BEFORE THE INDIAN CLAIMS COMMISSION

THE ASSINIBOINE INDIAN TRIBE, Plaintiff,	)	
v.	)	Docket No. 62
THE UNITED STATES, Defendant.	)	

Appearances:

Louis A. Gravelle, Douglas Whitlock,
Edward F. Howrey, and Davies, Richberg,
Beebe, Busick & Richardson,
Attorneys for Plaintiff.

Ralph A. Barney, with whom was
Assistant Attorney General
A. Devitt Vanech,
Attorneys for Defendant.

APR 27 1951

OPINION OF THE COMMISSION

O'Marr, Commissioner, delivered the opinion of the Commission:

This case comes to us on a motion of the defendant for summary judgment based upon the proposition that the claim asserted in the petition is the same claim that was submitted to the Court of Claims in case No. J-31 (77 C. Cls. 347) and by that Court determined upon its merits and, therefore, the judgment of the Court of Claims is res judicata.

In this case the plaintiff, according to the petition, sues for the value of 6,447,940 acres of land located in the States of Montana

and North Dakota, which had been set over to it by the treaty of September 17, 1851 (11 Stat. 749), known as the Fort Laramie Treaty. This tract will hereafter be referred to as the Fort Laramie lands. By Executive Order of August 18, 1868, 169,574 acres of the land was set apart for a military reserve; by Executive Orders of April 13, 1875 and July 13, 1880, 5,842,496 acres of the area were set apart for other Indians or restored to the public domain, and by said order of July 13, 1880, 465,870 acres of the area were taken to satisfy railroad grants and for public entry or sale as public lands. The petition further alleges that the lands were taken by defendant without the consent of the Indians and without compensation, and that they were of the value of $11,681,355.16 at the time they were taken.

The prayer of the petition is for the value of said lands at the time taken "plus an amount sufficient to produce the full equivalent of that value paid contemporaneously with the taking measured by a reasonable rate of interest from the time of taking to the date of payment, less legal offsets * * *."

The defendant does not question the alleged facts or the sufficiency of the petition to state a cause of action under the Indian Claims Commission Act, but by its motion for summary judgment asserts, in effect, that the cause of action here presented was determined on its merits by the Court of Claims in Case No. J-31 (77 C. Cls. 347) on December 4, 1933, and, therefore, the judgment of the Court of Claims is a bar to this claim. It is therefore necessary to review

the record in the former case.

According to the opinion in the former case, the plaintiff therein sought the recovery of damages because of the appropriation by defendant of the Fort Laramie lands belonging to plaintiff, being the same land involved in the pending claim, to which plaintiff claims title under the provisions of the Fort Laramie treaty referred to above. The petition in the former case included a claim for other lands and for destruction of game. The respective claims were treated separately by the Court of Claims, so this discussion will be confined to the claim arising out of the appropriation of the Fort Laramie lands.

The Court of Claims made special findings of fact which appear in the case as reported in 77 C. Cls. 347 and are numbered I to XII, however, the last sentence of No. XII does not appear in the official findings, it being the reporter's statement of the determination of the Court.

The Court found that the Fort Laramie lands had been ceded or granted the plaintiff by the Fort Laramie treaty, that they had been appropriated by the defendant, and that the value of the same at the time of the appropriation "did not exceed 50 cents an acre or $3,238,970." (Findings IV to VIII, inclusive, and pages 370-1, 373 of opinion). Thus, we see, the Court made every finding necessary for an adjudication of the claim; it found the Indians were entitled to the land, that it had been expropriated by defendant and that it had a maximum value of $3,238,970.

The Court also determined that the offsets amounted to at least $4,227,474.56 (Finding XII) and because of the fact that the offsets exceeded the value of the land, the Court (we find from an examination of the Court of Claims records in the case) made a final order on December 4, 1933, which reads as follows:

> "Upon the special findings of fact, which are made a part of the judgment herein, the Court decides as a conclusion of law, that the plaintiff is not entitled to recover, and its petition is therefore dismissed."

It is plain from the findings of fact that the Court determined that the lands there in question, which, as before stated, are the same as those involved in the case before us, were taken from the Indians by defendant under the Executive orders mentioned above and, at the time taken, had a value of $3,238,970. The Court also found that the defendant was entitled to offsets against plaintiff which exceeded the value of the land taken, hence, the dismissal.

The Court made no allowance for interest, and its failure to do so was the real question presented to and argued before us at the hearing of the motion to dismiss. The defendant taking the position that even if the plaintiff was entitled to interest as of a "taking" of the Indian lands, the failure of the plaintiff to appeal made the adjudication final and barred a renewal of the contest on that question. The plaintiff, on the other hand, insists that the question of the allowance of interest was never presented to or considered by the Court of Claims and furthermore that under the jurisdictional Act of

March 2, 1927 (44 Stat. 1263), which governed the Court of Claims, it could not allow interest on the value of the property appropriated, for, by express terms of the Act it was "confined to the value of the * * * property at the time of such appropriation or disposal * * *," and therefore the plaintiff is not barred by the former judgment of the Court of Claims from asserting the same claim before us. The parties agree that the jurisdictional Act of 1927 did not provide for interest, in fact, the legislative history of the Act set forth in plaintiff's brief (pp. 4 to 6) shows that interest was not intended to be allowed.

The amended petition in the former case and the petition before us are substantially the same as to the taking of the Fort Laramie lands. In both cases the claim is based upon the appropriation of 6,447,940 acres—the Fort Laramie land—by virtue of and under the authority of the three Executive orders referred to above.

As we view the judgment of the Court of Claims, and the findings upon which it was based, that Court made a definite and final adjudication on the question of value of the land taken, namely, the sum of $3,238,970. While the finding is that the value "did not exceed" that amount, the only proper construction to be placed upon the phrase is that the land had a value at the time it was taken of $3,238,970. Counsel for plaintiff direct our attention to this statement appearing at page 373 of the opinion—

> "We conclude that the value of this land at the time

> it was taken did not exceed 50 cents an acre and may have been less, and that its total value did not exceed $3,238,970." (Underscoring supplied.)

as indicating a failure of the Court to determine the "exact value" of plaintiff's land. We do not so construe the statement. In any event the findings control such differences. 3 Am. Jur. 669, Appeal and Error, Sec. 1158.

Passing for the present the question of offsets, the plaintiff contends that since the Court of Claims decision there have been intervening decisions creating an altered situation, and that the passage of the Indian Claims Commission Act changed the law, thus removing res judicata as a bar to the present suit.

The fundamental question before us is whether the altered situations relied upon by plaintiff applies to the claim asserted before and determined by the Court of Claims in the former case. We shall, therefore, consider the cases relied upon by plaintiff.

The case, Yankton Sioux Tribe v. United States, 272 U.S. 351, 71 L. ed. 294, decided in 1926, involved the value of 648 acres of land taken from the Sioux Indians for an Indian school in the State of Minnesota. The Indians owned the land in fee. The Act of February 16, 1891 (26 Stat. 764) authorized the Secretary of the Interior to acquire a site for the school "by purchase, condemnation or otherwise." Acting under this authority, the Secretary appropriated the land known as the "red pipestone quarries" for the school.

The Supreme Court decided:

"That the United States has taken and holds possession of the entire quarry tract of 648 acres is not in dispute; and since the Indians are the owners of it in fee, they are entitled to just compensation as for a taking under the power of eminent domain."

Later the Court of Claims awarded the Indians the value of the land plus interest, although interest was not provided for in the jurisdictional acts. 65 C. Cls. 427, decided April 16, 1928.

Klamath v. United States, 304 U.S. 119, 82 L. ed. 1219, decided in 1938, was a case in which the Indians sued the United States for the value of 87,000 acres of their land taken by the United States under the Act of June 21, 1906, (34 Stat. 325), which authorized the Secretary of the Interior to exchange the 87,000 acres of tribal lands of the Indians for other lands which had been taken from them by mistake and restored by the exchange. The lands were taken from the Indians without their knowledge or consent. The Court, in holding that the Indians were entitled to the value plus interest, said:

"Unquestionably Congress had power to direct the exchange and for that purpose to authorize expropriation of plaintiffs' lands. The validity of its enactments is not questioned. The taking was to enable the government to discharge its obligation, whether legal or merely moral is immaterial, to make restitution of the allotted lands. The taking was in invitum, specifically authorized by law, a valid exertion of the sovereign power of eminent domain. It therefore implied a promise on the part of the Government to pay plaintiffs just compensation."

The case United States v. Creek Nation, 295 U.S. 103, 79 L. Ed. 1331, decided in 1934, arose out of the treaty of June 14, 1866 (14 Stat. 785). At the time of this treaty the Creeks had a fee

simple title (see treaty of February 14, 1833, 7 Stat. 417) and ceded the west half of their holdings to the United States, retaining the east half. In 1867 the United States ceded the lands lying immediately west of the lands retained by the Creeks to the Sac and Fox Indians. A line dividing the two areas was run by defendant in 1871, and in 1872 a second line was surveyed which ran somewhat east of the original line and thereby took from the Creeks some 5,000 acres of the land retained by them in the 1866 treaty. By the Act of February 13, 1891 (26 Stat. 749), part of the 5,000 acres were allotted to Sac and Fox Indians and the balance sold to settlers. The Supreme Court held the Creeks were entitled as "just compensation" the value of the land, plus five per centum, from the date of patents issued settlers. The 1891 Act did not in terms include the 5,000 acres of Creek land but the defendant's agents erroneously thought it did, and so disposed of the 5,000 acres. The jurisdictional Act did not provide for interest. In referring to the disposals under the 1891 Act, the Court said:

> "True, they rested on an erroneous application of the act of 1891 to the Creek lands in the strip; but, as that application was confirmed by the United States, the matter stands as if the act had distinctly directed the disposals."

The case, United States v. Shoshone Tribe, 299 U.S. 476, 81 L. ed. 360, decided in 1936, was for the value of half the Shoshone reservation taken by the Government by placing Arapahoe Indians thereon in violation of the terms of a treaty with the Shoshone,

and against their will. The Court concluded that while the original taking was tortious it was made lawful by various acts of Congress which amounted to a ratification of the tortious acts which constituted an appropriation by the exercise of the power of eminent domain and under the Fifth Amendment. In addition to the value of the land taken, the Court allowed interest from the date of the appropriation.

The case of United States v. Goltra, 312 U.S. 203, 85 L. ed. 776, decided in 1941, involved an unauthorized taking of river vessels by the Government, the retention of which was judicially approved. The taking of the vessels was predicated upon an alleged violation of the terms of a contract, and in the suit for damages for the unlawful taking the Court of Claims (91 C. Cls. 42) allowed interest, in addition to the damages. In disallowing the interest, the Supreme Court clearly stated the difference between cases in which interest may be allowed as part of just compensation and those in which no interest may be allowed (unless, of course, it is permitted by the jurisdictional act or allowed by the statute governing interest on claims against the Government). This is what the Court said:

> "The distinction between property taken under authorization of Congress and property taken without such authority has long been recognized." Citing United States v. North American, 253 U.S. 330, 64 L. ed. 935; Seaboard Air Line v. United States, 261 U.S. 299, 67 L. ed. 664; and Phelps v. United States, 274 U.S. 341, 71 L. Ed. 1083.

The opinion continues, making special reference to the Creek and Shoshone cases, supra, as follows:

"Acts of government officials in taking property without authorization of Congress confer no right of recovery upon the injured citizen. There are two instances of Congressional ratification of takings which turned tortious acts into the exercise of the power of eminent domain and placed upon the Government the duty to make 'just compensation,' including sums in the nature of interest. These are United States v. Creek Nation and Shoshone Tribe v. United States. In both cases there was a special jurisdictional act. In neither case was interest expressly allowed. In both this Court found Congressional confirmation of the previously unauthorized acts; in the Creek Nation case, by disposition of the wrongfully acquired lands and failure to seek cancellation of the disposals after 'full knowledge of the facts' and in the Shoshone Tribe Case by 'the statutes already summarized, recognizing the Arapahoes equally with the Shoshones as occupants of the land, accepting their deeds of cession, assigning to the tribes equally the privilege of new allotments, and devoting to the two equally the award of future benefits.'

"In the case now before us, however, there is neither the requisite Congressional authority before the taking nor any ratification or confirmation of the tort after the taking, which would justify a conclusion that the fleet was acquired by eminent domain."

The conclusion to be reached from the Goltra case is that unless an appropriation of Indian land is taken under authority of Congress (and this includes Congressional ratification of unauthorized takings) no interest is allowable; in other words, it is only where such lands are appropriated in the exercise of the power of eminent domain does just compensation require the increment measured by interest or some other standard to be added to the value from the time of taking. The same rule applies to the appropriation of non-Indian property. Seaboard Air Line R. Co. v. United States, 261 U.S. 299, 67 L. ed. 664, and cases therein cited. Nor are condemnation proceedings necessary,

for, if the appropriation is made in the exercise of the power of eminent domain, the right to the increment of interest under the Fifth Amendment attaches whether the taking was as a result of such proceedings or by act of the Government without instituting condemnation proceedings; although it seems, that when property is taken without condemnation proceedings there arises an implied promise, imposed by the Amendment, to pay the value of the property, which includes the increment from the time of the taking. Jacobs v. United States, 290 U.S. 13, 78 L. ed. 142; United States v. Creek Nation, 295 U.S. 103, 79 L. ed. 1331.

The reason underlying the rule is plain and logical. In ordinary claims against the Government for the value of property taken, that is, property not taken under Congressional authority, no interest can be recovered unless there is an express statute or a contract allowing it. United States v. Alcea, decided by the Supreme Court on April 9, 1951, 95 L. ed. ____. In such cases the Fifth Amendment does not apply. However, when property is taken by authority of an act of Congress it is in such cases that the Fifth Amendment applies, and requires that the property holder be paid "just compensation," which the Supreme Court has construed to require not only payment for the value of the property at the time taken by the Government but "such additional amount beyond the value of the property rights when taken by the Government as may be necessary to the award of just compensation, the increment to be measured either by interest on the

value or by such other standard as may be suitable in the light of all the circumstances." Shoshone case, supra. The word "interest" as here used is a convenient measure of increment to value and is not meant in the sense the term is ordinarily used. United States v. Klamath, 304 U.S. 119, 123, 82 L. ed. 1219. Moreover, since this increment to value is a part of just compensation, it attaches automatically to the award and does not depend upon Congressional authority. Shoshone case, supra, and cases cited therein; United States v. Klamath, supra.

The case, United States v. Alcea Band of Tillamooks, 95 L. ed. ____, decided by the Supreme Court on April 9, 1951, confirms the conclusions reached above. In that case a treaty had been made by which the Indians ceded to the Government a large area of land they held by original Indian title. In anticipation of the ratification of the treaty the Government took over lands of the Indians, ceded by the treaty, and although the treaty was never ratified, retained them without paying the Indians any compensation therefor. The Court of Claims in its conclusions of law on the question of the amount of recovery (115 C. Cls. 490) determined that the Indians were entitled to the value of the land on November 9, 1855, the date taken, and "an additional amount in each case as a part of just compensation measured" by interest at stated rates. In its opinion (p. 491) that Court said:

"A further hearing has been held and the case is now before us for determination of the amount of compensation to which the four plaintiff tribes are entitled under the Fifth Amendment, measured by the value of the lands taken on November 9, 1855, plus an additional amount measured by a reasonable rate of interest to make just compensation."

In reversing the Court of Claims as to the allowance of interest, the Supreme Court said this:

"It is the 'traditional rule' that interest on claims against the United States cannot be recovered in the absence of an express provision to the contrary in the relevant statute or contract. 28 U.S.C. (Supp. III), Sec. 2516(a). UNITED STATES V. THAYER-WEST POINT HOTEL CO., 329 U.S. 585, 588 (1947), and cases cited therein. This rule precludes an award of interest even though a statute should direct an award of 'just compensation' for a particular taking. UNITED STATES V. GOLTRA, 312 U.S. 203 (1941). The only exception arises when the taking entitles the claimant to just compensation under the Fifth Amendment. Only in such cases does the award of compensation include interest. SEABOARD AIRLINE R. CO. V. UNITED STATES, 261 U.S. 299 (1923); UNITED STATES V. THAYER-WEST POINT CO., SUPRA."

In none of the cases cited above was interest provided for in the jurisdictional acts. And, it might be mentioned, it seems that it is unimportant that a jurisdictional act is silent on the question of interest if the appropriation of property is within the meaning of the Fifth Amendment. Shoshone v. United States, 299 U.S. 476, 493-4, 81 L. ed. 360, 367. And in every case where interest was allowed as a part of just compensation under the Fifth Amendment, the appropriation of Indian property was made under authority of Congress.

Now let us consider the Assiniboine case, as determined by the Court of Claims, in the light of the above cases. That Court, as we

have stated above, definitely found and decided that the Fort Laramie lands were taken or appropriated by virtue of three Executive orders. At no place in the findings or the opinion of the Court is it shown or even intimated that Congress authorized the several appropriations of the Fort Laramie lands, or that it in any manner approved the Executive acts which resulted in depriving the Indians of the entire reserve. So the Court of Claims was correct in not allowing interest because, (1) no interest was provided for in the jurisdictional act, and (2) the taking was not under authority of Congress.

This brings us to the proposition advanced by plaintiff, that there has been a (1) change in the law since the decision by the Court of Claims, and (2) there have been intervening decisions creating an altered situation.

As to the first, plaintiff said in its brief and argued before us that under the Indian Claims Commission Act we may allow interest as a part of just compensation. This may be true, although we find it unnecessary to decide the question here, in a case where the appropriation of lands is in the exercise of the power of eminent domain, that is under Congressional authority, but, as we have shown above, there was no such appropriation, and since the Indian Claims Commission Act does not provide for interest we may not allow it in cases like that of the plaintiff here. So whatever change in the law there may have been, does not help plaintiff.

As to the altered situation brought about by intervening decisions,

it is of course true that the Creek, Shoshone and Klamath cases, supra, were decided after the decision in the Assiniboine case, and by them interest was allowed as part of just compensation; however, the Yankton Sioux Tribe case, supra, was decided by the Supreme Court in 1926 and allowed "just compensation as for a taking under the power of eminent domain," and in 1928, the Court of Claims, pursuant to the mandate of the Supreme Court, allowed the Indians the value of the property plus interest as for a taking under the power of eminent domain. These cases, as we have shown above, do not support the plaintiff's position, since they were based upon an appropriation of lands under Congressional authority. Moreover, the decisions in the Yankton Sioux case, supra, disprove the assumption of plaintiff that the Court of Claims would not have allowed interest had it been urged to do in the Assiniboine case. In view of the decisions in the Yankton Sioux case, which were decided long before the Assiniboine case, it must be presumed that the Court of Claims was of the opinion that because of the nature of the claim the Assiniboine were not entitled to interest.

There remains the question of offsets. The plaintiff contends that the question of offsets was not "finally determined" by the Court of Claims because it did not designate the precise expenditures of the Government allowed by the Court as offsets against the liability. As we understand the findings, the Court considered a number of items of expenditures, aggregating $5,137,668.71. Of this total, plaintiff disputed items aggregating $910,194.15, and the Court deducted this

amount from the total expenditures claimed by the Government, leaving a balance of $4,227,474.56, which was allowed by the Court and which more than offset the value of the land appropriated, and resulted in the dismissal of the petition. We think there was a sufficient determination of the offsets in that case, and the plaintiff is not entitled to retry that issue.

Plaintiffs rely upon the cases, Seminole Nation v. United States, 316 U.S. 286, 310, 86 L. ed. 1480, 1497, as authority for their contention, but those cases are not authority for their position here. The Supreme Court, in remanding the cases, did direct the Court of Claims to "designate the particular gratuitous expenditures to be offset against the Government's total liability," but the failure of the Court to do so originally was not made a ground for reversal.

From the foregoing, it is our conclusion that the prosecution of the claim is barred by the judgment of the Court of Claims in J-31 (77 C. Cls. 347) and that the petition must be dismissed.

Chief Commissioner Witt and Associate Commissioner Holt concur.

Dated this 27th day of April, 1951.