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**Legislative History of the April 26, 1906 (Five Tribes)  
Act**

**by**

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Congressional focus on Federal Indian policy during the last quarter of the nineteenth century and the first three decades of the twentieth century was intent on dismantling American Indian tribal societies and integrating tribal citizens into Anglo-American society. The policy of removal, which had resulted in the development of the Choctaw and Chickasaw Nations to the west of Arkansas, was no longer considered a viable policy once the United States' territory had extended to the Pacific coast. Suddenly, the institutions developed by the Five Civilized Tribes, long held by the U.S. government as models for the "civilization" of indigenous peoples, were now themselves seen to be in the path of the expanding economic and settlement opportunities of a rapidly growing United States.

During the six years between the passage of the Dawes General Allotment Act of 1887 and the Indian Office Appropriations Act of March 3, 1893, a drastic shift in the views of the United States Congress towards the Five Civilized Tribes and their governments had taken place. The Five Civilized Tribes had been exempted from the Dawes Act due to both the reluctance of Congress to address the difficulty of changing

(in the case of the Choctaw and Chickasaw) the tribal land patent into individual land titles and dismantling the tribal national institutions which so resembled those of the United States. However, the increasing pressures of constituents' demands and the idea that ownership of private property would solve the "Indian problem" resulted in new legislation by Congress to bring about the end of the governments of the Five Civilized Tribes and create a new State encompassing Indian Territory.<sup>1</sup>

Bills were introduced in both the House and Senate in late December 1892 and early January 1893 "for adjustment of the rights of the Indians and Indian tribes to lands owned or occupied by them in the Indian Territory, and for other arrangements..."<sup>2</sup> Senator Henry Dawes (R-MA) introduced the Senate version, S. 2594 which was immediately challenged by Senator John Morgan (D-AL). Both Senators felt they had the best interests of Indian people in mind, though the men took very different views to the same end: the dissolution of the Five Civilized Tribes as political and legally recognized entities.

Senator Morgan objected to the legislation presented, particularly to the creation of a commission, stating:

I do not believe the Legislatures of those different tribes have that power (to treat with a commission regarding the release of lands to the United States)...nor do I believe that it is practicable under their organic law, or under the treaties, or under the legislation of the United States to assemble in those five tribes any body of citizen Indians who have the right to make the concessions...through the agency of this commission.<sup>3</sup>

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<sup>1</sup> Kent Carter, *The Dawes Commission and the Allotment of the Five Civilized Tribes, 1893-1914*, (Orem, Utah, Ancestry.com: 1999), pp. 1-2. **Ex. 1.**

<sup>2</sup> U.S. Congress. *Congressional Record*. 52<sup>nd</sup> Cong., 2d sess., 1893. Vol. 24, pt. 1. Washington, D.C. pp. 260, 551. **Ex. 2.**

<sup>3</sup> *Ibid.* **Ex. 2.**

The solution proposed by Senator Morgan was straightforward:

I believe that the Government of the United States ought now to pass laws for the proper distribution amongst the Indians of their domain, having respect, delicate respect, to every equity that has arisen out of former transactions...I believe that if we were to pass a just law it would be accepted by the Indians quietly, peacefully, and gratefully, and that we should avoid thereby those strifes and contentions which I am very much afraid will be aroused if we send a commission there...<sup>4</sup>

Congress never adopted this proposal in legislation, and the *Congressional Record* contains no mention of an amendment or further floor debate. Senator Dawes did not respond to Senator Morgan's statements, apparently willing to let the legislation passed by the committee speak for itself. The Senate Committee on Indian Affairs was committed to the idea of negotiating with the Five Civilized Tribes to bring about Congress' intention of dissolving not only the governments, but also breaking up the tribal estates of Indian Territory. Unilaterally dissolving the Five Civilized Tribes was not the method Congress was eager to use without engaging the tribes for concessions geared towards integrating tribal citizens into the society of the new State envisioned for Indian Territory.

The legislation introduced as S. 2594 and H.R. 10169 was quickly subsumed into the 1893 General Incidental Expenses of the Indian Service Appropriations Act as Section 16. This section authorized the creation of a three-member commission for three purposes: first, extinguishing national or tribal title to the lands of the Five Civilized Tribes; second, dividing the lands among the citizens of the Five Civilized Tribes in an equitable manner; and third, conducting a survey of the lands of the Five Civilized Tribes to be allotted to tribal citizens. Congress gave the commission authority to employ staff,

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<sup>4</sup> Ibid. Ex. 2.

including a secretary, stenographer, surveyors, and interpreters. **The President was charged with promulgating regulations and directions for the commission's operations. The final sentence of this section is a strong reiteration of the United States' right of sovereignty and authority over Indian Territory and its people.**<sup>5</sup>

Clearly, this offer of bilateral negotiation was to agree to the method, not the question, of Congress' intent that the governments and land-holding systems of the Five Civilized Tribes would end.

Despite the high hopes and confidence of government officials that this commission would quickly negotiate the change in relations desired by the United States, the commission discovered that negotiating with the Five Civilized Tribes was a difficult task. The Commission to the Five Civilized Tribes became popularly known as the Dawes Commission, because of the former U.S. Senator Henry Dawes seated as the first chairman of the commission. The commissioners were not met with enthusiasm in Indian Territory. This commission's existence and purpose were known to the Five Civilized Tribes as soon as the March 3<sup>rd</sup> Act was passed, as a delegation of Choctaw officials (in Washington DC for the appropriation of payment for the Leased District) forwarded the content of the Act by circular letter to the tribal governments.<sup>6</sup> Tribal officials were not inclined to either meet with or establish their own commissions to negotiate their tribal institutions out of existence. This was also the feeling amongst the tribal citizens by blood, who took great pride in their institutions and legal systems. Generally, the Five

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<sup>5</sup> *An Act Making Appropriations for current and contingent expenses, and fulfilling treaty stipulations with Indian tribes, for fiscal year ending June thirtieth, eighteen hundred and ninety-four*, Chapter 209, *U.S. Statutes at Large*, 52<sup>nd</sup> Cong., 2<sup>nd</sup> sess. (March 3, 1893), 646. **Ex. 3.**

<sup>6</sup> Angie Debo, *The Rise and Fall of the Choctaw Republic*, (Norman, OK, University of Oklahoma Press, 1961), p. 246. **Ex. 4.**

Civilized Tribes saw no need or obligation to consider dismantling their governments in order to join American society.

The next five years found the Dawes Commission continuing to attempt to negotiate the change in land holding and the dissolutions of the tribal governments envisioned in the Act of March 3, 1893. The chiefs and governors of the Five Civilized Tribes avoided meeting with the Commission, advising the Commissioners that they were not authorized nor empowered to undertake such negotiations on behalf of their nations; and the national councils were disinclined to appoint tribal commissions to dismantle cherished tribal institutions. Increasing pressure on the tribes, Congress authorized an additional two commissioners to the Dawes Commission on March 2, 1895; and President Cleveland appointed men who were seen as friendly to the Five Civilized Tribes.<sup>7</sup> Congress also enacted legislation for the survey of Indian Territory by the Dawes Commission, at the expense of the United States. These surveys began in the Choctaw Nation during the summer of 1895. The Commission also continued to pressure the governments of the Five Civilized Tribes to conduct negotiations for the allotment of tribal lands and continued to hold public meetings to explain the intent of the U.S. Government towards allotment of all tribal lands and U.S. citizenship for tribal citizens.<sup>8</sup>

During hearings held by the House Committee on Indian Affairs in March 1896, Commissioner McKennon described the Dawes Commission's difficulties in attempting to open negotiations with the tribes:

Just after we went there (Indian Territory) the Cherokee council...authorized the chief of that tribe to appoint a committee to meet us, but in the resolution...expressly prohibited such

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<sup>7</sup> Carter, *The Dawes Commission and the Allotment of the Five Civilized Tribes, 1893-1914*, p. 9. **Ex. 1.**

<sup>8</sup>Debo, *The Rise and Fall of the Choctaw Republic*, pp 250-251. **Ex. 4.**; Carter, *The Dawes Commission and the Allotment of the Five Civilized Tribes, 1893-1914*, p. 9-10. **Ex. 1.**

committee from doing anything except to throw every possible obstruction in our way in order to prevent us from accomplishing the purposes of our mission...<sup>9</sup>

Despite an agreement to refuse to meet or negotiate with the Dawes Commission contracted by representatives of the Five Civilized Tribes at a conference soon after this meeting with the Cherokee, the Commission was invited by tribal government officials to address Indian assemblies and political party meetings.<sup>10</sup> The Dawes Commission seized these opportunities to take their mission directly to the people of the Five Civilized Tribes. As Commissioner McKennon remarked to the Senate Committee on Indian Affairs, the understanding and instructions the Dawes Commission received from the Secretary of the Interior were clear: “You are going down there in the interest of the Indians; you are charged with the work of placing those people, if they negotiate with you, in the very best possible condition, in order that they may become good citizens of the United States and enjoy the property which belongs to them.”<sup>11</sup> Congress and the Executive branch were not considering any future for the tribes as entities with legal or political standing, and the tribal governments understood they were merely being afforded an opportunity to participate in formulating the plan for the dismantling of tribal governing institutions.

In 1896 following the disappointing reports of the Dawes Commission, Congress continued to increase pressure on the governments of the Five Civilized Tribes by again expanding the authority and duties of the Dawes Commission. By the summer of 1896,

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<sup>9</sup> U.S. Congress. Senate. *Argument made by Judge M’Kennon Before the Committee on Indian Affairs of the House of Representatives Relative to the conditions in Indian Territory, Together with Other Papers, and Senate Document No. 12, Report of the Commission Appointed to Negotiate with the Five Civilized Tribes of Indians, known as the “Dawes Commission”* 54<sup>th</sup> Congress, 1<sup>st</sup> sess., March 24, 1896, S. Document No. 182, p. 3. (hereafter cited as Senate Document No. 182) **Ex. 5.**

<sup>10</sup> *Ibid*, pp. 3-4, 19-20. **Ex. 5.**

<sup>11</sup> *Ibid*, p. 4. **Ex. 5.**

Congress authorized the Dawes Commission to assemble tribal citizenship rolls. Under a tight deadline to complete these five citizenship rolls, the Dawes Commission issued a public circular on July 8, 1896, informing the citizens of the Five Civilized Tribes of the application process. In parallel requests, the Commission also requested the rolls of each tribe from the tribal governments, as the enabling legislation stated “the rolls of citizenship of the several tribes, as now existing, are hereby confirmed...,” while directing the Commission to develop appended rolls which were intended to be free of some of the reported or perceived political abuses of citizen status by the tribal governments.<sup>12</sup>

The continued presence of the Dawes Commission and communications from tribal delegates regarding Congressional attitudes in Washington D.C. began to take their toll on the Choctaw and Chickasaw nations. Testimony to the House Committee on Indian Affairs, reported to the Senate and published as Senate Document No. 182, presented a vision of countries dominated by a political elite engaged in corruption and receiving more than their share of tribal estates than permitted under tribal laws. Crime rates and irregularities in including or excluding individuals from tribal citizenship were also presented as evidence of the failures of Five Civilized Tribes’ governments.<sup>13</sup>

To the members of the Dawes Commission, issues of public safety, encroaching outside interests, and thousands of acres of tribal lands in the hands of an elite few represented the complete failure of the governments of the Five Civilized Tribes. During the hearings of 1896, they presented information gathered to support their views of the need to continue the Congressional policy of the dissolution of the tribal governments and the extension of United States laws and authority over Indian Territory. Congress

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<sup>12</sup> Carter, *The Dawes Commission and the Allotment of the Five Civilized Tribes, 1893-1914*, p. 15-16. **Ex. 1.**

<sup>13</sup> Senate Document No. 182. pp 19-36. **Ex. 5.**

used this information to expand the authority of the Dawes Commission and increase the pressure on the Five Civilized Tribes to negotiate the end of tribal governments. By 1896, the Dawes Commission was assigned the task of formulating citizenship rolls for the Five Civilized Tribes as a precursor to allotment of tribal lands.<sup>14</sup> Once the Dawes Commission began accepting citizenship applications and requesting copies of the official tribal rolls, the almost universal agreement within tribal communities against any change in the status of their relations with the United States began to erode. The Five Civilized Tribes' governments began authorizing commissions to meet with the Dawes Commission to negotiate towards the termination of tribal relations with the United States and the subsumation of Indian Territory into a new State.

### **The Curtis Act, 1898**

On April 23, 1897, the Dawes Commission concluded an agreement with the Choctaw and Chickasaw Commissions for the allotment in severalty of the lands of the Choctaw and Chickasaw Nations; setting aside lands for townsites; reservations of lands for educational and orphan institutions, church land, cemeteries, and certain non-tribal individuals; and reserved coal and asphalt deposits “for the sole use of the members of the Choctaw and Chickasaw tribes...”.<sup>15</sup> Commonly known as the Atoka Agreement, after the town in which the agreement was concluded, this agreement provided the basis for the inclusion of the Choctaw and Chickasaw in the legislation resulting in the Curtis

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<sup>14</sup> Commission to the Five Civilized Tribes, *Annual Reports of 1894, 1895, and 1896. and Correspondence with the Representatives of the Five Civilized Tribes*. Five Civilized Tribes Commission's Report, Washington, DC: GPO, November 18, 1896, p. 83 [MA C-2851] **Ex. 6.**

<sup>15</sup> U.S. Congress. Senate. *Letter from the Secretary of the Interior, Transmitting Communication from the Acting Commissioner of Indian Affairs, Submitting Agreement between the United States Commissioners to Negotiate with the Five Civilized Tribes, and the Commissioners on behalf of the Choctaw and Chickasaw Indians*, Senate Document No. 93, 55<sup>th</sup> Cong., 1<sup>st</sup> sess., Washington, DC: GPO, May 19, 1897, pp. 3-4 (hereafter cited as Senate Document No. 93) **Ex. 7.**

Act. Acting Commissioner Thomas P. Smith in submitting this agreement to the Secretary of the Interior wrote, “This agreement represents without a doubt the most important proposition relating to Indian affairs with which the Government has had to deal, at least in recent years.”<sup>16</sup>

In the Atoka Agreement, three significant changes in the Choctaw and Chickasaw governments were agreed to: the extension of United States law and courts over the Choctaw and Chickasaw Nations; the abolishment of the tribal courts; and the requirement for Presidential approval to ratify Choctaw and Chickasaw council resolutions. The Choctaw and Chickasaw commissions further agreed to the dissolution of their tribal governments eight years after the ratification of the Atoka Agreement by the U.S. Congress and a vote of the tribal citizenry. The agreement to sever the Choctaw and Chickasaw people from their tribal institutions was in line with Congressional intent as expressed by the earlier enabling legislation for the Dawes Commission.

The Atoka Agreement provided for a single reservation of common tribal property: “...all the coal and asphalt within the limits of the Choctaw and Chickasaw nations shall remain and be the common property of the members of the Choctaw and Chickasaw tribes...so that each and every member shall have an equal and undivided interest in the whole...” (emphasis added)<sup>17</sup> Reservation of minerals to the tribes was contained in Section 11 of the general provisions of the Curtis Act.<sup>18</sup> The coal and asphalt lands are the sole reservation of common tribal property, and the royalties of the

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<sup>16</sup> Ibid., p. 2. **Ex. 7.**

<sup>17</sup> Ibid., pp. 7-8. **Ex. 7.**

<sup>18</sup> *An Act for the protection of the people of the Indian Territory, and for other purposes, U.S. Statutes at Large* 30 (1899-1899): 497. **Ex. 8.**

minerals were to have been the basis of an education fund for Choctaw and Chickasaw children.<sup>19</sup>

#### The Atoka Agreement

The 1898 statute incorporated sections applying to all the Five Civilized Tribes and also the Atoka Agreement specific to the Choctaw and Chickasaw Nations. A Muscogee Nation agreement was also appended to the statute.<sup>20</sup> A general summary of sections of interest from the Curtis Act follows.

Sections 1 through 10 of the Curtis Act focused on the extension of criminal laws over Indian Territory and their application to all officers of the Five Civilized Tribes and the complicated issues surrounding the denied applicants for citizenship in the Five Civilized Tribes and their improved lands. These sections were especially important to the Choctaw and Chickasaw, as previously there were suits filed concerning tribal property of which the tribes had not been made a party to, nor received notification for the proceedings.<sup>21</sup> The loss of jurisdiction over these citizenship claimant suits to the United States courts effected not only the remaining powers of government retained by the tribes, but had the additional impact of possibly distributing portions of the tribal estate to individuals not considered citizens by the tribes. These sections constituted the initial attempt to address the difficulties of the so-called “court citizens” of the Choctaw and Chickasaw Nations.

Section 11 of the Curtis Act reserved all mineral rights to the tribes, along with townsites and reserved lands for schools, churches, cemeteries, and other public

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<sup>19</sup> Op.cit., p. 8. **Ex. 7.**

<sup>20</sup> *An Act for the protection of the people of the Indian Territory, and for other purposes, U.S. Statutes at Large* 30 (1899-1899): 495. **Ex. 8.**

<sup>21</sup> *Ibid.*, 495-497. **Ex. 8.**

buildings. This section also provided that tribal citizens might take allotments containing their current homes and improvements to the extent of the allowable acreage in the division of the tribal estate. Section 11 also described the process for the repayment of allotted lands to tribes from persons found to have been “illegally accorded the rights of citizenship” and to allow towns to secure or condemn lands necessary for public improvements.<sup>22</sup>

Section 12 directs the Secretary of the Interior to confirm all allotments and to ensure “the allottees...remain in peaceable and undisturbed possession thereof...”<sup>23</sup>

Section 13 authorized the Secretary of the Interior to “provide rules and regulations in regard to the leasing of oil, coal, asphalt, and other minerals” in Indian Territory. The section laid out basic limits on the length of allowable leases, schedules of advance royalty payments, and limited mineral leases to 640-acre tracts. The section allowed current leases then in effect to remain in effect if Congress approved them; and if not, allowed preference to current operators for new leases supervised by the Secretary.<sup>24</sup> The provisions of the Atoka Agreement of the Curtis Act, however, allowed coal and asphalt leasees to operate leases of up to 940 acres “in a square as nearly as possible...”<sup>25</sup> Congressional intent for any acreage limits on mineral leases was conflicted within the provisions of the Act.

Section 14 laid out requirements for incorporating townsites, requirements for voting, and the application of Arkansas law over such incorporated towns, authority to levy taxes for schools, etc.

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<sup>22</sup> Ibid., 497-498. **Ex. 8**

<sup>23</sup> Ibid., 498. **Ex. 8.**

<sup>24</sup> Ibid., 498-499. **Ex. 8.**

<sup>25</sup> Ibid. 510. **Ex. 8.**

Section 15 stated the requirements for townsite commissions and the duties to be performed by the commissions, including the surveys and filings of plats with the Secretary of the Interior and the clerk of the United States District Court. This section outlined the requirements for purchasing lots with improvements as well as providing for the sale of unimproved lots. Section 15 also detailed the point at which the monies deriving from these sales could be deposited into tribal accounts. Surface lands used by miners “engaged in actual mining” were exempted from purchase, until the lease was worked out and then such lands were to be “disposed of as provided for in this Act.”<sup>26</sup>

Section 16 clearly stated that any royalties for minerals or other products, including timber, from tribal lands were to be paid only to the tribe owning the lands under rules and regulations prescribed by the Secretary of the Interior. There were two qualifications to this section. The first was that until allotment was completed, a tribal citizen could continue to be in possession of all the agricultural and grazing lands “as would be his just and reasonable share of the lands of his nation or tribe...” The second qualification was that an allottee could dispose of timber contained on his or her allotment.<sup>27</sup> This provision of Section 16 is the sole mention of timber resources in the general provisions of the Curtis Act. The Atoka Agreement is silent on the subject of timber resources and lands.

Section 17 made holding lands in excess of other citizens of a tribe a Federal misdemeanor.<sup>28</sup> Section 18 established civil penalties for violating Sections 16 and 17.<sup>29</sup>

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<sup>26</sup> Ibid., 501. **Ex. 8.**

<sup>27</sup> Ibid., 501-502. **Ex. 8.**

<sup>28</sup> Ibid., 502. **Ex. 8.**

<sup>29</sup> Ibid. **Ex. 8.**

Section 19 removed the authority of tribal governments to disburse moneys to tribal members and required that officials appointed by the Secretary of the Interior disburse per capita payments directly to individuals.<sup>30</sup>

Section 20 allowed the Dawes Commission, with the approval of the Secretary of the Interior, to employ “all assistance necessary for the prompt and efficient performance of all duties” imposed by the task of enrolling tribal citizens and the survey and allotment of the lands of the Five Civilized Tribes.<sup>31</sup>

Section 21 reiterated the authority of the Dawes Commission to develop “correct” rolls of tribal citizenship. Far from today’s standard of tribes’ authority in determining their membership, Congress directed the Dawes Commission “to make correct rolls of the citizens by blood of all the...tribes, eliminating from the tribal rolls such names as may have been placed thereon by fraud or without authority of law...” The Dawes Commission was further directed in the formulation of rolls of freedmen of the Cherokee, Choctaw, and Chickasaw; hearings for Mississippi Choctaw claiming status as Choctaw citizens; and allowing persons claiming citizenship in more than one tribe in Indian Territory to be enrolled in only one tribe.<sup>32</sup>

Section 22 allowed members of one tribe, through use, custom, or intercourse laws to take their allotments within another tribe’s land if the tribes are agreeable, or to take the value of improvements upon removal or private sale of improvements and take allotment within his own tribal lands.<sup>33</sup>

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<sup>30</sup> Ibid. Ex. 8.

<sup>31</sup> Ibid. Ex. 8.

<sup>32</sup> Ibid., 503-504. Ex. 8.

<sup>33</sup> Ibid., 504. Ex. 8.

Section 23 established end dates for all agricultural and grazing leases, and the cessation of all leasing activity until the completion of allotment with the provision that allotted members could continue to lease their own allotments.<sup>34</sup>

Section 24 directed that all moneys be credited to the specific tribes for which they were deposited, and directed the Assistant U.S. Treasurer to give triplicate receipts to the depositor.<sup>35</sup>

Section 25 dealt with purchased land in the Cherokee Nation to be segregated for the Delaware Tribe.<sup>36</sup>

Section 26 vacated the standing of all tribal laws and disallowed their enforcement by the United States courts in Indian Territory.<sup>37</sup>

Section 27 authorized the creation of an Indian Inspector for Indian Territory.

Section 28 abolished all tribal courts in Indian Territory. Sections 26 through 28 effectively dismantled the judicial branches of all Five Civilized Tribes and created another level of bureaucratic oversight of tribal affairs with the office of the Indian Inspector for Indian Territory.<sup>38</sup>

Section 29 of the Curtis Act contains the entire text of the Atoka Agreement negotiated and signed by the Dawes Commission and the commissions appointed by the Choctaw and Chickasaw Nations. The only resources specifically mentioned as remaining in the tribal estate are the coal and asphalt deposits that the agreement envisioned as the foundation of an educational fund for Choctaw and Chickasaw children.

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<sup>34</sup> Ibid. Ex. 8.

<sup>35</sup> Ibid. Ex. 8.

<sup>36</sup> Ibid. Ex. 8.

<sup>37</sup> Ibid. Ex. 8.

<sup>38</sup> Ibid., 504-505. Ex. 8.

At the time of the Curtis Act, Congress did not contemplate the possibility of surplus lands within the Five Civilized Tribes or provide for their retention or disposal. The survey of the Choctaw and Chickasaw Nations had not been completed at the time of the passage of the Curtis Act, and so there was no method to determine how much land there was or the amount of acreage for different categories of land which would be of most use to the tribal citizens of the Choctaw and Chickasaw Nations. The largest known resource of the Choctaw and Chickasaw Nations were the deposits of coal and asphalt which were segregated from the surface title to any lands which were reserved or to be allotted. Statutory language addressing unallotted lands are absent from the Curtis Act.

Despite their attempt to resist the dismantling of these tribal institutions, the Five Civilized Tribes found themselves continuing to be overwhelmed by an ever-increasing influx of non-citizens who were not subject to tribal laws and courts, or who could easily avoid any prosecutions; pressures for commonly held lands and resources; and criticism over the predicament the jurisdictional issues presented for keeping law and order in Indian Territory. Now the challenge faced by tribal citizens and U.S. officials was to actually implement the steps necessary to finalize tribal rolls, allot tribal lands, and capitalize any remaining tribal estate in order to distribute the proceeds amongst enrollees.

### **The Supplementary Act of 1902**

On February 23, 1901, Secretary of the Interior E. A. Hitchcock transmitted two versions of an agreement negotiated with the Choctaw and Chickasaw Nations to the

House Committee on Indian Affairs. This agreement was negotiated in order to address emerging difficulties in the processes of enrollment, allotment, and the designation and sale of townsites within the Nations. Secretary Hitchcock was not satisfied with some of the original provisions of this agreement, stating, “if approved in the form negotiated would seriously embarrass and retard the allotment of lands and adjustment of the relations of the Choctaw and Chickasaw tribes.”<sup>39</sup> To this end, the Secretary called a meeting involving a member of the Department of the Interior, a member of the Dawes Commission, and a representative of the Choctaw and Chickasaw Nations to address the Department’s objections to the agreement. These individuals are not identified in the Secretary’s letter, so identifying the authors of the revised document is an exercise in speculation. However, the most likely representative of the Choctaw and Chickasaws during these meetings was David C. McCurtain who was appointed as the Choctaw delegate in 1899.<sup>40</sup> The Secretary of the Interior noted the tribal representative did “not assent to the change made in Article 8.”<sup>41</sup>

In the original negotiated agreement, Article 8 provided for the filing of a bill of equity by the Choctaw and Chickasaw Nations to annul citizenship decisions made by the United States courts in Indian Territory (these persons were known as “court citizens”).<sup>42</sup> The Secretary of the Interior objected to this article because “(w)hether these judgments are valid or invalid is a judicial rather than a legislative question, and cannot be committed to or passed upon by the legislative branch... To ratify this article as originally

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<sup>39</sup> U.S. Congress. House. *Agreement with the Choctaw and Chickasaw Nations*. House Document No. 490. 56<sup>th</sup> Cong. 2<sup>nd</sup> sess., February 23, 1901, 1. (hereafter cited as House Document No. 490) **Ex. 9.**

<sup>40</sup> *Acts and Resolutions of the General Council of the Choctaw Nation*, Bill No. 8, October 19, 1899 (Wilmington, DE: Scholarly Resources, Inc., 1975) pp. 7-9. **Ex. 10.**

<sup>41</sup> *Op. cit.*, **Ex. 9.**

<sup>42</sup> *Ibid*, p. 3. **Ex. 9.**

negotiated would simply increase the confusion which now exists surrounding these judgments...”<sup>43</sup>

The substituted Article 8 disallowed “court citizen” enrollment “unless it appears to the said commission that notice of the insitiou (sic) of such suit had been given and decision or judgment rendered against both the Choctaw and Chickasaw Nations.”<sup>44</sup> This substitution confirmed the authority of the Dawes Commission to make enrollment decisions rather than the tribes themselves.

The original agreement did not allow allotments to be made to enrollees deceased prior to November 1901. The amended agreement is puzzling as this section remains, but an additional section was added allowing allotments to be selected for such decedents and for said allotments to be probated to heirs under the laws of Arkansas.

This agreement specifically prohibited the enrollment of Choctaw and Chickasaw children born after November 1901 in both versions.

The agreement addressed the problem of Chickasaw freedmen allotments. The agreement specified the point at which allotment deeds were considered to be in the possession of minors, inmates, or other incapacitated individuals.

The Supplementary Agreement of 1902 in Section 9 stipulated that all lands of the Choctaw and Chickasaw Nations:

...shall be appraised at their true value: *Provided*, That in determining such value consideration shall not be given to the location thereof, to any mineral deposits, or to any timber except such pine timber as may have been heretofore estimated by the Commission to the Five Civilized Tribes, and without reference to improvements which may be located thereon.<sup>45</sup>

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<sup>43</sup> Ibid, p. 1-2., **Ex. 9.**

<sup>44</sup> Ibid, p. 11., **Ex. 9.**

<sup>45</sup> Public Law 228, 57<sup>th</sup> Cong., 1<sup>st</sup> sess. 1902: 642. **Ex. 22**

Essentially, this based all land appraisals on soil type and excluded all resources which could be removed or harvested from the land itself.

Section 14 contained the first mention of selling residual or unallotted lands following completion of allotment to tribal citizens and freedmen. The section does not reserve any residual lands from public auction:

...the residue of lands not herein or otherwise disposed of, if any there be, shall be sold at public auction under rules and regulations and on terms to be prescribed by the Secretary of the Interior, and so much of the proceeds as may be necessary for equalizing allotments shall be used for that purpose, and the balance shall be paid into the Treasury of the United States to the credit of the Choctaws and Chickasaws, and distributed per capita as other funds of the tribes.<sup>46</sup>

The coal and asphalt lands were provided for in Sections 56 through 63, and other reserved lands were specified in Section 26. Nowhere are the timber lands of the Choctaw and Chickasaw Nations reserved, either from allotment or sale, or as a reserve of tribal property.<sup>47</sup>

Sections 56 through 63 dealt with selling coal and asphalt lands not under leases; selling coal and asphalt lands under leases; the sale of coal and asphalt deposits separately from surface rights; rights of current leasees; and the delivery of coal and asphalt patents for lands and/or deposits. These sections envisioned the eventual sale of all the coal and asphalt lands and deposits.<sup>48</sup> There were no provisions for a continued tribal estate encompassing the most valuable resource of the Choctaw and Chickasaw Nations.

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<sup>46</sup> Ibid., 642. **Ex. 22.**

<sup>47</sup> Ibid., 645-646, 653-655. **Ex. 22.**

<sup>48</sup> Ibid., 653-655. **Ex. 22.**

This agreement provided for a tribal vote in addition to passage of legislation to ratify these modifications to the Curtis Act. The statute passed by Congress again differed from both versions of the February 1901 agreement, but was ratified by a majority of votes in both the Choctaw and Chickasaw Nations.

### **1904 Statement of Commissioner Tams Bixby and House Document No. 556**

On January 28 1904, Commissioner Tams Bixby appeared before the House Committee on Indian Affairs to address budget requests of the Dawes Commission and answer questions posed by the House Committee. Representative James Sherman (R-NY) chaired the session, and Representative Charles Curtis (R-KS) was unexpectedly absent that day.<sup>49</sup>

Commissioner Bixby began his statements with a general overview of the duties and accomplishments of the Dawes Commission during the eleven years of its existence. He began with the negotiation of the various agreements with the Five Civilized Tribes; then spoke about creating the citizenship rolls; and moved on to the subject of allotting the lands among the members of the Five Civilized Tribes. **Representative Charles H. Burke (R-SD) then asked: “You allot all of the land, do you not?” Bixby answered: “There is no public land, but in all of the tribes there will be a surplus, which is to be sold by the Secretary of the Interior for the benefit of the respective tribes.”**<sup>50</sup>

The head of the Dawes Commission, in his statements to the House Committee, mentioned no mention of preserving any portion of the tribal estate.

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<sup>49</sup> United States Congress. Indian Territory Affairs. *Statement of Hon. Tams Bixby, Chairman of the Commission to the Five Civilized Tribes, before the House Committee on Indian Affairs*, Washington: GPO, January 29, 1904., 3. **Ex. 11.**

<sup>50</sup> *Ibid.*, p. 4-5. **Ex. 11.**

The committee's attention soon turned to the Choctaw and Chickasaw timber lands. Representative John H. Stephens (D-TX) opened the issue with Bixby during this exchange:

STEPHENS: I believe under an original agreement between the Choctaw and Chickasaw and the Congress that they had a right to select timber lands; that the only lands segregated were mineral lands?

BIXBY: The Choctaw and Chickasaw agreements unquestionably give the members of the tribes a right to select land upon which pine timber was growing.

STEPHENS: Upon which they had their homes?

BIXBY: Whether they had their homes there or not.

STEPHENS: And is it not a fact that recently the Secretary of the Interior has prevented those people from taking those lands, without any law whatever?

BIXBY: It is a fact that upon the recommendation of the Commission those lands are not being allotted at the present time...

STEPHENS: The why does the Commission disregard the act of Congress?

BIXBY: I am glad you ask me that, because perhaps I should explain this situation. Just before the opening of the land offices in the Chickasaw and Choctaw nations I received letters from Governor McCurtin (sic) advising me that certain syndicates or land improvement companies were about to receive possession of the pine timber in the Choctaw Nation at a consideration, entirely inadequate, and that as a matter of fact the Indians were about to be robbed of their pine.

I presented the letters to the Commission the next day, and the Commission instructed me to make an examination of the situation immediately and to report back to the Commission what I found. I immediately went down to the Choctaw Nation, looked the ground over, and made inquiries and investigations, and made up my mind that Governor McCurtin (sic) did not overstate the situation. I so reported to the Commission, and recommended three propositions; any one of which if adopted would dispose of the matter. The proposition adopted was that these lands should be withheld from allotment until the Secretary of the Interior could be advised of the situation, and with the thought also in mind that perhaps Congress might be also advised. That recommendation was approved. We did advise the Secretary that we had withheld these lands temporarily from allotment, not in a spirit of attempting or of thinking we ought to oppose a law of Congress...The

Secretary approved our recommendation. Since that time he has approved the petition of one individual...and has directed us to make an allotment to him. We have expected he would direct us to make allotments to others who have their homes on those lands. **We expect to prepare a proposition covering this, so that every Indian that has a home on pine land may take it, but that the other pine may be sold for the benefit of the tribe.** The only reason for doing this is to protect the Indians in their property. We know full well that if allotment goes on under this scheme, these difficulties not having been anticipated, the Indians will not get 10 per cent of the value of the pine.<sup>51</sup> (emphasis added)

Following this exchange, Representative Burke directly asks Commissioner Bixby, “Will there be any public lands in the Indian Territory after you get through?” Bixby responded, “Not an acre.”<sup>52</sup>

As Commissioner Bixby understood his duties under Congressional statute, he did acknowledge the duty of the commission to make allotments within the timber lands, and his statements and correspondence from this situation show the temporary nature of the suspension of allotting pine lands due to the activities of land and timber grafters. The Committee members’ comments show they expected allotments to be made in these lands, but made no statements regarding the preservation of these lands as a tribal estate. From the above exchange, it was clear that the Dawes Commission’s understanding of their duties included the sale of unallotted timber lands of the Choctaw and Chickasaw Nations.

Less than a month after the January hearing, the Secretary of the Interior presented a draft bill to the House Committee on Indian Affairs. This draft legislation presented in House Document No. 556 was entitled “The Draft of a Bill “To Make Final Disposition of the Affairs of the Five Civilized Tribes in the Indian Territory, and for

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<sup>51</sup> Ibid., pp. 8-9. Ex. 11.

<sup>52</sup> Ibid., p. 12. Ex. 11.

Other Purposes.”” and its sections covered topics discussed during the January hearing as needing additional Congressional direction.<sup>53</sup> In his transmittal letter, Secretary Hitchcock stated: “This draft has been prepared to include provisions which are believed by the Commissioner to the Five Civilized Tribes to be necessary for the speedy closing up of the affairs of these Indians.”<sup>54</sup>

Section 5 of this draft bill was intended to modify the provisions of the sale of the coal and asphalt lands as provided for in Section 59 of the Supplementary Act of 1902. It would have required approval by the U.S. President for all sales of coal and asphalt lands or deposits and allow the President to also reject any sales. The section would have repealed the three-person commission to oversee the coal and asphalt sales as specified in Section 59 of the Supplementary Act of 1902. Section 5 would have also allowed for the payment of administrative expenses for conducting and finalizing the sales of coal and asphalt lands from the Treasury accounts of the Choctaw and Chickasaw Nations.<sup>55</sup>

Section 6 of the Department of the Interior’s draft legislation sought to authorize the sale by sealed bid of “(t)he standing pine timber on lands of the Choctaw Nation, principally valuable by reason of such timber thereon...” The section envisioned the sale and harvest of all commercial pine timber prior to release for allotment with the exception of persons who had “substantial improvements placed thereon prior to July first, nineteen hundred and two.” Such tribal members could have selected this timber land with improvements with a limit of 40 acres as a portion of his or her allotment. Any

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<sup>53</sup> U.S. Congress. House. *Letter from the Secretary of the Interior transmitting a Draft of a Bill for Final Disposition of the Affairs of the Five Civilized Tribes in the Indian Territory, and for Other Purposes.* Document No. 556, 58<sup>th</sup> Cong., 2<sup>nd</sup> sess. Washington, DC: GPO, February 20, 1904, 1. (Hereafter cited as House Document No. 556) **Ex. 21.**

<sup>54</sup> *Ibid.* **Ex. 21.**

<sup>55</sup> *Ibid.*, 3. **Ex. 21.**

allotments made under the “substantial improvements” clause would have been exempt from the sale of timber. Other persons wishing allotment with standing pine timber would have done so with the stipulation that the timber would be sold and removed and the proceeds credited to the Choctaw and Chickasaw Nations. As in Section 5, the Choctaw and Chickasaw Nations would have had administrative costs deducted from the proceeds of the sale of the timber.<sup>56</sup>

Section 29 of the draft bill also provides for the sale by sealed bid of “the residue of lands in each of said nations not reserved or otherwise disposed of shall be sold under sealed bids...”<sup>57</sup> Nowhere in this draft bill were any tribal lands considered for reservation as a tribal estate. Section 28 even provided for the sale of all government buildings and property not otherwise disposed of following the dissolution of the Five Civilized Tribes.<sup>58</sup>

### **The Five Tribes Act of 1906**

By January 1906, Congress was attempting to enact additional legislation in order to resolve outstanding issues preventing the “winding up” of the affairs of the Five Civilized Tribes. The first form of this legislation was presented to the House Committee on Indian Affairs by the Secretary of the Interior on December 7, 1905. This draft legislation was written by a committee appointed by the Secretary that was charged “to make a thorough examination of the laws and conditions relative to the Five Civilized Tribes in Indian Territory and to formulate a draft of such legislation as may be necessary

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<sup>56</sup> Ibid. Ex. 21.

<sup>57</sup> Ibid., 9. Ex. 21.

<sup>58</sup> Ibid. Ex. 21.

or advisable because of the approaching extinction of the tribal governments...”<sup>59</sup> In drafting this bill, the committee considered “provisions for the education of Indian children, the disposition of tribal property, the collection of tribal debts, the payment of tribal obligations, and the proper administration of any other interests of the tribes...”<sup>60</sup> The committee informed the Secretary that they considered suggestions from tribal representatives and others with an interest in Indian welfare; however, the legislation was not negotiated or officially approved by the Five Civilized Tribes in a departure from the development of the Curtis Act and the Supplementary Act of 1902.

This draft, while not an exact copy of the draft legislation submitted to the House Committee in 1904, contained many of the same provisions, most in an expanded and more specific state. As the work of the Dawes Commission progressed, they were better able to suggest statutory remedies for bringing the affairs of the Five Civilized Tribes to a close.

On January 18, 1906, Representative Charles Curtis (R-KS) introduced H.R. 5976 for consideration on the floor of the House “to provide for the final disposition of the affairs of the Five Civilized Tribes of the Indian Territory and for other purposes.”<sup>61</sup> This bill was substantially the same as the draft received from the Department of the Interior. Floor discussions over all sections of the bill ensued over the following two days by the Committee of the Whole House.

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<sup>59</sup> U.S. Congress. House. *Letter from the Secretary of the Interior, transmitting with a Favorable Recommendation, a Draft of a Bill for Final Disposition of the Affairs of the Five Civilized Tribes in the Indian Territory, and for other purposes.* Document No. 74, 59<sup>th</sup> Cong, 1<sup>st</sup> sess. Washington, DC: GPO, December 7, 1905, 1-2. (Hereafter cited as House Document No. 74) **Ex. 12.**

<sup>60</sup> *Ibid.*, 2. **Ex. 12.**

<sup>61</sup> U.S. Congress. *Congressional Record.* 59<sup>th</sup> Cong., 1<sup>st</sup> sess., 1906. Vol. 40, pt. 1. Washington, DC. 1240. **Ex. 13.**

Representative Curtis began by outlining the legislation enacted since March 3, 1893 to bring about a drastic change in relations between the Choctaw and Chickasaw Nations and the United States.<sup>62</sup> He then stated the reason H.R. 5976 was being offered: “...it is important that this bill be passed, because when the 4<sup>th</sup> of March arrives there will be a great number of things to be disposed of in that Territory, and their settlement should be provided for.”<sup>63</sup> Curtis then summarized the sections of the bill prior to fuller discussions. The first four sections of the bill dealt with necessary provisions for closing the rolls of the Five Civilized Tribes. Section 5 outlined the procedure for issuing allotment patents and deeds.<sup>64</sup>

#### **Section 6 of the Five Tribes Act**

Section 6 of H.R. 5876 provided “...that the chiefs may be continued, or such chiefs as are recognized by the Secretary of the Interior shall be continued, and authorized to sign deeds and transact certain other business for the tribes.” Curtis noted Section 6 was necessary “because the original agreements provided that the deeds should be signed by the chief of the tribe.”<sup>65</sup> The final two paragraphs of the bill authorized the Secretary of the Interior to employ legal counsel for the tribes upon recommendation of the tribal executives, compensation and staff for counsel, and also provided that the Secretary could appoint counsel “(S)hould either of said executives fail to recommend a competent person for employment as counsel...”<sup>66</sup>

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<sup>62</sup> Ibid. 1240-1241. Ex. 13.

<sup>63</sup> Ibid. 1241. Ex. 13.

<sup>64</sup> Ibid. Ex. 13.

<sup>65</sup> Ibid. Ex. 13.

<sup>66</sup> Ibid. Ex. 13.

Representative John Hall Stephens (D-TX) offered an amendment striking the committee's final two paragraphs and inserting a statement that the Secretary could employ legal counsel for the tribes. He also inquired whether DOI solicitors could be used as tribal legal counsel. Representative Curtis replied that the DOI had no attorneys to use for such tasks, and when the Department of Justice furnished counsel for tribal cases, the expense had proved greater than employing outside counsel to represent the tribes. Curtis also explained the rationale in having the Secretary consider first the attorneys recommended by the tribal executives: "...it is their (the tribes) property, and as long as they are willing to do what is fair and right they should have a right to recommend to the Secretary of the Interior the counsel whom they desire... I think they have a right to be represented."<sup>67</sup> Representative Stephens reminded the House of the Chickasaw school warrant scandal that had involved high officials of the Chickasaw government and their contracted attorneys converting national school warrants for their personal use and put the question to Representative Curtis if it would have been "better to leave it in the hands of the Secretary of the Interior to employ competent counsel here in Washington?"<sup>68</sup> The paragraphs were retained in the House bill with the addition of "and satisfactory" following the word "competent" in the next to last paragraph.

No floor discussions occurred on Section 6 on the floor of the Senate. The conference report contained an amended section, which did not contain the final two paragraphs of Section 6 in H.R. 5876.<sup>69</sup> In practice, the position of National Attorney for

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<sup>67</sup> Ibid., 1251. **Ex. 13.**

<sup>68</sup> Ibid. **Ex. 13.**

<sup>69</sup> U.S. Congress. Senate. *Conference Report in Regard to H.R. 5976, "An Act to Provide for the Final Disposition of the Affairs of the Five Civilized Tribes in Indian Territory, and for other purposes."* Document 269, 59<sup>th</sup> Cong., 1<sup>st</sup> sess. Washington, DC: GPO, March 19, 1906, 2. (hereafter cited as Senate Document 269) **Ex. 14.**

both the Choctaw and Chickasaw Nations continued until the restoration of constitutional tribal governments. However, the absence of this language in Five Tribes Act indicates the continuing intent of Congress to end the legal status of the Five Civilized Tribes.

The sole mention of tribal officials other than the chiefs and governors was noted in Sections 8 and 11, where all tribal officials with tribal monies or records in their possession were to hand those documents over to a U.S. officer designated by the Secretary of the Interior on March 4, 1906.<sup>70</sup> Floor debates on these provisions was limited to a comment by Senator Joseph W. Bailey (D-TX) on an amendment to replace the phrase “willfully and fraudulently” before the word “fail” that “if any man having the money of these people refuses to pay it over it would not be a question as to whether there was any fraud or willfulness in it or not; it is a breach of his plain duty...”<sup>71</sup> Although this amendment failed on the floor of the Senate, it was reinserted in conference and appears in the Act.

The remaining provisions of Section 11 abolished the power of the Five Civilized Tribes to levy taxes from December 31, 1905 and provided for the refund of any tribal taxes collected after that date. Tribal governments had lost their judicial functions, their power to pass legislation without submitting it for approval to the U.S. President, and with this provision, their power to levy taxes for any governmental function on the citizens and residents of the tribes. The remaining representatives of the tribal governments were the tribal executives and counsel, retaining powers clearly intended by Congress to last solely as long as the “winding up” of tribal affairs would take.

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<sup>70</sup> Op. cit. 1241. **Ex. 13.**

<sup>71</sup> U.S. Congress. *Congressional Record*. 59<sup>th</sup> Cong., 1<sup>st</sup> sess., 1906. Vol. 40, pt. 4. pp. 3053-3065. Washington, DC, 3057. **Ex. 15.**

### Section 7 of the Five Tribes Act

Representative Curtis specifically addressed the issue of the Choctaw and Chickasaw timber lands during the introduction of H.R. 5976:

Section 7 provides for the appraisal of certain timber sections in the Choctaw country.

Under the original agreement the pine-timber lands were not to be allotted and such lands were reserved, by the terms of the agreement, from allotment...provision is made that if any person does take his allotment from the timber sections he shall take it at its appraised value, including the appraised value of the timber...so that he will have no advantage over other members of the tribe.<sup>72</sup>

Representative Curtis' statement is interesting in that he appears to be speaking about the Atoka Agreement or perhaps about the 1901 agreement behind the Supplementary Act of 1902. However, no such provision referring to the Choctaw and Chickasaw timber lands exists in either agreement. The purpose of Section 7 in the H.R. 5976 was to allow allotments to be taken within these identified timber lands, on the condition that any allottee take the value of the land including the value of the appraised timber, in order to ensure the equalized values of allotments.

The Senate's amendment to Section 7, which was agreed to by the House and is the final language of the section required that any allotments made in the reserved sections contain "substantial, permanent, and valuable improvements ...placed prior to the passage of this act and not for speculation, but by members and freedmen of the tribes actually themselves and for themselves..."<sup>73</sup> Section 7 specifically directs the pine timber contained in these reserved sections of townships "shall be sold and disposed of at

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<sup>72</sup> U.S. Congress. *Congressional Record*. 59<sup>th</sup> Cong., 1<sup>st</sup> sess., 1906. Vol. 40, pt. 1. Washington, DC. 1241. **Ex. 13.**

<sup>73</sup> *Op.cit.*, 3057. **Ex. 15.**

public auction for cash, under the direction of the Secretary of the Interior.”<sup>74</sup> There is no further discussion in these debates about the timber lands, and no discussion in the House concerning preservation of this portion of the tribal estate as commonly-held lands.

Section 12 continued to refine the requirements surrounding townsites and the purchase and payment for lots within the towns.

### **Section 13 of the Five Tribes Act**

The original language of Section 13 as introduced in H.R. 5976 provided for the sale of the unleased portions of the coal and asphalt lands of the Choctaw and Chickasaw Nations. Representative Curtis noted there was disagreement in committee over whether the present lessees should be given preferential rights in the sale of the coal and asphalt lands. The committee’s decision to exclude coal and asphalt lands currently under lease was made “after the statement was made showing the amount of revenues derived each year from the coal royalties.”<sup>75</sup>

Intense debate surrounded the language of Section 13 in both the House and the Senate. Several methods of the disposition of the coal and asphalt lands were considered. Representative Curtis reported that in the House Committee on Indian Affairs, “a member... was directed to prepare an amendment which will reserve from sale all of the coal lands and provide for the leasing of unleased coal lands. The Committee believed that the operators in the Territory who have invested their money were entitled to this protection...”<sup>76</sup> Representative Stephens presented an amendment to Section 10 which would have directed the Secretary of the Interior to set aside the coal and asphalt lands

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<sup>74</sup> Ibid. Ex. 15.

<sup>75</sup> Op.cit., 1242. Ex. 13.

<sup>76</sup> Ibid., 1243. Ex. 13.

and hold the proceeds as an education fund. This amendment was defeated following Representative Curtis' response to the question of why the lands could not be used as the basis for such a fund:

...the reason we should not use the money of the Indians and these coal lands is this: We have already agreed with the Indians to sell the coal lands and divide the money among the members of the tribes...and what right have the people to take the Indian's money and create a school fund for the State, especially when we have agreed with them to sell the property and divide the money among them?<sup>77</sup>

During floor debate of Section 13 in the Senate, Senator Bailey echoed the sentiments of Representative Stephens as to the best use of the Choctaw and Chickasaw coal and asphalt lands:

...I am sure that no disposition ought to be made of them [coal and asphalt lands] until Congress knows what is best to do with them. Those lands are immensely valuable...I have been inclined to believe that the best disposition that could be made of them would be to leave them as a school fund...Indeed, sir, if their value is not overestimated they would provide a school fund sufficient in time to maintain a common school system for the entire Indian Territory...It seems to me that we could not make a better disposition of them than to reserve them for that purpose...As the Indian disappears—and he will disappear; there is nothing more certain in the future than the extinction of the Indian race...To dispose of them (coal and asphalt lands) now gives to individual or corporate greed...<sup>78</sup>

Senator Bailey concluded his remarks by throwing his support behind continuing the leases then in effect, looking to the “vast benefit to all the industries” dependent on the coal from the mines. Senator Robert M. La Follette (R-WI) offered an amendment which would prohibit railroads from gaining interests in the coal and asphalt lands and limiting the purchase or ownership of these mineral lands to 3,000 acres, with the penalty of

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<sup>77</sup> Ibid., 1252-1253. Ex. 13.

<sup>78</sup> Op.cit., 3058. Ex. 15.

forfeiture back to the tribes.<sup>79</sup> Speaking prior to the defeat of this amendment, Senator Clarence D. Clark (R-WY) reminded his colleagues of their primary duty to the tribes:

...mindful that this is the land of the Indians, mindful that it is our duty to put it in such shape that the President or the Secretary of the Interior can dispose of it for the Indians for the best sum possible, mindful of the fact that the secretary and the President may make regulations as to the quantity of the tracts in which it shall be sold...I think it would be a great mistake and would possibly depreciate the value of these lands in the public market by putting a Congressional limitation on the amount to be sold in one tract.<sup>80</sup>

While some Senators expressed concern over the potential for all the coal and asphalt lands to have been consolidated under a “common carrier,” limits on the acreage of any tracts were not enacted for the coal and asphalt lands, which were the most valuable asset possessed by the Choctaw and Chickasaw Nations.

Senator Teller was in favor of postponing the sale of the coal and asphalt lands:

...I believe the committee was largely influenced in the determination to sell this property because of the immediate dissolution of the tribal government and the difficulties which the committee saw must arise on that condition taking effect. I do not myself think it is a good time to sell the property. I was very much in favor of providing that no portion of it should be sold for the next five years...a large tract of land, so valuable as that, can not be put on the market and sold instantly. It must take time...<sup>81</sup>

The debate over Section 13 centered on attempts to determine whether active leases should be ended prior to their expiration dates in order to be sold, whether new leases could be made, and if there should be separate sales for surface lands versus the subsurface minerals. In the final version, the only decision reached by the 59<sup>th</sup> Congress was that all the coal and asphalt lands were to be reserved from sale “until the existing

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<sup>79</sup> Ibid., 3059. **Ex. 15.**

<sup>80</sup> . U.S. Congress. *Congressional Record*. 59<sup>th</sup> Cong., 1<sup>st</sup> sess., 1906. Vol. 40, pt. 4. pp. 3204-3214. Washington, DC, 3213. **Ex. 16.**

<sup>81</sup> Op.cit. 3061. **Ex. 15.**

leases...shall have expired or until such time as may be otherwise provided by law.”<sup>82</sup>

Faced with the pressure of the looming expiration of the tribal governments, this Congress passed the issue of the sale of the coal and asphalt lands on to the next Congress. Clearly, however, Congress continued the intention of the statutes of 1893, the Curtis Act of 1898, and the Supplementary Act of 1902, that the tribal lands and resources be sold and the proceeds be distributed amongst tribal members.

Section 14 of the Five Tribes Act outlined procedures for conveyance of lands reserved to persons, corporations, or organizations by Acts of Congress and accrual of lands to the Murrow Indian Orphans’ Home of remaining allottees’ rights to lands amounting to less than ten dollars after homestead and surplus lands. Section 15 provided for the sale of tribal government real property including lands, buildings and furnishings, including sale to any succeeding municipality or county.<sup>83</sup>

### **Section 16 of the Five Tribes Act**

In House Document No. 183, Representative Curtis summarized Sections 15, 16, and 17 for the House Committee on Indian Affairs:

Sections 15, 16, and 17 make all necessary provision for the sale of all buildings and other property belonging to the various tribes, **provide for the sale of all surplus lands**, and for the final distribution of the funds of the tribes. (emphasis added)<sup>84</sup>

The original language of Section 16, H.R. 5976 was relatively straightforward:

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<sup>82</sup> *An Act To Provide for the Final Disposition of the Affairs of the Five Civilized Tribes in the Indian Territory, and for other purposes*, Public Law 129, 59<sup>th</sup> Cong., 1<sup>st</sup> sess., (April 26, 1906), 142 (hereafter cited as Public Law 129) **Ex. 17.**

<sup>83</sup> *Ibid.*, 142-143. **Ex. 17.**

<sup>84</sup> U.S. Congress. House Report Document No. 183, 59<sup>th</sup> Cong. 1<sup>st</sup> sess., Washington, DC. p. 2. (hereafter cited as House Document No. 183) **Ex. 18.**

SEC. 16. That when allotments as provided by this and other acts of Congress have been made to all members and freedmen of the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes, the residue of lands in each of said nations not reserved or otherwise disposed of shall be sold by the Secretary of the Interior under rules and regulations to be prescribed by him and the proceeds of such sales deposited in the United States Treasury to the credit of the respective tribes. Conveyances of land sold under the provisions of this section shall be executed, recorded, and delivered in like manner and with like effect as herein provided for other conveyances.<sup>85</sup>

The House Committee amended the section to allow for the proposed sale of 100,000 acres for a game preserve. A further amendment was offered on the floor by Representative Curtis that would have allowed the such lands to revert to the United States or a State surrounding the preserve should the use of the lands as a game preserve cease. These amendments did not garner support in either the House or the Senate despite Choctaw Principal Chief Green McCurtain's letter of support and the Choctaw National Council's resolution to sell the lands to Jack Gordon.<sup>86</sup> Although these amendments were dropped, the surplus or residue of lands in each of the Five Civilized Tribes that were **not reserved or otherwise disposed of** were required to be sold by the Secretary of the Interior. As Section 16 of H.R. 5976 reads, all unallotted lands with the exception of the coal and asphalt lands, reservations for schools, cemeteries, and other grants to institutions and individuals were to be sold by the Secretary of the Interior. The timber lands reserved in Section 7 were reserved **for sale** for the benefit of the Choctaw and Chickasaw Nations, not as any continuance of the tribal estate.

Active discussions continued in both the House and the Senate concerning limits of acreage that could be purchased by any single buyer. The Homestead Act of 1862

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<sup>85</sup> U.S. Congress. *Congressional Record*. 59<sup>th</sup> Cong., 1<sup>st</sup> sess., 1906. Vol. 40, pt. 1. Washington, DC. 1254. **Ex. 13.**

<sup>86</sup> *Ibid.*, 1257. **Ex. 13.**

limited purchases of unoccupied public lands to 160 acres, and following the outcry against the land grants to private railway companies who realized enormous profits from the sale of parcels of those lands, the members of Congress were reluctant to allow large purchases of either public or tribal lands. Representative Curtis explained the committee's inclusion of this amendment; "The Indians themselves have asked for it, and the land is theirs to be disposed of... We put the provision in that it should be sold by the Secretary of the Interior... because we knew that he would protect the interests of the Indians."<sup>87</sup> The resolution of the Choctaw General Council of November 24, 1905 stated a request to Congress for this particular sale:

...it is the sense of the Choctaw council that there could be no better disposition made of the lands desired by Jack Gordon and his associates than to dispose of the same at its appraised value; and the Congress of the United States is most earnestly solicited to take the necessary steps looking to the sale of this land to Jack Gordon and his associates at its appraised value...<sup>88</sup>

Despite the presence of this amendment, requested by the Choctaw government itself, Congress was unwilling to explicitly authorize such provision. The rejection of this amendment does not reveal any explicit intent of Congress regarding reservation of unallotted timber assets from the provisions of Section 16.

Section 16 in its final form became a much more complex paragraph following the adoption of the Senate's revised section that added three sentences to the section along with the House amendment concerning agricultural lands. The statute reads:

SEC. 16. That when allotments as provided by this and other Acts of Congress have been made to all members and freedmen of the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes, the residue of lands in each of said nations not reserved or otherwise disposed of shall be sold by the Secretary of the Interior under

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<sup>87</sup> Ibid., 1255. **Ex. 13.**

<sup>88</sup> Ibid., 1257. **Ex. 13.**

rules and regulations to be prescribed by him and the proceeds of such sales deposited in the United States Treasury to the credit of the respective tribes. In the disposition of the unallotted lands of the Choctaw and Chickasaw nations, each Choctaw and Chickasaw freedman shall be entitled to a preference right, under such rules and regulations as the Secretary of the Interior may prescribe, to purchase at the appraised value enough land to equal with that already allotted to him forty acres in area. If any such purchaser fails to make payment within the time prescribed by said rules and regulations, then such tract or parcel of land shall revert to the said Indian tribes and be sold as other surplus lands thereof. The Secretary of the Interior is hereby authorized to sell, whenever in his judgment it may be desirable, any of the unallotted land in the Choctaw and Chickasaw nations, which is not principally valuable for mining, agricultural, or timber purposes, in tracts of not exceeding six hundred and forty acres to any one person, for a fair and reasonable price, not less than the present appraised value. Conveyances of lands sold under the provisions of this section shall be executed, recorded, and delivered in like manner and with like effect as herein provided for other conveyances: *Provided further*, That agricultural lands shall be sold in tracts of not exceeding one hundred and sixty acres to any one person.<sup>89</sup>

This is a much denser and grammatically intricate section than the original bill. Plaintiff's memo of April 27, 2009 asserts that Section 16 as passed by Congress prohibits the sale of the unallotted timber lands. A dissection of the relevant sentences shows a very different intent. The first sentence of the section *clearly* states "the residue of lands in each of said nations not reserved or otherwise disposed of shall be sold by the Secretary of the Interior," giving explicit direction to the Secretary for the disposal of remaining unallotted tribal lands regardless of their character. The sole reservation of any timber lands was in Section 7, and the township sections reserved were specifically reserved from allotment in order to be sold.

Sentences 2 and 3 of this section give a preference right to Choctaw and Chickasaw freedmen to purchase any unallotted lands at the appraised values before any

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<sup>89</sup> Public Law 129, 143. **Ex. 17.**

general sales took place. These purchases were restricted to equal the area of the freedmen's allotments of 40 acres. Sentence 3 established the reversion of any such lands purchased and defaulted thereon back to the tribes.

Sentence 4 is the crucial sentence to Plaintiffs' argument concerning Choctaw and Chickasaw timber lands. There are several dependent clauses in this sentence tending to obscure a clear understanding of the sentence, a pitfall of the legislative process. To gain a firm understanding of sentence 4, the first step is to strip out the qualifying clauses:

*The Secretary of the Interior is hereby authorized to sell, whenever in his judgment it may be desirable, any of the unallotted land in the Choctaw and Chickasaw nations.* This essentially restates sentence 1 of Section 16. Through the entire body of Congressional floor debates leading up to the Five Tribes Act, the sale of all "surplus" or unallotted lands is the basic intention of Congress; in addition to reflecting Congressional policy and intent since the passage of the Dawes General Allotment Act of 1887.

Next, the phrases and placement should be examined for their functions in modifying the basic direction of sentence 4. The final phrase of the sentence is the most important modifier for all lands to be sold: *for a fair and reasonable price, not less than the present appraised value.* (In practice, "not less than the appraised value" is a qualifier for the modifying phrase "for a fair and reasonable price"). Through the debates and reports on the Five Tribes Act of 1906, this was always a primary consideration for Congress—that the tribes receive at least the appraised value for the sale of their unallotted lands.

Adding this modifier, the sentence now reads: *The Secretary of the Interior is hereby authorized to sell, whenever in his judgment it may be desirable, any of the*

*unallotted land in the Choctaw and Chickasaw nations, for a fair and reasonable price, not less than the present appraised value.*

Now the last two and most difficult dependent clauses need to be put into context: *which is not principally valuable for mining, agricultural, or timber purposes, in tracts of not exceeding six hundred and forty acres to any one person,*

Here, there is another clause modifying a clause: “in tracts of not exceeding six hundred and forty acres to any one person” **qualifies** the phrase “which is not principally valuable for mining, agricultural, or timber purposes.” The limit of tracts to 640 acres is solely applicable to lands outside mining, agricultural, or timber classifications.

*The Secretary of the Interior is hereby authorized to sell, whenever in his judgment it may be desirable, any of the unallotted land in the Choctaw and Chickasaw nations, which is not principally valuable for mining, agricultural, or timber purposes, for a fair and reasonable price, not less than the present appraised value.*

Unmistakably, this gave direction and provision of authority to the Secretary to ensure the sale of even “valueless” lands of the tribal estate, but to limit such sales with the insertion of the final clause:

*The Secretary of the Interior is hereby authorized to sell, whenever in his judgment it may be desirable, any of the unallotted land in the Choctaw and Chickasaw nations, which is not principally valuable for mining, agricultural, or timber purposes, in tracts of not exceeding six hundred and forty acres to any one person, for a fair and reasonable price, not less than the present appraised value.*

Based on the debates in the House and Senate on the House Committee's insertion of the amendment to allow the sale of 100,000 acres of "valueless" land as a game preserve, sentence 4 emerged from the conference committee to deny the Choctaw government's and Jack Gordon's specific request and expresses limitations on the sale of such supposed "valueless" lands. Representative Curtis stated his understanding of these lands:

There will be in the Choctaw and Chickasaw country one or two million acres of land not fit for agriculture, mining, or for any other purpose, because of the fact that it is mountainous. The committee was advised the Secretary did not care to sell a tract of 100,000 acres to any one person or company with out direct authority of Congress, and your committee thought that such land was worthless, practically, except for this purpose.<sup>90</sup>

The purpose of sentence 4, therefore, is that lands not classified as principally valuable for mining, agriculture, or timber *are limited* in their sale to any one person in tracts of 640 acres. Sentence four in no way limited the sale of lands *principally valuable* for mining, agriculture, or timber as directed in the first sentence of Section 16. The sole purpose of sentence 4 was to address the issue of selling "valueless" lands; and limiting the acreage of such sales. The final provision of Section 16 addresses the limit of the sale of agricultural lands to 160 acres to any one person, in line with the Homestead Act.

The reality of Section 16 is that "valueless" lands were to be sold for at least their appraised value and limited the tracts of these lands to 640 acres to a single individual. Similarly, agricultural lands were limited in their sale to 160 acres. Freedmen of the Choctaw and Chickasaw tribes were given preference rights to buy an additional 40 acres of land at appraised values (ie, they did not have to compete in a sealed bid or public

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<sup>90</sup> U.S. Congress. *Congressional Record*. 59<sup>th</sup> Cong., 1<sup>st</sup> sess., 1906. Vol. 40, pt. 1. Washington, DC. 1244. **Ex. 13.**

auction sale). However, there was no reservation of or limit on the sale of unallotted lands principally valuable for mining or timber. The *Congressional Record* shows lively floor debates over the coal and asphalt lands, including intense discussions about acreage limits for leases and purchases of those lands, from 160 up to 3,000 acres, however, these limitations did not make it into the 1906 statutory language.<sup>91</sup>

### **Plaintiffs' Memo of April 27, 2009**

Plaintiffs' memo of April 27, 2009 relies heavily on debate from other topics to support their reading of Section 16. While some of the debates on the coal and asphalt lands are only marginally relevant to the topic of the timber lands, there were no discussions or comments on the reservation of timber lands from either sale or preservation as a tribal estate.

House Report No. 183, which accompanied H.R. 5976, did contain the amendment requested by the Choctaw government and Jack Gordon through the Secretary of the Interior to allow the sale of a 100,000 game preserve. This amendment was not well written as to be understood as specific to only a single proposed sale, and was objected to by members of the House and Senate who saw the amendment not as a provision for a single sale in a specific instance, but a method by which individuals or corporation could acquire large swathes of Indian lands, appraised as “valueless” or otherwise. Representative Curtis did attempt to explain this on the floor of the House:

The law as it is authorizes the Secretary to dispose of all unallotted lands. There will be in the Choctaw and Chickasaw country one or two million acres of land not fit for agriculture, mining, or for any other purpose, because of the fact that it is mountainous. The

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<sup>91</sup> U.S. Congress. *Congressional Record*. 59<sup>th</sup> Cong., 1<sup>st</sup> sess., 1906. Vol. 40, pt. 4. pp. 3053-3065. Washington, DC, 3059. **Ex. 15.**

committee was advised the Secretary did not care to sell a tract of 100,000 acres to any one person or company without direct authority of Congress...

[I]t was thought best by your committee to authorize the Secretary, in his discretion, to sell that amount to any person or company if he could find such a purchaser. I may state now that there is such a firm, a corporation, which desires to buy that amount of land to be used as a game preserve only, but the committee thought it best not to authorize the sale of that amount of land to a certain person or company, but to authorize the Secretary to sell to any person or company if, in his discretion, he thought it best to do so.<sup>92</sup>

Prior to the floor vote on this amendment, Representative Frank T. Fitzgerald (D-NY) asked, "...I wish to inquire whether it is the purpose to permit the sale of more than one tract as a game reserve?" Representative Curtis replied, "There was only one tract suggested to the committee. It came in just before the bill was reported, and because of the nature of the land the committee had no objection to allowing the secretary (sic) to sell that amount if he thought it a good thing to do. The committee heard of but one organization and it worded the amendment in general terms, so that if the Secretary thought best he might sell to any person who might apply."<sup>93</sup>

Congress did not accept this reasoning of the committee, and two separate acreage limits were established as shown previously: the first was a limit of 640 acres for unallotted lands not principally valuable for mining, agriculture, or timber; and the second was a limit of 160 acres for unallotted agricultural lands. Unallotted lands appraised to any other category did not receive a statutory limit as to the acreage to be sold to any one person.

The comment of Senator Bailey during the Senate debate on February 28 did not occur "in reference to the breadth of authority with the Secretary should enjoy with

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<sup>92</sup> Op.cit., 1244. Ex. 13.

<sup>93</sup> Ibid., 1255. Ex. 13.

respect to sale of tribal lands,”<sup>94</sup> but was made in support of a continuance of the governments of the Five Civilized Tribes. To quote more fully from the Senator’s remarks:

I agree with the Senator from North Dakota and the Senator from Wyoming...that they (Five Civilized Tribes, ed.) ought to continue their tribal government as to prevent either a lapse of all government or a devolution of the government of those 80,000 people upon the Secretary of the Interior.

There was a proposition presented this morning by the Senator in charge of the bill to do that. I protest against any man in this country being made the government of 80,000 people, even if they are Indians. That is a little too much authority to confer on any one man. If the Secretary of the Interior was as wise and as just as he was yesterday described by my friend from Wisconsin, I would not agree to confer upon him that extraordinary power. But even if I could consent to confer such a power upon anybody, the present Secretary of the Interior is the last man of my acquaintance upon whom I would consent to confer it.<sup>95</sup>

Similarly, Plaintiff’s memo also takes a comment of Senator Henry M. Teller (D-CO) out of context. Plaintiffs note that Senator Teller made the statement, “If we can protect these Indians (sic) lands longer, we ought to do it.” During the Senate floor debate on extending the trust restrictions on Indian allotments, Senator Teller stated:

...the Senator from North Dakota...has cited *The United States v. Rickert*. That is a case where the court passed upon the question whether the Government, holding land for the Indians in trust, could maintain an action in the courts to prevent the State from taxing the property...It also held that the personal property was purchased with money of the Government and was furnished to the Indians in order to maintain them on the land allotted during the period of the trust estate...If we can protect these Indian lands longer, we ought to do it. Whether we can add anything to what has already been done, whether, when the Government has given a patent, subject to a limitation of ten years, we can add another ten years, or

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<sup>94</sup> U.S. Congress. *Congressional Record*. 59<sup>th</sup> Cong., 1<sup>st</sup> sess., 1906. Vol. 40, pt. 4. pp. 3120-3214. Washington, DC, 3121. **Ex. 19.**

<sup>95</sup> *Ibid.* **Ex. 19.**

five years, is a question we will probably leave to the courts to determine. It would be a good thing for the Indians if we could do it...<sup>96</sup>

This comment did not in any way address the issues presented by Section 16 and was not relevant to the amending or passage of the section. The next quote from Senator Teller in connection with the railroad right of ways across the Five Civilized Tribes was made during the floor debate of Section 13 concerning the leasing and sale of the coal and asphalt lands. The Senator has no remarks in the record relative to preservation of tribal property during the debates on H.R. 5976.

### **Conclusion**

A thorough examination of the documents relative to the passage of the Five Tribes Act of 1906 does not demonstrate even a passing contemplation by Congress that Choctaw and Chickasaw unallotted timber lands might have been preserved as a tribal estate. Attempts to find a basis for this assertion in previous legislation and background documents have been as equally fruitless. Since the passage of the 1893 General Incidental Expenses of the Indian Service Appropriations Act authorizing the Dawes Commission, the preponderance of evidence of Congressional intent is unquestionably accumulated on the point that all unallotted tribal lands of the Five Civilized Tribes were to be sold. No portion of the tribal estate, even the most valuable Choctaw and Chickasaw coal and asphalt lands, was exempted from this intent. Where there were explicit segregations of tribal lands, they were always for the express purpose of sale, as for the coal and asphalt lands and the timber lands described in Sec. 7 of the Five Tribes

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<sup>96</sup> U.S. Congress. *Congressional Record*. 59<sup>th</sup> Cong., 1<sup>st</sup> sess., 1906. Vol. 40, pt. 6. pp. 5043-5056. Washington, DC, 5055. **Ex. 20.**

Act of 1906. There is simply no direct or indirect evidence that any Choctaw or Chickasaw tribal lands were reserved or were ever intended to be reserved from sale to remain tribal property or assets.