

7-17-1886

Right of Way to Certain Railroads

Follow this and additional works at: <https://digitalcommons.law.ou.edu/indianserialset>

 Part of the [Indian and Aboriginal Law Commons](#)

Recommended Citation

S. Rep. No. 1494, 49th Cong., 1st Sess. (1886)

This Senate Report is brought to you for free and open access by University of Oklahoma College of Law Digital Commons. It has been accepted for inclusion in American Indian and Alaskan Native Documents in the Congressional Serial Set: 1817-1899 by an authorized administrator of University of Oklahoma College of Law Digital Commons. For more information, please contact darinfox@ou.edu.

IN THE SENATE OF THE UNITED STATES.

JULY 17, 1886.—Ordered to be printed.

Mr. DAWES, from the Committee on Indian Affairs, submitted the following

REPORT:

[To accompany vetoed bill S. 2281.]

The Committee on Indian Affairs, to whom was referred the message of the President of the United States, returning, with his objections, Senate bill 2281, granting to railroads right of way through the Indian Reservation in Northern Montana, have considered the same and report:

That the objections of the President to said bill, contained in the message (hereto appended) are of a twofold character: first, objections to the general character of the bill itself; that it is in the nature of a general right of way for railroads through this Indian reservation; second, that it does not sufficiently guard against an invasion of the rights, and a disturbance of the peace and quiet, of the Indians on the reservation mentioned.

The objections to the general character of the bill overlook entirely the existing general railroad law of the United States applicable to the public domain, as a comparison of the bill with the existing law will show. Senate bill 2281 is in the following words:

Be it enacted, &c., That the right of way through the Indian reservation in Northern Montana, set apart for the use of the Gros Ventre, Piegan, Blood, Blackfeet, and other Indians, by act of Congress approved April fifteenth, anno Domini eighteen hundred and seventy-four, is hereby granted to any railroad company duly organized under the laws of any State or Territory, except the District of Columbia, or by the Congress of the United States, which shall have filed with the Secretary of the Interior a copy of its articles of incorporation and due proofs of its organization under the same, to the extent of one hundred feet in width; also the right to take from the public lands adjacent to the line of said road material, stone, earth, and timber necessary for the construction of said railroad; also ground adjacent to such right of way for station buildings, depots, machine shops, side-tracks, turn-outs, and water-stations, not to exceed in amount three hundred feet in width and three thousand feet in length for each station, to the extent of one station for each ten miles of its road.

SEC. 2. That any railroad company whose right of way, or whose track or road-bed upon such right of way, passes through any canyon, pass, or defile, shall not prevent any other railroad company from the use and occupancy of the said canyon, pass, or defile for the purposes of its road, in common with the road first located, or the crossing of other railroads at grade; and the location of such right of way through any canyon, pass, or defile shall not cause the disuse of any wagon-road or other public highway now located therein, nor prevent the location through the same of any such wagon-road or highway when such road or highway may be necessary for the public accommodation; and where any change in the location of such wagon-road is necessary to permit the passage of such railroad through any canyon, pass, or defile, said railroad company shall, before entering upon the ground occupied by such wagon-road, cause the same to be reconstructed, at its own expense, in the most favorable location, and in as perfect a manner as the original road: *Provided*, That such expenses shall be equitably divided between any number of railroad companies occupying and using the same canyon, pass, or defile.

SEC. 3. That it shall be the duty of the Secretary of the Interior to fix the amount

of compensation to be paid the Indians for such right of way, and provide the time and manner for the payment thereof; but no right of any kind shall vest in any railroad company in or to any part of the right of way herein provided for until plats thereof, made upon actual surveys for the definite location of such railroad, and including the points for station buildings, depots, machine-shops, side-tracks, turnouts, and water-stations, shall be filed with and approved by the Secretary of the Interior, and until the compensation aforesaid has been fixed and paid; and the surveys, construction, and operation of any such railroad shall be conducted with due regard for the rights of the Indians, and in accordance with such rules and regulations as the Secretary of the Interior may make to carry out this provision.

The first two sections of the general statute of the United States, "granting to railroads the right of way through the public lands of the United States," approved March 3, 1875, are as follows:

Be it enacted, &c., That the right of way through the public lands of the United States is hereby granted to any railroad company duly organized under the laws of any State or Territory, except the District of Columbia, or by the Congress of the United States, which shall have filed with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of one hundred feet on each side of the central line of said road; also the right to take, from the public lands adjacent to the line of said road, material, earth, stone, and timber necessary for the construction of said railroad; also ground adjacent to such right of way for station-buildings, depots, machine shops, side-tracks, turn-outs, and water-stations, not to exceed in amount twenty acres for each station, to the extent of one station for each ten miles of its road.

SEC. 2. That any railroad company whose right of way, or whose track or road-bed upon such right of way, passes through any canyon, pass, or defile, shall not prevent any other railroad company from the use and occupancy of the said canyon, pass, or defile, for the purposes of its road, in common with the road first located, or the crossing of other railroads at grade. And the location of such right of way through any canyon, pass, or defile shall not cause the disuse of any wagon or other public highway now located therein, nor prevent the location through the same of any such wagon road or highway where such road or highway may be necessary for the public accommodation; and where any change in the location of such wagon road is necessary to permit the passage of such railroad through any canyon, pass, or defile, said railroad company shall before entering upon the ground occupied by such wagon road, cause the same to be reconstructed at its own expense in the most favorable location, and in as perfect a manner as the original road: *Provided*, That such expenses shall be equitably divided between any number of railroad companies occupying and using the same canyon, pass, or defile.

It will be observed that the bill under consideration is an attempt to apply to this Indian reservation the general law applicable to the construction of railroads through the public domain, and that whatever criticism can properly be made on the general character of this bill lies with equal force against the existing law, for every act authorized by this bill to be done in the matter of constructing railroads in this Indian reservation is authorized by the existing law to be done in any part of the public domain.

This law has existed now for more than ten years, and no complaint of its operations has been heard in any quarter. It was in the line of a broad and liberal policy, inviting capital and enterprise to push railroads into and through the public domain in every direction where there was reasonable hope to expect that development would in the future produce business enough to justify the outlay. The beneficial results of that policy have been so marked in the rapid settlement of the public domain and the development of the resources of the country that no one has hitherto suggested that it be abandoned. It has not been discovered before that it was possible that "speculating corporations would be enabled to seek out and secure the right of way over the natural and most feasible routes, with no present intention of constructing railroads along such lines, but with the view of holding their advantageous easements for disposal at some future time to some other corporation for a valuable consideration."

One objection raised by the President to this bill is that it confers the right upon any railroad company in the country "to prospect for routes of travel, survey them, and construct routes of travel wherever it may please," without check. If that be true, it is impossible for the committee to see how any railroad corporation can secure, as against any other railroad corporation, the "most feasible routes," or can, by taking possession in advance, compel any other corporation to purchase of it any right to build a railroad, when this bill confers that right without purchase.

Certainly if any railroad can go where it pleases in this reservation under this bill, no one railroad can compel another to buy that right of them, and if perchance there be any locality where it is impossible for more than one railroad track to run, the second section of the bill, like the second section of the existing law, provides amply against any attempt at monopolizing this right. The committee are unable to see any force or consistency in either of these objections. Certainly the one is refuted by the other.

The objection that this bill "invades the rights of the Indians, and is a disturbance of their peace and quiet," is also without foundation. The message states that this bill "ignores the right of the Indians to be consulted as to the disposition of their lands." The right of the Indians to occupy this reservation is correctly stated by the President to be derived from a treaty made by them with the United States on the 17th of October, 1855, and by act of Congress approved April 15, 1874. In so much of this reservation as is covered by that treaty they have expressly conceded the right to build every kind of a way without being further consulted, as will appear from the eighth article of the treaty itself, which is in the following words:

For the purpose of establishing traveling thoroughfares through their country, and the better to enable the President to execute the provisions of this treaty, the aforesaid nations and tribes do hereby consent and agree that the United States may, within the countries respectively occupied and claimed by them, construct roads of every description; establish lines of telegraph and military posts; use materials of every description found in the Indian country; build houses for agencies, missions, schools, farms, shops, mills, stations, and for any other purpose for which they may be required, and permanently occupy as much land as may be necessary for the various purposes above enumerated, including the use of wood for fuel and land for grazing, and that the navigation of all lakes and streams shall be forever free to citizens of the United States.

When they made that treaty they consented, as appears from this article, that the United States, without further consultation with them, should construct any road it was deemed that the public good should require. The bill does not, therefore, "ignore the right of the Indians to be consulted;" for the Indians, under the treaty, have renounced that right. So far as any portion of the reservation is covered by the statute and not by the treaty, it will be observed that the statute confers no right to the soil upon the Indians. It merely sets it apart for their occupation. The same power that enacted the law can modify it to any extent.

It is difficult for the committee to imagine what right of the Indians has been invaded by this bill or what right it is possible to invade under it. The committee, however, recognize the duty of Congress in dealing with the Indians, either upon reservations secured to them by treaty without reserving to the United States, as in this instance, the right to build ways, or in any other way, to adopt such a policy towards them as will best promote their welfare and secure to them the enjoyment of such privileges and immunities under the laws of the land as will conduce to their peace and quiet, as well as to their ultimate civilization

and self-support; and, therefore, any sound objection to this bill in this regard would be a sufficient reason why it should not become a law.

The committee, however, have failed to find in this bill any tendency either to invade the rights or disturb the peace and quiet of the Indians. They have already considered what the rights of the Indians in this reservation actually are. If they have no right to object to the construction of a railroad through their reservation, it nevertheless remains to be considered whether the construction of such railroad in the manner provided in this bill will be injurious to the peace and quiet of the Indians, or retard them in their effort to reach ultimate citizenship and self-support.

The bill carefully provides for compensation to the Indians for any possible right of way they may have conceived that they have and for the payment thereof. The amount and the time and manner of payment is to be fixed and determined by the Secretary of the Interior, and no foothold can possibly be obtained under the bill by any company for the purpose of constructing a railway until "plats thereof, made upon actual surveys for the definite location of such railroad, and including the points for station buildings, depots, machine-shops, side tracks, turnouts, and water-stations, shall be filed with and approved by the Secretary of the Interior, and until the compensation aforesaid has been fixed and paid."

This provision was inserted in the bill notwithstanding the provisions already cited in which the Indians had given in advance their consent for the building of any such railroad. It was thought better as a matter of abundant caution and to remove any possible complaint on the part of the Indians to provide for such adjustment in this manner of any claim they might set up, rather than to assert to these people the absolute right of the United States to construct these roads without reference to their wishes or ideas of their own rights. And as a further caution a provision was inserted in the bill, which does not exist in any other bill which has become a law with the approval of the President, that "the surveys, construction, and operation of any such railroad shall be conducted with due regard for the rights of the Indians, and in accordance with such rules and regulations as the Secretary of the Interior may make to carry out this provision"; so that so long as the Indians occupy this reservation it will be impossible, if the Secretary of the Interior does his duty, for any railroad to be constructed or operated in any manner that shall in any way conflict with a due regard for the rights of the Indians.

The President is in error when he says that there is "no check save possible disapproval by the Secretary of the Interior of its maps of location, and no limitation upon its acts except such rules and regulations as he may prescribe." It is a positive, not a "possible" duty of the Secretary of the Interior to enforce the provisions of the bill, and while it is true, as the President says, that "this power vested in the Secretary of the Interior might itself be improvidently exercised and subject to abuse," the committee do not consider that objection of such force as to require the postponement of legislation until the possibility of such abuse shall cease to exist.

All legislation must recognize such a possibility, and guard against it as well as the exigencies of each case may require; but the possibility of abuse by those whose duty it is to administer the law is hardly a sufficient objection to the law itself.

The objection of the President, that the bill "invites a general invasion of the Indian country and brings into contact and intercourse

with the Indians a class of whites and others who are independent of the orders, regulations, and control of the resident agents," does not appear to the committee to be sound. The day of isolation for the Indian has passed, and, on the contrary, the present policy of dealing with the Indian is to bring him as fast and at as many points as possible in contact with civilization, and every facility of intercourse, subject, of course, to the law, which now covers white men and Indians alike, should be permitted.

The reservation under consideration embraces 33,000 square miles of territory upon the borders of the British Possessions, mountainous and cold, with narrow valleys of some fertility, but affording very little opportunity for cultivation beyond their use for cattle ranges. It has been for a long time considered in every respect an unfortunate location of these Indians, and at the present session of Congress a law was passed, with the approval of the President, appointing a commission for the purpose of providing, if possible, a more suitable reservation, in a warmer climate and on a more productive soil for these Indians.

In this vast and almost inhospitable region there are only about 6,000 Indians. They are at present almost inaccessible. They were placed there for the game they could obtain for their own subsistence. The game has disappeared. They have become absolutely dependent on the United States for their entire support. They are now so difficult of access that within a few years, the supplies of the Government having failed, they died in great numbers from actual starvation.

If railroad communication had existed, or if railroads had been induced to approach this reservation to any considerable extent, these Indians would have been relieved of much suffering in the past; and any provision of law that shall induce capital to extend railroad facilities into that region, will tend directly to secure these Indians from a repetition of the suffering they have already endured. It will tend, also, to bring among them the arts and influences of civilization, and enable the Government the better to maintain among them schools, to bring to them those who desire to labor for them in their interest, and to show them a better way of life than that to which they have hitherto been devoted; in a word, will contribute directly and efficiently toward their ultimate civilization and self-support.

The committee are not aware that this bill, more than any other possible legislation tending to bring these Indians into communication with civilization, "gives the right to enter upon Indian lands to a class of corporations carrying with them many individuals not known for any scrupulous regard for the interest or welfare of the Indians." If the Indians are to be shut out of civilization lest "many individuals not known for any scrupulous regard for their interest or welfare" may come in contact with them, it is enough to say that such a policy would be a reversal of the present policy of the Government toward the Indians, and the unlearning of all that half a century of mistake and folly has taught us.

A better way to treat the Indian is, in the opinion of the committee, to bring him as early and rapidly as possible in contact with all classes of whites, so that the good may go along with the evil, and that he may learn from it all what there is desirable in civilization.

The committee are of opinion, therefore, that, instead of "invading the rights and disturbing the peace and quiet of the Indians," the policy that shall induce capital to extend into all the reservations railroad and other facilities of communication with civilization as fast as possible, is most desirable, and that when all these railroad privileges are to be

exercised with "due regard for the rights of the Indians," and at all times under the supervising control of that executive officer into whose charge the law has committed the Indian, the committee deem it that a considerable advance, to say the least, has been made in wise legislative provisions for the protection and promotion of the interests of the Indian.

It may not be improper, in considering the weight to be given to the objection offered in this message, that the bill under consideration ignores the right of the Indians to be consulted as to the disposition of their lands, to make note of the fact that upon the day these objections to this bill were communicated in this message to the Senate the President permitted another bill to become a law without interposing his objections which granted a right of way to a railroad through the Indian Territory, to which the Indians themselves had given no manner of consent, and which depended for its authority upon the right under eminent domain to condemn the property of the Indians in the Territory and take it without their consent.

For these reasons the committee are of the opinion that this bill ought to become a law, notwithstanding the objections of the President thereto, communicated in the message which has been referred to them for consideration.

[Senate Ex. Doc. No. 204, Forty-ninth Congress, first session.]

Message from the President of the United States, returning Senate bill 2281, granting to railroads right of way through the Indian reservation in Northern Montana, with his objections thereto.

To the Senate of the United States :

I return without approval Senate bill number twenty-two hundred and eighty-one, entitled "An act granting to railroads the right of way through the Indian reservation in Northern Montana."

The reservation referred to stretches across the extreme northern part of Montana Territory, with British America for its northern boundary. It contains an area of over 30,000 square miles. It is dedicated to Indian occupancy by treaty of October 17, 1855, and act of Congress of April 15, 1874. No railroads are within immediate approach to its boundaries, and only one, as shown on recent maps, is under construction in the neighborhood leading in its direction. The surrounding country is sparsely settled, and I have been unable to ascertain that the necessities of commerce or any public exigencies demand this legislation which would affect so seriously the rights and interests of the Indians occupying the reservation.

The bill is in the nature of a general right of way for railroads through this Indian reservation. The Indian occupants have not given their consent to it, neither have they been consulted regarding it, nor is there any provision in it for securing their consent or agreement to the location or construction of railroads upon their lands. No routes are described, and no general directions on which the line of any railroad will be constructed are given.

No particular organized railway company engaged in constructing a railroad towards the reservation and ready or desirous to build its road through the Indian lands to meet the needs and requirements of trade and commerce is named. The bill gives the right to any railroad in the country, duly organized under the laws of any Territory, of any State, or of the United States, except those of the District of Columbia, to enter this Indian country, prospect for routes of travel, survey them, and construct routes of travel wherever it may please, with no check save possible disapproval by the Secretary of the Interior of its maps of location, and no limitation upon its acts except such rules and regulations as he may prescribe.

This power vested in the Secretary of the Interior might itself be improvidently exercised and subject to abuse.

No limit of time is fixed within which the construction of railroads should begin or be completed. Without such limitations, speculating corporations would be enabled to seek out and secure the right of way over the natural and most feasible routes, with no present intention of constructing railroads along such lines, but with the view of holding their advantageous easements for disposal at some future time to some

other corporation for a valuable consideration. In this way the construction of needed railroad facilities in that country could be hereafter greatly obstructed and retarded.

If the United States must exercise its right of eminent domain over the Indian Territories for the general welfare of the whole country, it should be done cautiously, with due regard for the interests of the Indians, and to no greater extent than the exigencies of the public service require.

Bills tending somewhat in the direction of this general character of legislation, affecting the rights of the Indians reserved to them by treaty stipulations, have been presented to me during the present session of Congress. They have received my reluctant approval, though I am by no means certain that a mistake has not been made in passing such laws without providing for the consent to such grants by the Indian occupants, and otherwise more closely guarding their rights and interests; and I hope that each of those bills as it received my approval would be the last of the kind presented. They, however, designated particular railroad companies, laid down general routes over which the respective roads should be constructed through the Indian lands, and specified their direction and termini, so that I was enabled to reasonably satisfy myself that the exigencies of the public service and the interests of commerce probably demanded the construction of the roads, and that by their construction and operation the Indians would not be too seriously affected.

The bill now before me is much more general in its terms than those which have preceded it. It is a new and wide departure from the general tenor of legislation affecting Indian reservations. It ignores the right of the Indians to be consulted as to the disposition of their lands, opens wide the door to any railroad corporation to do what, under the treaty covering the greater portion of the reservation, is reserved to the United States alone; it gives the right to enter upon Indian lands to a class of corporations carrying with them many individuals not known for any scrupulous regard for the interest or welfare of the Indians; it invites a general invasion of the Indian country, and brings into contact and intercourse with the Indians a class of whites and others who are independent of the orders, regulations, and control of the resident agents.

Corporations operating railroads through Indian lands are strongly tempted to infringe at will upon the reserved rights and the property of Indians and thus are apt to become so arbitrary in their dealings and domineering in their conduct toward them that the Indians become disquieted, often threatening outbreaks, and periling the lives of frontier settlers and others.

I am impressed with the belief that the bill under consideration does not sufficiently guard against an invasion of the rights and a disturbance of the peace and quiet of the Indians on the reservation mentioned; nor am I satisfied that the legislation proposed is demanded by any exigency of the public welfare.

GROVER CLEVELAND.

EXECUTIVE MANSION,
July 7, 1856.