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Creek Orphans of 1832. Letter from the Acting Secretary of the Interior, relative to an appropriation required to restore to the Creek orphans of 1832 certain funds to which they are entitled under the treaty of March 24, 1832

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CREEK ORPHANS OF 1832.

L E T T E R

FROM THE

ACTING SECRETARY OF THE INTERIOR,

RELATIVE TO

An appropriation required to restore to the Creek orphans of 1832 certain funds to which they are entitled under the treaty of March 24, 1832.

APRIL 10, 1872.—Referred to the Committee on Appropriations and ordered to be printed.

DEPARTMENT OF THE INTERIOR,
 Washington, D. C., April 6, 1872.

SIR: I have the honor to submit herewith an estimate of appropriation required to restore to the Creek orphans of 1832 certain funds to which they are entitled under the provisions of the treaty with the Creek Nation of March 24, 1832, but illegally invested in stocks or diverted to other purposes, amounting to the sum of \$251,055 97.

By the accompanying copy of an opinion of Assistant Attorney General Smith, dated the 15th ultimo, it will be found that the subject has been carefully examined; and as the conclusions of that officer appear to be sustained by reason and authority, I respectfully request the favorable action of Congress upon the estimate.

I am, sir, very respectfully, your obedient servant,

B. R. COWEN,
 Acting Secretary.

The SPEAKER of the House of Representatives.

Estimate of appropriation required to restore to the Creek orphans of 1832 certain funds to which they are entitled under the provisions of the treaty with the Creek Nation of March 24, 1832, but illegally invested in stocks or diverted to other purposes:

For this amount, to restore to the Creek orphans the par value of certain stocks, now held in trust by the United States for said orphans, provided that said stocks shall become the property of the United States..	\$74,300 00
For this amount, to restore to the Creek orphans the amount taken from their fund, and used for the support of loyal refugees of the Creek people, during the late rebellion.....	106,799 68
For this amount, to restore to the Creek orphans the amount taken from their fund, and used for general purposes of the tribe.....	69,956 29
Total.....	<u>251,055 97</u>

DEPARTMENT OF JUSTICE,
OFFICE OF ASSISTANT ATTORNEY GENERAL,
Washington, D. C., March 15, 1872.

SIR: I have considered the claim of the Creek orphans, referred by you for my opinion.

This claim grows out of the treaty made with the Creeks on the 24th of March, 1832, and found in volume 7 United States Statutes, page 366.

By that treaty twenty sections of land, to be selected by the President of the United States, were reserved "to the orphan children of the Creeks," and were directed to be "retained or sold for their benefit, as the President may direct." He did direct that they should be sold, and they were sold under the provisions of the act of March 3, 1837, (5 Stat., 186,) and the proceeds, amounting to \$108,713 82, invested in stocks. The third section of that act authorized the interest to be paid to the Creeks "in such amounts and in such manner" as in the opinion of the President would be most advantageous to them, and the principal, whenever the President should think proper.

This sum and its interest have been reinvested, and now amount to a large sum, probably \$275,000. This is exclusive of the payments that have been made, under the order of the President, two in number, one August 26, 1868, of \$106,434 12, and the other, July 1, 1870, of \$24,291 63.

The orphans have received no other payments, either on principal or interest. There has been expended out of these funds, and without their consent, for the general purposes of the tribe, \$69,956 29, and for the support of loyal Creek refugees, \$106,799 68. The stocks now on hand consist of Tennessee 5's and Virginia 6's.

These bonds are below par, and are non-interest-paying bonds. They have been purchased since September 11, 1841.

The attorney for the orphans claims:

1. That the bonds now on hand were obtained in violation of law;
2. That the application of the \$69,956 29, for the general purposes of the tribe, was improper;
3. That the application of the \$106,799 68, for the support of loyal refugees, was not authorized by law; and
4. That all the payments to the orphans should have been in gold, and that the difference between coin and Treasury notes should be made up to them.

I will consider these claims in their order:

1. The bonds now on hand were purchased in violation of law.

The third section of the act of March 3, 1837, authorized the President to invest the proceeds of the sales of the Creek reserves "in stocks," without specifying any particular stocks. That language is broad enough to justify the purchase that was made, and if the trustee acted in good faith and with reasonable care, there is no legal liability for any loss resulting from his action.

This principle is not controverted; but it is claimed that the subsequent act of September 11, 1841, (5 Stat., 465,) required the investments made after that date to be in United States stocks, bearing interest at not less than five per cent. per annum.

The first section of that act repealed the act authorizing the Secretary of the Treasury to invest the interest accruing on the Smithson bequest in State stocks, and required such interest to be invested in United States stocks of not less than five per cent. annual interest.

The second section is as follows: "That all other funds held in trust by the United States, and the annual interest accruing thereon, when

not otherwise required *by treaty*, shall in like manner be invested in stocks of the United States, bearing a like rate of interest." This section is general in its terms, and applies to all cases not otherwise provided *by treaty*, and is, I think, a repeal of all laws inconsistent therewith. The act of 1837 is inconsistent with it, and is therefore repealed by it. If the original investment had been made after the passage of the law, there would probably be no doubt of its application. Does it make any difference that the original investment was before the act, but the actual investment was made after the act, but out of funds arising from a sale of stocks, sold after the passage of the act? I think not. The trustee misapprehended his powers, and invested in stocks which the law prohibited him from investing in, and a loss has resulted therefrom. It may have been difficult for him to procure, at that time, the class of bonds the law required. If so, it was his duty to withhold the investment until such time as the proper stocks could be procured, or until he was otherwise directed by Congress. It seems to me that the loss should fall upon the United States and not upon its wards.

2. As to the application of the \$69,956 29, for general purposes: These twenty sections were set apart for the benefit of the orphans. The adults of the tribe received compensation for their interests. The orphans were not then in a condition to receive their share. Their claim is now an individual one, and I do not understand how money belonging to individuals can be taken and expended for general purposes of the tribe. The obvious mode would have been to have taken the moneys of the tribe and used them for the general purposes of the tribe.

The purposes for which these moneys were spent were mostly educational; such as building school-houses and supporting schools for the tribe. This may have been beneficial to the orphans, or rather to some of their heirs, for the orphans of 1832 would not be likely to be in school between 1850 and 1861.

The Secretary of the Interior is not a trustee of the Indians in such a sense as to be authorized to spend their money for their benefit without express provision of law. He has no discretion. He must be directed by Congress. It may give him discriminating power, but it did not do it in the case of the Creek orphans. I think their money was improperly expended, and should be returned to them.

3. As to the application of the money for the support of the loyal refugees: The only ground for making this application of the orphan fund is found in the appropriation acts of July 5, 1862, (12 Stat., 528;) March 3, 1863, (12 Stat., 793;) June 25, 1864, (13 Stat., 180,) and the joint resolution of February 22, 1862, (12 Stat., 614.) The first provides "that all appropriations heretofore or hereafter made to carry into effect treaty stipulations, or otherwise, in behalf of any tribe or tribes of Indians, all or any portion of whom shall be in a state of actual hostility to the Government of the United States, including the Cherokees, Creeks, Choctaws, Chickasaws, Seminoles, Wichitas, and other affiliated tribes, may and shall be suspended and postponed, wholly or in part, at and during the discretion and pleasure of the President: *Provided further*, That the President is authorized to expend such part of the amount heretofore appropriated and not expended, and hereinbefore appropriated for the benefit of the tribes named in the preceding proviso, as he may deem necessary, for the relief and support of such individual members of said tribes as have been driven from their homes and reduced to want on account of their friendship to the Government."

(The acts of March 3, 1863, and June 25, 1864, are substantially like that of July 5, 1862.)

This provision is a summary one. It purports, without a hearing, trial, or "day in court," to dispose of certain funds belonging to certain Indians. It should certainly receive a strict construction, and no funds should be confiscated under it, unless they come clearly within the letter of the act. Looking to the letter, it will be seen that the Creek orphan fund is not included.

The language is, "all appropriations heretofore or hereafter made," &c. The term "appropriation" is well understood. It signifies such portions of the public moneys as have been set apart by Congress for some particular object. It does not include moneys that have never been the property of the Government. This orphan fund never was the property of the Government, and Congress never had, prior to the date of the act now under consideration, made any appropriation for it. The President was the party who controlled the fund and directed when and how it should be paid.

But it was to be not only "all appropriations," but only such appropriations as had been made or should be made "in behalf of any tribe or tribes of Indians, all or any portion of whom shall be in a state of actual hostility to the Government of the United States."

It was a fund that *belonged to the tribe* that was condemned, not a fund that belonged to *individuals* of the tribe. This orphan fund belonged to individuals, and perhaps to those who were wholly innocent of any participation in the rebellion.

It may well be doubted whether Congress had power to confiscate individual property without invoking the action of the courts, and it should not be held that it had undertaken to do an act so doubtful as to its legality, unless the language is so plain as to leave no other reasonable construction.

The joint resolution of February 22, 1862, is in these words:

That the Secretary of the Interior be authorized to pay, out of the annuities payable to the Seminoles, Creeks, Choctaws, and Chickasaws, and which have not been paid in consequence of the cessation of intercourse with those tribes, so much of the same as may be necessary to be applied to the relief of such portions of said tribes as have remained loyal to the United States, and have been or may be driven from their homes in the Indian Territory into the State of Kansas, or elsewhere.

Here it is the *annuities* that are authorized to be paid out, the yearly allowances that have been appropriated by Congress, and those that are "payable to the Creeks," and other tribes therein named.

This fund is in no sense an *annuity*, and it is not one "payable to the Creeks." It is payable to *individuals* of the Creeks. I fail to find authority in the acts referred to for expending this orphan fund in the support of loyal refugees.

The treaty of June 14, 1866, (14 Stats., 785,) has sometimes been referred to as releasing the United States from all liability for this fund. I do not so interpret that treaty. The eleventh article provides that—

The stipulations of this treaty are to be a full settlement of all claims of said Creek Nation for damages and losses of every kind growing out of the late rebellion, and all expenditures by the United States of annuities in clothing and feeding refugees and destitute Indians, since the diversion of annuities for that purpose consequent upon the late war with the so-called Confederate States; and the Creeks hereby ratify and confirm all such diversions of annuities heretofore made from the funds of the Creek Nation by the United States, and the United States agree that no annuities shall be diverted from the objects for which they were originally devoted by treaty stipulations with the Creeks to the use of refugees and destitute Indians other than the Creeks, or members of the Creek Nation, after the close of the present fiscal year June, thirtieth, eighteen hundred and sixty.

The release here made is "of all claims of said Creek nation" for losses and damages of every kind growing out of the late rebellion, and all ex-

penditures by the United States of *annuities* in clothing and feeding refugees and destitute Indians.

It does not include all claims of the individuals of said nation, nor expenditure of the individual funds belonging to individual members of said nation—the Creek orphan fund. That, as I have before attempted to show, is not an annuity.

This view is strengthened by reference to the sixth article of the treaty. That did purport to dispose of this orphan fund, but the Senate struck out the entire article.

If it had been the intention of the parties to this treaty to release individual claims, it is to be presumed that they would have used apt words to indicate such intention.

This Creek Nation understand the use of the English language. In the fifth article of their treaty of August 7, 1856, (11 Stats., 699,) they released and discharged the United States "from all other claims and demands whatsoever which the Creek Nation, or any *individuals thereof*, may now have against the United States;" but they were careful to except out of its provisions "the fund created and held in trust for Creek orphans under the second article of the treaty of March 24, 1832."

I think they would have been equally careful to have excepted the orphan fund from the operations of the treaty of 1866 if they had supposed it could be construed to cover individual claims.

For fear there might be some question about their right to insist upon treaty stipulations having been forfeited by their action during the rebellion, they were careful to provide in the twelfth article of this treaty that the United States should "reaffirm and reassume all obligations of treaty stipulations with the Creek Nation entered into before the treaty of said Creek Nation with the so-called Confederate States July 10, 1861, not inconsistent therewith.

My conclusion is that this orphan fund was not released, and that the same is a subsisting legal liability against the United States to its full amount, diminished only by the two payments that have been made to the orphans.

4. As to the difference between coin and Treasury notes: This claim was made while the decision of the Supreme Court in the case of *Hepburn vs. Griswold* was in full force.

Since the reversal of that case, and the decision of the Supreme Court in a case not yet reported, I suppose it will not be seriously contended that the orphans are entitled to be paid in coin. They certainly are not as the law now stands. I recommend that, when the President shall direct the payment to be made, Congress be requested to make an appropriation for the benefit of the Creek orphans that shall cover the entire amount found due them upon the principles herein set forth, the United States to take the bonds now on hand, and allow therefor their par value and annual interest on the same, not exceeding five per cent.

Very respectfully,

W. H. SMITH,
Assistant Attorney General.

Hon. C. DELANO,
Secretary of the Interior.

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
Washington, D. C., April 5, 1872.

SIR: I have the honor to be in receipt of your letter of the 30th ultimo, in which you transmit, with your approval and for consideration and appropriate action on the part of this office, a decision of the Hon. W. H. Smith, Assistant Attorney General, upon the claims of the orphans of the Creek Nation, growing out of the treaty with said tribe of March 24, 1863. (Statutes at Large, vol. 7, p. 366.)

The Assistant Attorney General decides, and the Department rules accordingly, that the Creek orphan fund is entitled to be reimbursed in the following amounts:

First. By the value of certain depreciated bonds purchased, in contra- vention to law, with moneys belonging to said fund as follows, namely:	
Bonds of the State of Tennessee	\$20,000
Bonds of the State of Virginia, (Richmond and Danville Rail- road Company).....	3,500
Bonds of the State of Virginia, (Chesapeake and Ohio Canal Company)	9,000
Bonds of the State of Virginia, registered certificates	41,800
	<hr/>
Aggregate	74,300
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Second. By the sum of \$69,956 29 taken without authority of law from said fund and applied to the general purposes of the Creek Nation.

Third. By the sum of \$106,799 63 taken without authority of law from said fund and applied to the support of loyal refugees of the Creek Nation.

The said Creek orphan fund is thus, in the opinion of the Assistant Attorney General, and by the decision of the Department, entitled to be reimbursed in an aggregate amount of \$251,055 97.

I accordingly inclose an estimate for appropriations sufficient to reimburse said fund in the several amounts stated.

I have the honor to be, very respectfully, your obedient servant,
F. A. WALKER, *Commissioner*.

The Hon. SECRETARY OF THE INTERIOR.