should have gone) certain general rules would have been laid down for the guidance of the court (and for which we are contending in the instant case), as follows:

"Gratuity" offsets in Indian cases shall only be allowed,

1. Where it is shown by *competent evidence,* that moneys expended by the United States for the benefit of the *entire Nation (the plaintiff),* as distinguished from moneys expended for the benefit of *particular individuals;*
2. Where it is shown, by *competent evidence, what part, if any,* of moneys expended for a *group of Nations or Tribes* (such as the Cherokee, Creek, Choctaw, Chickasaw and Seminole Nations) were expended for the benefit of the *particular Nation or Nations* against which the offset is claimed (as, in the instant case, the Choctaw and Chickasaw *Nations,* the *plaintiffs);* and that *no "Gratuity" offsets shall be allowed* where moneys have been expended by the United States in the *fulfillment of its Treaty obligations and undertakings, or incidental thereto.*

In the instant case (and in all other cases of the Choctaw and Chickasaw Nations) we have endeavored to make it plain that these Indian Nations not only rely upon the *general Treaty obligations and undertakings,* based upon *good and valuable considerations* passing between the parties, but upon the *definite and specific Treaty obligations and undertakings,* based upon the same *good and valuable considerations,* that *"no charge or claim"* will ever be made, by the United

States, for moneys expended for the division and distribution of the Tribal estates; and, as to many other items, they rely upon the contentions that moneys expended for the benefit of *individuals,* in connection with their *privately owned and patented lands,* or for the *support and accommodation* of *certain individuals* of a *particular class,* do not constitute a valid charge against the *Nations,* the *plaintiffs* herein, and are not allowable, in the instant case.

(d) *Statement of Honorable William W. Hastings, Member of Congress from Oklahoma.*

We have said that the Act of 1935, authorizing so-called "Gratuities" in Five Tribes cases, was an *"after thought";* and that, prior to that time, and during the progress of the division and distribution of the Tribal estates of the Five Civilized Tribes, no plan for "charging back" to those *Nations or Tribes* the moneys expended by the United States for those purposes, was ever seriously considered.

Why? Because Congress and the responsible officials of the United States, charged with the duty of administering Indian affairs, were well aware of the *Treaty obligations and undertakings* of the United States to divide and distribute the Tribal estates *at its own expense* and that *"no charge or claim"* would ever be made therefor.

The only suggestion ever made that the United States might be *reimbursed,* for any purpose and to any extent, arose in 1919 over moneys expended for

Probate Attorneys who were rendering services to the *individual owners* of *allotted and patented lands,* whose *privately owned lands* were endangered by the machinations of the so-called "land grafters".

There was no suggestion at that time, nor at any other time, that the moneys being expended for that purpose by the United States, should be a *"charge or claim"* against the *Nations;* and the suggestion that the *private estates* thus served might bear a part of such expenses *was not adopted.*

That afforded Honorable William W. Hastings, Member of Congress from Oklahoma, an opportunity to review the history of the relations of the Five Civilized Tribes with the United States; and his statement confirms much of what we have endeavored to make plain throughout this Brief.

Mr. Hastings is, himself, a Cherokee Indian, and was the Tribal Attorney for the Cherokee Nation throughout practically the whole period of the division and distribution of the Tribal estates.

Upon the admission of Oklahoma as a State, he came to Congress; and remained there continuously from 1907 to 1935, when he voluntarily retired.

No man in public service was ever accorded higher regard and greater respect by his colleagues in Congress, and by his contemporaries and associates in the service of his country, including Presidents and Cabinet officers, and particularly, those charged with the duty of administering Indian Affairs.

He was, throughout practically the entire period of his service in Congress, a Member of the House Committee on Indian Affairs, and is responsible for more legislation affecting Indian Nations or Tribes than any other man.

Therefore, no living man is better qualified than he to testify as "one having authority" upon the relations between the United States and Indian Nations or Tribes, and particularly the Five Civilized Tribes.

His statement (the correctness of which is affirmed by Honorable E. B. Merritt, Assistant Commissioner of Indian Affairs) follows, for such bearing as it may have upon the issues in the instant case.

His statement follows:

(Hearings Before the Committee on Indian Affairs, House of Represetnatives, 66th Congress, 1st Session, on Conditions of Various Tribes of Indians, Act of June 30, 1919.)

Pages 249-254.

"Mr. Hastings. Let me inject a word. In the early part of 1830 and between 1830 and 1840 the Five Civilized Tribes were practically coerced into making treaties with the Government by which they were removed from comfortable home and civilized surroundings in the eastern States to what was afterwards known as the Indian Territory. The Government, by various treaties with these Tribes, agreed to protect them and promised in those treaties that they should *hold those lands forever in their tribal capacity.* Subsequent treaties were made confirming these prior treaties.

By the Act of March 3, 1893, 26 years ago, the Government after finding that the Indian Territory was surrounded, railroads run through the country, cities and towns had grown up, thousands and thousands of white men had gone in there, some in towns and some as tenants, sent what is known as the Dawes Commission down to negotiate with the Five Civilized Tribes to *induce them, if possible, to give up their tribal government and become citizens of the United States and to become ultimately a State of the Union. The Dawes Commission had very great difficulty in negotiating these agreements.* I hesitate to put it into the record, but it is the truth that they, in a measure, *coerced them into making those agreements.* The Cherokees never made one. They did make one in 1899. They ratified it; the Government here did not. But by means of certain coercive legislation on behalf of Congress, they were compelled to accept an act of Congress approved July 1, 1902, because it was an alternative either to accept that legislation or to go under other legislation that had been enacted by the Congress that was exceptionally objectionable to the tribe.

Under those circumstances, either agreements negotiated with the tribes, or acts of Congress enacted, and submitted to the tribes, which they accepted, and it amounted legally to the same thing this legislation provided for making rolls on behalf of the Government, survey of lands and individualization of lands, and winding up of their estate; in other words, giving to each member of the tribe the portion that was due him.

Since these agreements were negotiated with the representatives of the Government, first, the Dawes Commission, and later others have been

doing this work under those *various agreements.* In order to *induce the tribes to negotiate these agreements and give up the tribal government* to which they were attached, because they had their own tribal governments, with executive, legislative and judicial departments, and their country cut up into counties, to which the Indians were very much attached, *it was with extreme reluctance* that a great part of the Indians finally consented. A great many of them never consented, and it was under these circumstances that these agreements were made and executed. Of course, the *Government of the United States had to put some terms there favorable to the Indians to get them to accept them,* and among others, *they agreed to bear this expense and are bearing the expense of administration in this work.*

* * * * * * *

The Chairman. I think you ought to go more fully into the question whether or not some arrangement could not be made whereby some part of this $85,000 for probate attorneys could be borne by the people who were given the benefit of the service.

Mr. Hastings. That is impracticable. It can not be done. It is *not a tribal estate; it is individual,* and these Indians are citizens of the United States. The Government of the United States feels that it has a duty to perform with reference to supervising those estates of the *individual restricted Indians.* The individual restricted Indian would not permit any part of his estate to be taken. For instance, in the Cherokee tribe, how are you going to pay probate attorneys in the Cherokee tribe? He would not pay them. He is

not asking for this supervision. The Government feels it is its duty to see that the estate is protected and it pays the probate attorneys to come there. The Indian did not ask for them and will not pay them.

The Chairman. *Is the statement that Mr. Hastings is now making the understanding of the bureau, and is that the law as to the probate attorneys?*

Mr. Meritt. *I think the statement of Mr. Hastings is correct."*

Many allotments worth Millions — inured wholly to owners & not to plaintiff Nations.

II.

FURTHER COMMENTS UPON ITEM 15, IN "DEFENDANTS' STATEMENT SETTING FORTH GRATUITIES", PAGE 474, RELATING TO MONEYS OF THE OSAGE NATION.

We have said in our Answer Brief (pages 516 and 595 of the printed Record) that certain moneys now set up as allowable "Gratuities", and for which the United States asks a finding *in its favor,* belonged to the *Osage Nation* and *not to the* United States.

In the Osage Treaty of 1865 the Osage Indians conveyed certain lands to the United States for a consideration of $300,000; such lands were to be surveyed and sold; and, after reimbursing the United States for said moneys and the cost of survey, the *"remaining proceeds"* were to be placed to the credit of a *"Civilization Fund"* and used for the "civilization and education of Indian Tribes residing within the limits of the United States."

An examination of the Osage Treaty of 1865 (14 Stat., 687; 2 Kappler, 878), set out in the decision of this Honorable Court in *"Osage Nation* v. *United States"*, No. B-38, (66 Ct. Cls., 64-82) shows (Article XII) that the Osages shall remove from the lands *"ceded in Trust"*; (Article XIII) that the lands *"hereby ceded in trust"* shall be surveyed and sold; and (Article XVI) that the reserved lands may be disposed of in the same manner as *"said trust lands"*.

In commenting upon this strange transaction the court says:

"There is no other instance in connection with Treaties by the United States with Indians where the United States has applied or undertaken to apply the proceeds of sales of lands of one tribe to the benefit of another."

In view of this record, we are sure that it will not be seriously contended that the *United States* is entitled to recover these moneys, notwithstanding attempted findings and conclusions of the General Accounting Office, and notwithstanding the fact that they are set up as moneys of the United States, in its *"Statement"* upon "Gratuities".

III.

THE LAW.

At the time our *Answer Brief* was prepared, we did not have access to all the decisions of this Honorable Court bearing upon "Gratuity" offsets.

It has been said that there have been no decisions upon so-called "Gratuities" in Five Civilized Tribes cases, except that, in the case of *"Western Old Settler Cherokees* v. *United States,* No. 42078 (82 Ct. Cls., 456-76), the petition *was dismissed;* and, therefore, the issues of so-called "Gratuities" were not considered upon their merits.

We have also shown that it has been held (in the case of *"Osage Tribe of Indians* v. *United States,* No. B-38, (66 Ct. Cls., 64-82) that, where petitions are dismissed, upon the main issues, *"no further consideration"* is given to counterclaims.

These two cases are commented upon in our *Answer Brief* (pages 610-11, printed Record), and are again referred to only for the purpose of giving the volume and page references, as they appear in the Court of Claims Reports.

We have since examined all decisions bearing upon "Gratuities"; and all of such holdings, in so far as they may bear upon the issues of so-called "Gratuities" in the instant case, are set out below.

In this connection, we again say that the conditions under which the United States expended moneys in the *Five Civilized Tribes* are *wholly different* from

conditions existing in the *Western Reservation Tribes,* in that (1), the Five Civilized Tribes owned their lands by *Patent and under fee simple title,* whereas the holdings of the Western Reservation Tribes was entirely different; (2), the whole plan of the United States was to divide and distribute the *whole of the Tribal estates,* to *abolish the Tribal Governments* and to *end all Tribal existence,* in preparation for Oklahoma Statehood, whereas, the Western Reservation Tribes were to *continue their existence indefinitely;* and (3), the Five Civilized Tribes had, in their Treaties, definite and specific provisions that *"no charge or claim"* would ever be made by the United States for the moneys expended for the division and distribution of their Tribal estates.

Notwithstanding this radical difference, there are many holdings in the Western Reservation Indian cases which have a considerable bearing upon the Five Tribes cases; and they will now be referred to.

A considerable part of the moneys claimed by the United States as allowable "Gratuity" offsets, in its *"Statement",* were expended for the benefit of *individuals,* either in connection with their *individually owned and patented lands* or for the support and accommodation of certain *individuals of the restricted class,* in schools and hospitals; and we contend that such moneys were not expended for the benefit of the *Choctaw and Chickasaw Nations,* the *plaintiffs* in the instant case.

In *"Blackfeet (and other Indians)* v. *United States"*, No. E-427 (81 Ct. Cls., 101-42) this court held:

> "Cases are cited establishing the rule that Congress does not legislate for the institution of suits by *individual* tribal Indians."

Then, if *individual tribal Indians* may not institute suit, how, we inquire, may the United States ask for a finding, *in its favor,* for moneys expended for *individuals,* where the case is between the Choctaw and Chickasaw *Nations* as *plaintiffs* and the United States as *defendant?*

In the same case is contained expressions bearing upon the moneys which the United States is obligated to expend under *Treaty obligations,* and those *over and above Treaty obligations.*

It says (in discussing certain items held to be allowable, as "Gratuity" offsets):

> "They were expenditures which the United States was under *no legal obligation to make* for, or on behalf of, the plaintiffs";

and also,

> "* * * it was the intent and purpose of Congress to charge the plaintiffs with all sums disbursed for their benefit *over and above those provided for in Treaty or other obligations";*

and also,

> "The court allowed the counterclaim as presented, holding that under the special jurisdictional act this language, 'all set offs or counterclaims, including gratuities' clearly disclosed a congressional intent to charge the Indians 'with all sums disbursed for their benefit *over and above those provided for in Treaty obligations'.* The court is still of the same opinion."

So are we of the same opinion. We grant that "Gratuities", as such, are allowable, in the instant case, *if and when found to be "Gratuities";* but it is contended that, because of *general Treaty obligations and undertakings,* and *definite and specific Treaty obligations and undertakings,* the moneys falling within those classifications *are not "Gratuities";* and that, upon *other grounds,* moneys expended for the benefit of *individuals,* and not for the *plaintiff Nations,* are, likewise, not allowable.

In the case of *"The Assiniboine Indian Tribe* v. *The United States",* No. J-31 (77 Ct. Cls., 347-80), the court, in Finding XII sets out a total of $688,631.14 for "Agency buildings and repairs"; "Miscellaneous Agency expenses"; "Pay of Miscellaneous employees, superintendents, interpreters and Indian Police"; and "Expense of delegations".

These items, and this total, were disallowed as "Gratuity" Offsets, and the court said:

> "It (the General Accounting Office Report) also includes a number of items where the money was expended only indirectly for the benefit of the Indians, or jointly for their benefit and the purposes of the Government. * * * Assuming for the purposes of the case that none of these items should be credited against the plaintiff tribe, we have a total of $910,194.15 (including another

total of $221,563.01) which should be deducted from the amount estimated by the Comptroller General's Office * * *''

It is always insisted that conditions in the Western Reservation Tribes wholly differ from the Five Civilized Tribes, for the reasons heretofore set out; but here the court disallowed a number of items, and a tremendous total, corresponding to similar items set up in the instant case.

They *might have been allowed* in the Western Reservation Indian case, and not *allowed* in this Five Tribes Case, because of Treaty obligations and undertakings, both *general and specific.* Certainly, if not allowable in the Western Reservation case, like items would not be allowable in this Five Tribes case.

In the case of *''The Crow Nation or Tribe of Indians* v. *The United States''*, No. H. 248 (81 Ct. Cls. 238-81) the court set out the Fort Laramie Treaty of 1868 (15 Stat., 649).

These obligations contained in the Treaty (and which will be presently referred to) parallel, to a large extent, the *general Treaty obligations and undertakings* of the United States in the various Chocaw and Chickasaw Treaties heretofore referred to.

In the Crow Treaty, it was mutually agreed that peace should be maintained; that ''intruders'' should be expelled and punished; that the Indians would be reimbursed for damages; that the boundaries of the Indian country were defined and claims to other lands

relinquished; and that *Agents and Agencies* be established and maintained.

In carrying out these *Treaty obligations and undertakings* the United States expended certain moneys.

In the Crow case, *all moneys* expended by the United States were set up as ''Gratuity'' offsets.

As to these claimed ''Gratuity'' offsets, the court held:

> ''In compliance with the *obligations assumed under this Treaty,* the United States expended, during the period from 1870 to 1927 * * *''

a certain sum of money, and

> ''* * * in addition thereto * * * although not obligated thereunder * * *.''

it expended a further sum of money.

The petition was dismissed, upon the ground that allowable ''Gratuities'' exceeded recoveries; but here is a holding by the court that moneys expended *''in compliance with the obligations assumed under this Treaty''* were not allowable as ''Gratuity'' offsets.

In the case of *''Kansas or Kaw Tribe of Indians* v. *The United States''*, No. F-64 (80 Ct. Cls., 264-325) the court included in its Findings the various Treaties with that Tribe, showing what the United States was obligated to do.

The question of ''Gratuities'' was an issue in the case, and the court held:

> "During the period from June 3, 1825, to June 30, 1928, the United States expended for the benefit of the plaintiff tribe the sum of $449,263.33 *over and above the amount it was obligated to expend, by treaty* or otherwise."

thus drawing a distinction between moneys expended in pursuance of *Treaty obligations and undertakings,* and moneys expended *"over and above the same".*

In the case of *"The Klamath (and other tribes)* v. *The United States,"* No. E-346 (not reported, but appearing in Pamphlet decision, pages 9 and 10), in passing upon "Gratuity" offsets, the court holds:

> "* * * there is omitted from the defendant's counterclaim all sums expended for the benefit of the Indians *under Treaty provisions during the periods the United States was obligated to disburse the same."*

The court then disallowed various other items because they were *"required to be disbursed under the Treaty",* and because they fall *"within the terms of the Treaty."*

There may be other cases and other holdings, which we have overlooked in the Court of Claims cases of the Western Reservation Indian Tribes; but it is respectfully submitted that, *even in those cases,* the rule has been fairly well established and applied that (1), moneys expended by the United States in carrying out *Treaty obligations and undertakings,* and (2), moneys expended for the benefit of *individuals,* and

not for the benefit of the *plaintiff Tribes,* are not allowable as "Gratuity" offsets, in those cases.

These cases are cited and commented upon for whatever application they may have to the issues of "Gratuity" offsets in the instant case, with the suggestion, often herein stated and restated, that the Five Civilized Tribes cases should be gauged and governed by the *particular conditions,* and by the *particular Treaties and laws* that apply, *only* to them.

IV.

CONCLUSION.

With these additions to our "REPLY BRIEF" heretofore filed, which are contained in this "SUPPLEMENT" thereto, the instant case is respectfully submitted.

WILLIAM H. FULLER,
and
MELVEN CORNISH,
Special Attorneys, Chickasaw Nation.