Opinion of G.W. Terell, Attorney General, Republic of Texas to His

Excellency Sam Houston, President, Republic of Texas in reference to

Cherokee Lands

City of Houston, September 10, 1842.

To His Excellency, The President:

Sir: You asked my opinion of the title by which the Cherokee Indians held the

Lands lately possessed by them in east Texas.

"Deeply impressed with the magnitude of the interest involved, and aware of the deep excitement which pervades the public mind on the subject, I have endeavored to bring to its investigation all the energies of my limited capacity. The question naturally divides itself into two branches, corresponding to the two governments under which the claim has grown up. The first of these being the Mexican Government, I shall first dispose of that branch of the subject.

The Republic of Mexico, by legislative enactments of both her general and state governments, invited the Indian tribes residing within and bordering on her territories, to settle within the limits of the Republic of Mexico. The Cherokees, availing themselves of this invitation, selected the section of country under consideration for their permanent residence. I have never seen any evidence that they ever obtained a grant for these lands from the Mexican government, but there is sufficient evidence of several acts of the Mexican government authorities, such as the ordering of intruders to be driven off their lands, and others, which clearly showed that the Mexican government **recognized** their **settlement-right** to which they occupied. This settlement-right was considered by the Mexican laws as the first or incipient stage of title to the lands thus occupied. Those laws as appropriated, and no longer subject to entry, location, or settlement, by any other person or community, considered them unless abandoned by their first occupants. The Cherokee Indians had, therefore, by virtue of their settlement and continued occupancy, under the then existing laws of Mexico, acquired an 'inchoate' right to the lands on which they resided, which they alone under those laws had the right to mature into perfect titles. Thus stood the affairs of the Indians when the first convention, usually denominated the 'Consultation,' met at San Felipe in October 1835. This convention, by one of the most solemn acts recorded in the journals of its proceedings, declared that the Cherokee Indians had 'derived their just claims to lands included within the boundaries hereinafter mentioned, from the government of Mexico, from whom we have also derived our right to the soil by grant and occupancy.' They moreover solemnly declared that 'we will guarantee to them peaceable enjoyment of their rights to their lands, as we do our own, and we pledge the public faith for the support of the foregoing declarations,' and, as if to give still more solemnity to the act and make it, if possible, of more binding force, all the members of the Convention separately signed this guaranty and 'pledge of the public faith.' It would be difficult to conceive any manner in which a nation could bind itself under more solemn obligations, to affix to its action a higher moral sanction than is here done. 'The language of the instrument partakes largely of the strong and deep feelings that marked the crises at which it was put forth.' I cannot well imagine in what manner language could be combined better calculated to produce with those, to whom it was addressed, implicit confidence in its truth and sincerity.

The authority of this body however, to make a grant, has been questioned by some gentlemen for whose opinions I have much respect – but with due deference to those gentlemen, I can discover no solid foundation for such objection. In the language of a gentleman, (the late lamented and talented John Birdsall, Attorney General of the Republic of Texas), whose clear head and vigorous understanding qualified him well for the investigation and elucidation of subjects of this complicated character, the Consultation was a primary representation of all the people of Texas (Tejas) in their highest political capacity. They assembled independently of Coahuila, and the political organization which had formerly existed, and by this act became virtually severed and separate from the Mexican. They were the only political authority known to the country for the time being and were therefore necessarily charged with the duties and attributes of Government. They were the government de facto. They exercised the prerogative of government. They suspended laws then in force and closed the courts of justice. They enacted laws and caused them to be executed; and finally, they organized a provisional government for Texas (Tejas), independently of the other Mexican states. In this state of things and for these causes, was the convention of 1835 called by "the people of all Texas" (Tejas). The deliberations of that body therefore necessarily took a wide range, embracing within its legitimate scope, the general interest of the then Department Texas (Tejas). This was the body which not only recognized the claim of the Cherokee Indians to the lands in question as being derived from the laws of Mexico, but which also guaranteed to the Indians their right to these lands – but they authorized and required the provisional government, which they organized, to make a treaty with them, and designate their boundaries, which was done in accordance with the authority and instructions given by the provisional government, and consequently binding upon the government and people of the country. Had not this guaranty and pledge of the public faith been made to the Indians by the convention directly, the provisional government would have possessed the authority to grant the lands in question powers to conduct the political affairs of the country. They combined in that body the functions of political powers, to-wit: the Legislative and Executive. Hence, it follows, that the convention made any specific grant of these lands to the Indians, the authority of the Provisional Government to do so, would have been fairly deductible from the general powers with which that body was clothed. This body exercised all the attributes and functions of government from November 1835, until sometime in March 1836; during which time it was the only political authority known to or recognized by the country; consequently, a grant of any portion of the public domain by that body would have been considered void. To admit this fact and to deny the validity of a grant made by the convention which created the Provisional Government, and from which alone it derived its powers, would be a

solecism in reasoning. It would be, to make the powers of the agent superior to that of the principal.

Had the Convention, which framed the Constitution, granted these lands to the Indians – or has the first Congress that assembled under the constitution, done so, their right would scarcely have been questioned by any person. In my opinion, the grant from the consultation is equally authoritative, equally valid as if made by the last convention. I can discover no difference in the legitimate powers of the two assemblies. They were both primary representations of "the people of all Texas" (Tejas) – assembled for the same general purpose – deriving their authority from the same source, to-wit, the people, the great fountain head of all political power."

"They were both organic in their structure – radical in their character – equal in dignity, plenary in their powers, and similar in the great objects of their convocation. I can see no reason, therefore, why the acts of one should not be considered as binding and obligatory upon the country as those of the other. It has been urged, however, in favor of the acts of the last Convention, that they were submitted to the people, and by them ratified, which gave to the acts of that body an authority and force superior to those of the former. This by no means follows as a necessary consequence. The only act of the last convention, which was submitted to the people for their approval, was the constitution – that being designated as the fundamental, organic law of the land, by which the Republic of Texas was to be perpetually governed – it was thought proper that it should be submitted to the consideration of the people. I am not prepared to say, however, that instrument would not have been of equally binding authority without this submission.

Moreover, there were many and very important acts of this Convention which were not submitted to the people, but which have ever since been recognized as valid by the Republic of Texas. Even the Declaration of Tejas' Independence, that great act of national sovereignty, which forever severed the bounds of political union between Texas and Mexico, was never submitted to the people. That body organized a government "ad interim", and elected a president and cabinet, and did many other acts, which were never directly ratified by the people; and yet their validity, so far as I have heard, has never been questioned. The true question in all transactions performed by a delegated authority is not whether the acts of the delegate have been subsequently acknowledged by the primary authority, but whether the delegate has transcended the powers with which he was invested; and if he has acted within the scope of his authority, his acts are binding upon the primary authority without subsequent ratification; and this upon the well established rule of law, that the acts of the agent are binding upon his principal, unless the agent transcend the powers with which he is clothed.

Again, it is urged that the Consultation acted under the Constitution of 1824; and there being no authority clothed with power by that instrument to grant lands except the congress of Mexico, or some of the Mexican States, consequently, any grant made by them was null and void. This, in my judgment, is not entirely a fair method of stating the proposition. The consultation could not have been concerned under the constitution of 1824, because that body expressly declared that General Santa Anna had, "by force of arms overthrown the federal constitution of Mexico, and dissolved the social compact which existed between Tejas and the other members of the Mexican confederacy. 'That Tejas is no longer morally or civilly bound by the compact of union', the constitution of 1824, which they declared to be overthrown, consequently they could not have assembled under that constitution – but, as they themselves declare: "the people of Tejas", availing themselves of their natural rights, "convened a general Consultation of the people of all, Tejas", with the avowed purpose of providing from the general welfare of the country and organizing a government for the time being. It is true this convention did not repudiate the constitution of 1824, but they declared it to be overthrown by Santa Anna. They also recognized that instrument as containing the 'Republican principles', in the vindication and maintenance of which Tejas had taken up arms; but they nowhere said that it is still in force and that Tejas is governed by it. On the contrary, a very little attention to the history of that body and its proceeding will be sufficient to convince any candid mind separate from and independent of the then existing government of Mexico, and to place the country in the best posture of defense to resist the encroachment of the government, for they declare they 'hold it to be their right during the disorganization of the Mexican federal system, and the reign of despotism to withdraw from the Union – to establish an independent government, etc.' True, they had declared they had taken up arms in defense of the 'Republican principles of the federal constitution of 1824.' Those principles were the enduring principles of a Republican government, which guaranteed to him freedom of speech and freedom of people; these, and such as these, were 'the Republican principles of the constitution of 1824, in defense of which the convention of 1835 declared they had taken up arms.' But had they recognized that constitution as still in force and as controlling their actions, they could scarcely have performed a single prominent act, which they did. They could not have organized a Provisional Government – they could not have raised an army to oppose the forces of the government of Mexico, and such was the fact – that great charter of the rights of the citizen had been overturned by violence, and upon its ruins a central military despotism erected, subversive of those 'principles of Republic liberty' secured to the citizens of the republic by that instrument of compact, between the Mexican federal and state governments. By this act of usurpation on the part of the Mexican federal government, the states were absolved from all further allegiance to the compact of union. They had an inherent and ineffaceable right to resist the encroachments of this 'military despotism.' This Tejas did, as an integral portion of the Mexican Confederacy; and it is no argument against her rights to say that Coahuila did not unite with Tejas in the measure – for the political bands which had united these two departments into one state had been swerved by the overthrow of the federal constitution and by Coahuila's adhering to those who usurped the authority of the Mexican federal government.

Moreover, a separate state government had been guaranteed to her by the constitution of 1824, and when the time arrived for her to assume this station in the Mexican Confederacy, it was denied her. Therefore, she determined to assert her own rights upon her own responsibility. For this purpose was the convention of 1835 called by 'the people of Tejas.' The authority with which the members of that body were clothed emanated directly from the people – the great source of all political power in a Republican government; and although they did not formally declare an independent national government, they certainly did assume a separate political existence. They took upon themselves all the attributes and exercised all the functions pertaining to the highest political authority of a state or nation – and for the time being there was no other government or authority of a state or authority recognized by the people in the country of Tejas, and their acts have been sanctioned by the nation, the Republic of Texas from that time to the present."

"If there be any one attribute of government more unquestionable than all others, it is the right to exercise jurisdiction over the public domain of the country. This right of sovereignty over the soil, has from the first institution of government, been exercised by the existing political authority of every country. The Convention of which I am now speaking was, for the time the highest – nay the only political authority recognized in the country. They did exercise this right of sovereignty over the soil of the country of Tejas – they made sundry grants of land to individuals – these grants have never, within my knowledge been questioned to this day. Why then should this grant to the Cherokee Indians be questioned more than others made by the same body? Their right to these lands was guaranteed by the convention in terms as strong and explicitly as language could convey them. From all these considerations, I conclude that the title of the Indians to the lands in question was valid and unimpeachable.

The subject of the original Indian title to these lands being disposed of, another question growing immediately out of the decision of the other, presents itself for consideration, Viz: What locations and surveys made upon those lands prior to the Act of Congress of 1840, directing their survey and sale are to be respected as legal, and consequently exempted from the cooperation of this law? This is a question of equal importance though of much less difficulty of solution than the former. It is a well established principle of legal decision that lands, when once appropriated according to the existing laws of any country, do not again become vacant or subject to entry of location, without an inquisition of office, except by special legislative enactment. And of such force and authority has this principle been recognized to be, that even an inchoate right to lands legally acquired, but which has not ripened into a grant or other perfect title, cannot be divested, unless by office found, in the mode prescribed by the existing laws of the country.

The Cherokee Indians had settled in the country of Tejas, under the invitation of the Mexican Government (the Spanish), and according to the laws then existing had certainly acquired an inchoate right to the lands they occupied. These lands, therefore, could not be legally subject to location while in their possession – nor even after, without a manifest violation of the above well settled rule of law. There is but one exception to this rule in the laws of either the General or State Governments of Mexico, and that is the provision contained in the 30th – Article of the General Colonization law of Coahuila and Tejas (Texas), which declares that when settlers may resolve to leave the state and settle themselves in a foreign country – if they do not sell their lands they shall become "entirely vacant." This, however, was in the case of voluntary abandonment. But the Indians did not voluntarily abandon their settlements. On the contrary, they were forcibly driven from their homes and possessions. Therefore, the provision of the colonization law above referred to, cannot apply to their lands. They must come under the general principle of the law that requires an inquest of office before the lands possessed by them could be legally subject to location and appropriation by the citizens of the country. This inquest of offices has never been taken – consequently those lands have never, since the Indians were driven from them, been subject to location, either by the laws of Mexico or Texas

From the foregoing facts and reasons, I conclude that none of the locations made upon the lands occupied by the Cherokee Indians subsequent to the date of the guaranty made by the Constitution to the Indians in 1835, are valid and legal; and consequently that none made since that date are legally exempt - - - - - - - sale under the Act of Congress of February 1840."

All of which is respectfully submitted.

G. W. Terrell

Attorney General