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### Report : Claim of W. Hart

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S. Rep. No. 256, 31st Cong., 2nd Sess. (1851)

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IN SENATE OF THE UNITED STATES.

JANUARY 29, 1851.

Submitted, and ordered to be printed.

Mr. BELL made the following

REPORT:

[To accompany bill S. No. 432 ]

*The Committee on Indian Affairs, to whom was referred the memorial of William B. Hart, have had the same under consideration, and make the following report:*

The treaty of Dancing Rabbit creek, made with the Choctaw Indians on the 27th September, 1830, ceded to the United States all the lands owned by them "east of the Mississippi river."

The 3d article provided that "as many as possible of their people, not exceeding one-half of the whole number," should remove to the country set apart for them west of the Mississippi river, "during the falls of 1831 and 1832," and "the residue to follow during the succeeding fall of 1833."

The 14th article provided for the reservation of one section of six hundred and forty acres of land to "each Choctaw head of a family" who should desire "to remain and become a citizen of the States," and who should "signify his intention to the agent within six months" thereafter. In like manner, each head of a family was entitled to "half that quantity for each unmarried child which is [was] living with him over ten years of age," and also "a quarter section to such child as may be under ten years of age." Five years' residence upon these lands was requisite to entitle the parties to patents in fee simple for them; but provision was also made that, if they removed west of the Mississippi at any subsequent time, they should "not be entitled to any portion of the Choctaw annuity."

Other large reservations of land were made by the 19th article. Provision was made that these might be sold, with the consent of the President of the United States; "but should any prefer it, or omit to take a reservation for the quantity he may be entitled to, the United States will, on his removing, pay fifty cents an acre, after reaching their new homes."—*See 7 U. S. Stat. at Large, 333.*

Other reservations were made by a supplemental treaty concluded on the 28th September, 1830.—*See 7 Stat. at Large, 340.*

On the 3d March, 1837, Congress passed an act authorizing the appointment of commissioners to ascertain all the Indians who were entitled to lands under these treaties and who had not received them, and to

report "whether any of said lands have been sold by the government, &c."—*See 5 Stat. at Large*, 180.

This act was amended by that of February 22, 1838, which gave to said commissioners "the powers of a court of record, for the purpose of compelling the attendance of witnesses, &c."—*See 5 Stat. at Large*, 211.

An act approved August 23, 1842, continued the foregoing acts in force until the powers of the commissioners were fully executed, and prescribed the conditions upon which the Indians should be entitled to patents for the lands reserved in the original and supplementary treaty, and for certificates for other lands where their reservations had been sold, &c.—*See 5 Stat. at Large*, 513.

In case of the sale of a reservation by the United States, this act provided (*see 3d section*) that the Indian entitled to it under the treaty should be entitled to a certificate for an *equal* quantity of land, "*to be taken out of any of the public lands in the States of Mississippi, Louisiana, Alabama, and Arkansas, subject to entry at private sale.*" These certificates were to be issued under the direction of the Secretary of War, by an agent appointed for the purpose, and "*not more than one-half*" of them were to be "*delivered*" to said Indians until after their "*removal to the Choctaw territory west of the Mississippi river.*" Certificates for *one-half* of the land were, therefore, to be issued *before* their removal.

The early removal of the Indians who still remained east of the Mississippi was considered necessary for many reasons, and especially because it was earnestly insisted on by the people of the State of Mississippi. Accordingly, on the 3d March, 1843, the Secretary of War made a contract with Alexander Anderson, by which he agreed to remove them by water from Vicksburg to Fort Coffee.—*See report of Secretary of War to the House of Representatives, January 21, 1845, Doc. 107, 2d Sess. 28th Congress.*

Efforts were made for their removal under this contract, but the Indians refused to go *by water*, and the contract was cancelled on the 4th September, 1844. On the same day another contract was made for their removal with Anderson, Cobb, Forrester, and Pickens. (*See pages 13 and 16 of Doc. last referred to.*) These parties were to be paid \$26 71½ per each Indian removed.

The government appointed Colonel H. N. Barstow as agent to superintend the emigration, and see that it was properly conducted; and he repaired to the Indian country to enter upon his duties.

Efforts were immediately made to remove the Indians within the time fixed in the contract; but they refused to go until the certificates or scrip for their lands were issued. They desired these to pay their debts. The Secretary of War promised that it should be issued in September, 1844; but the promise was not complied with. The contractors were, therefore, placed in a most embarrassing position. By the condition of their contract they were required to remove one thousand Indians within the year 1844, or *forfeit the contract*. They were, under these circumstances, compelled to furnish the Indians, *at their own private expense*, those articles which were necessary for their removal, relying upon the promise of the Secretary and the provisions of law by which the Indians were to be furnished with land scrip to repay them.

This course was adopted by the advice of Barstow, the agent, who accompanied Forrester to New Orleans to make the purchases.

The testimony of Colonel John B. Guthrie shows that the articles thus supplied to the Indians cost the contractors the sum of \$15,496 29.

The same witness also shows that, after the Indians arrived at their new homes, they were also supplied with wagons, oxen, and horses, by the contractors, to the value of \$3,345.

Colonel Barstow, in an official report, states that these articles were necessary to the Indians, that they were indispensable to their health and comfort, and that the difficulties in the way of removal were obviated by the course pursued by the contractors.—*See summary of the evidence made at the Indian office, marked B.*

John B. Luce, who was the clerk of the government agent, corroborates this statement—not of his personal knowledge, but by what he understood from the parties.—*See same statement.*

The aggregate of the sums thus advanced by the contractors at the time of the first removal was \$18,841 29.

Another removal took place in the spring of 1846, when it again became necessary for the contractors to supply the Indians with those articles of necessity without which they could not remove. At this time Major William Armstrong was the agent of the government, and Luce was his clerk. He swears that the outfit thus furnished may be "fairly estimated at \$10 to each person supplied." The number removed, according to the muster-rolls, is 768, which makes this item amount to \$7,680.—*See exhibit B, from the Indian office.*

The Indians refused to remove, both in 1845 and 1846, without their horses and oxen. The agent of the government assured the contractors that, if they would subsist them, they would be paid by the government. (Luce and Guthrie both show this in their statements.) There were accordingly 550 removed, (the contractors have charged for only 549,) which at \$13 per head (the price fixed by Guthrie) is \$7,137. Precedent for this allowance is furnished in a similar one made when the Chickasaws were removed from Mississippi, in 1843. The department in that instance allowed twenty-five cents per day for each horse or pony, and estimated the travel at 12 miles per day. By the same mode of calculation, the compensation in this case would amount to \$18 75 per head, which is \$5 75 more than the contractors have charged.—*See exhibit B, from Indian office.*

The Indians who were collected for emigration, and who dispersed because they were not furnished with their scrip, were supported by the contractors. It appears that they were supplied liberally, but the contractors are unable to specify the precise amount expended by them for this purpose. The character of their demand for compensation for this expenditure is fully set forth in exhibit B, from the Indian office, under the head of "item 5." They have charged \$5,000, which they state is less than the sum expended.

A number of Indians at another time were assembled with a view to emigration, and, although they did not disperse, they were delayed some time by the negligence of the government in forwarding their scrip, and in the mean time were subsisted by the contractors. A detailed account of the rations issued by them was laid before the Indian department. Item "6," in exhibit B, makes the charge for these supplies \$1,505.

Under the head of item "7," as stated in the account of the claimant, the charge of \$4,251 is fully explained. The charge is for the difference between the contract price for the removal of 262 Indians and the amount paid for their removal by the government by its own agents. The amount is not claimed as profit, but to reimburse the contractors for expenditures incurred by them in getting the Indians together and furnishing supplies prior to their actual departure for the west.

The preceding analysis of the claim presented by the memorialist, and of the grounds or evidence upon what it is supported, has been taken from the papers reported from the Indian Bureau. The Commissioner of Indian Affairs refuses to allow the claim, but expresses an opinion favorable to it, as an equitable claim upon the government.

The contract for the removal of the Choctaws, in the performance of which his claim *originated*, stipulated, among other things, that the contractors should, in no event, set up any claim for any further allowance than what was specified in the contract; and, on this ground, the Indian Office appear to have declined paying any part of the demand now made upon the government. The committee are of opinion that any damages the contractors may have sustained by the default of the government should be paid, notwithstanding the provision in the contract above stated. It could not have been contemplated that any act of omission or commission by one of the parties should work an injury to the other, and constitute no ground of redress. It appears that the contractors did sustain great damage, and were subject to great expense, not necessarily connected with the fulfilment of their contract, by the failure of the government to furnish the scrip in due time, which was to have been delivered to the Indians before their departure for the country set apart for them west of the Mississippi. Of the whole amount claimed by way of damages against the government, the sum of \$6,505 is based upon issues and supplies furnished to the Indians by the contractors, on various occasions, when the Indians were assembled with a view to their immediate emigration, but dispersed, or their departure delayed, by the neglect of the government in forwarding the scrip due them, which was to have been delivered east of the Mississippi.

There is no satisfactory proof of the specific nature or amount of the provisions furnished under these circumstances; but the committee are satisfied, from the facts stated in the report from the Indian Office, that the amount demanded under this head is rather below than above the amount actually expended.

A further sum of \$7,139 is demanded by the memorialist for so much expended in subsisting and removing the horses and oxen of the emigrating Indians. This was not contemplated by the contract for removal; but, as the Indians refused to emigrate unless they could take their stock with them, the agent of the government appointed to superintend the removal assured the contractors that they might rely upon the justice of the government for their remuneration, and they accordingly assumed the charge of their removal. This claim, the committee believe, cannot be resisted.

The charge of \$4,251 for the difference between the actual cost to the government in transporting a party of 262 Indians and the contract price is made upon the ground that the contractors had borne all the charges for collecting these Indians, and for their subsistence and supplies previous

to their actual movement, and during the delays and embarrassments which grew out of the accidental death of Barstow, the agent appointed by the government to superintend the emigration, and see that the contractors complied faithfully with their stipulations.

The committee therefore think this charge reasonable and proper.

But the larger part of the claim made upon the government consists of the outfit and supplies, other than provisions for subsistence, furnished the Indians both before they left the State of Mississippi and after they arrived west, and which were not included or provided for in the contract. These supplies, or so many as were furnished before the Indians set out from the State of Mississippi, it appears by the evidence, were for the most part articles of necessity and comfort, without which the Indians could not be prevailed upon to emigrate, and without which most of them could not have been removed without great suffering and exposure. It further appears that the contractors furnished the first party of emigrants, after their arrival west, with wagons, horses, and oxen to the value of \$3,345, making, in the aggregate, the sum of \$18,841 expended in supplies which the contractors were not bound to furnish by the terms of their engagement with the government, but which they furnished voluntarily, with the understanding that they would be indemnified by the Indians themselves, so soon as the government should put it in their power to do so by the delivery of the land scrip which had been promised them.

At the time these supplies were furnished, the law provided that one-half the scrip awarded to the Indians might be delivered to them east of the Mississippi; and that the other half should be delivered after their arrival west. The policy of this provision of the act of 1842 was, undoubtedly, to secure the emigration of the Indians, and in that aspect was wise and provident; but when—in 1845, and after the contractors had incurred the large extra expense above stated in removing a party of some eleven or twelve hundred Indians, upon the faith of the law as it stood when they entered upon the business, and expecting to be reimbursed upon the delivery of the said scrip to the Indians on their arrival west—Congress by a new law provided that the half of the land scrip due the Indians, and which by the act of 1842 was to have been delivered to them after their arrival west, should not be delivered to them at all, but that the amount should be funded at the rate of \$1 25 per acre, and the interest only paid to them annually, the committee are of opinion that, while the change of the law was dictated, doubtless, by a humane regard for the welfare of the Indians, yet that the government became bound, in justice and good faith, to make good to the contractors all losses or damages which accrued to them in consequence of the new legislation. The same humane policy which governed Congress in funding the value of the said scrip due the Indians, and thus putting it out of their power to dispose of it improvidently, equally forbids the exercise of any power which Congress may have over the annually accruing interest on the scrip funded by requiring that it shall be withheld to satisfy the present claimant. By the fourteenth article of the treaty of 1830, those Choctaws who took reservations under that article were expressly excluded from any interest in the annuity stipulated in that treaty, and the committee are of opinion that they are intended to be excluded from all interest in the annuities due under any former treaty; and these were the Indians removed by the contractors. To withhold the interest due on the funded scrip would de-

prive them, probably, of their only remaining resource, save the labor of their own hands.

A further sum of \$7,680 appears to have been laid out in supplies by the contractors, not included in their contract, upon a party of seven hundred and sixty-eight Indians emigrated by them in 1846. It is proved that these supplies consisted of articles chiefly of necessity, and without which the Indians probably could not have been induced to emigrate. This extra expenditure was made after the government had funded the scrip which was by the act of 1842 to be delivered west of the Mississippi river, and does not stand upon ground of equal merit with the like expenditure on the party which emigrated in 1844-'45; but, as the policy of removing these remnants of the Choctaws remaining in Mississippi is one called for by so many considerations of humanity to the Indians themselves, as well as of interest to the State itself, and as it appears that the Indians would not consent to remove without the supplies furnished in this instance as well as in the former one, the committee think it but reasonable and just that the government should indemnify the contractors. The contractors doubtless relied upon the liberality and justice of the government to remunerate them for this extra expense, as will appear from the correspondence of the agents of the government with the Indian Office, and from their sworn statements exhibited by the memorialist.

It appears from the papers exhibited to the committee that the memorialist, William B. Hart, holds by assignment, either of the contractors themselves or of their legal representatives, the entire interest in the contract with the government under which this claim originated; and the committee therefore report a bill for the payment to him of the aggregate amount, which the committee think should be allowed by Congress.