BEFORE THE INDIAN CLAIMS COMMISSION

THE BLACKFEET AND GROS VENTRE TRIBES OF INDIANS, residing upon the Blackfeet and Fort Belknap Reservations in the State of Montana,	)	
Petitioners,	)	
v.	)	Docket No. 279
THE UNITED STATES OF AMERICA,	)	
Defendant.	)	

Decided: December 17, 1952

Appearances:

Ernest L. Wilkinson, with whom were John W. Cragun, Glen A. Wilkinson and Francis M. Goodwin, Attorneys for Petitioners.

Wm. D. McFarlane and Ralph A. Barney, with whom was Mr. Assistant Attorney General William Amery Underhill, Attorneys for Defendant.

OPINION OF THE COMMISSION

Holt, Associate Commissioner, delivered the opinion of the Commission.

This case is before the Commission on the defendant's motion for summary judgement, based on the proposition that the claims contained in the petition herein are res judicata by reason of the prior

judgment of the Court of Claims, rendered on April 8, 1935 in case No. E-427, styled Blackfeet et al. v. The United States, reported in 81 C. Cls. 101.

There are four claims asserted in the petition in the present case.

(1) The first is a claim for damages (interest) in such an amount as will compensate petitioners for the alleged delay by defendant in making payment for a portion of their lands which the Court of Claims in the previous case, mentioned above, found had been taken by defendant.

(2) The second claim is based upon a revision of the agreement between petitioners and the defendant, approved by the act of Congress of May 1, 1888 (25 Stat. 113), wherein petitioners and other Indians ceded 17,500,00 acres of their reservation lands to the defendant for a total consideration of $4,300,000, or 24-1/2 cents an acre. It is alleged in the petition that the lands ceded had a far greater value and the defendant, in inducing petitioners to sell their lands for such a small price, acted fraudulently, paid an unconscionable consideration therefor, took advantage of the unilateral mistake of petitioners as to the value of the lands at the time of the cession, or acted not consistent with fair and honorable dealings. They seek an award under this claim in such an amount as will constitute just compensation for petitioners' proportionate interest in the 17,500,000 acres, alleged to be 9,502,500 acres, and the amount actually paid by defendant.

(3) The third claim is based on an agreement of September 26, 1895, ratified by the act of June 10, 1896 (25 Stat. 321, 353), under which the Blackfeet Tribe, a petitioner herein, ceded to defendant that portion of its reservation west of a line set forth in the act. It is alleged that by the act of May 11, 1910 (36 Stat. 354), the area was made and remains a part of the Glacier National Park, but through a mistake in the survey of the eastern line of the area, the defendant wrongfully included therein 45,000 acres of the Blackfeet land not ceded, for which the petitioner here seeks payment of just compensation.

(4) The fourth claim is for a general accounting by the defendant for all property of funds received or receivable and expended for and on behalf of petitioners, and all interest paid or due to be paid on any and all funds of petitioners.

The defendant by its motion for summary judgment asks a dismissal of the entire petition, asserting it is entitled to a judgment as a matter of law in that all the issues contained in said petition have been heretofore litigated and judicially determined, or could have been, the the Court of Claims in the prior case No. E-427 (81 C. Cls. 101), and, therefore, the same are res judicata by reason of the judgment in that case.

The record in the former case (No. E-427) relied on by the defendant as adjudicating the claims set forth in the present petition, shows that case was before the Court of Claims under the special jurisdictional act of March 13, 1924 (43 Stat. 21), which conferred jurisdiction upon the Court of Claims, with right of appeal to the Supreme

Court of the United States

> * * * to consider and determine all legal and equitable claims against the United States of the Blackfeet, Blood, Piegan, and Gros Ventre Nations or Tribes of Indians, * * * for lands or hunting rights claimed to be existing in all said nations or tribes of Indians by virtue of the treaty of October 17, 1855 (Eleventh Statutes at Large, page 657, and the following, * * *, and all claims arising directly therefrom, which lands and hunting rights are alleged to have been taken from the said Indians by the United States, and also any legal or equitable defenses, set-offs, or counter claims, including gratuition, which the United States may have against the said nations or tribes, and to enter judgment thereon, all claims and defenses to be considered without regard to lapse of time; and the final judgment and satisfaction thereof shall be in full settlement of all said claims.

According to the opinion of the Court of Claims, four claims were asserted in the petition filed in that case by the present petitioners under the foregoing jurisdictional act. The first was a claim for loss and damages resulting from the alleged failure of the defendant to protect game and hunting rights in certain territory defined in the 1855 treaty; and while the claim was denied, it is not an issue in the present case. The second was a claim for surface and royalty values of 13,361,200 acres of land assigned petitioners by Article 4 of the treaty of 1855, alleged to have been taken by the United States without the consent or agreement of petitioners without payment of compensation; and the third, a claim for the value of an additional 2,092,420 acres of land alleged to have been taken by the defendant by virtue of the Executive order of August 19, 1874, and for which they were not compensated. These two claims for the taking of petitioners' lands were considered together by the Court of Claims, and the court, in its Finding No. XIV, found that out of the territory assigned to pe-

titioners by the treaty of October 15, 1855, an area constituting 15,289,344 acres (shown on Royce's Map of Montana No. 1 as areas 399 and 574)had been taken by defendant under the provisions of the act of Congress of April 15, 1874 (18 Stat. 28), and the Executive order of August 19, 1874; that after deducting therefrom petitioners' proportionate share, amounting to 3,027,594.24 acres, of certain other lands which the court determined the defendant had added to their reservation as originally constituted under the 1855 treaty, the court found the petitioners were deprived of 12,261,749.76 acres, for which they had received no compensation, fixing its value at the time taken at $6,130,874,88. The fourth claim by the Blackfeet Tribe was based on the acts of defendant under the act of Congress of May 11, 1910 (36 Stat. 354), in taking from them and depriving them of certain timber rights and hunting and fishing rights in a tract of land constituting a part of Glacier National Park, which rights had been reserved by them in the agreement ratified by the act of June 10, 1896 (29 Stat. 321), which claim was denied by the court, but is considered in this opinion in connection with the third claim in the present action.

THE FIRST CLAIM

The scope of our inquiry as respects the first cause of action, set forth in paragraphs 7 through 10 of the petition in the instant case, has been much circumscribed by the pleadings and the admissions of the parties.

It is definitely alleged in paragraph 8 of the petition herein

that by the treaty of October 17, 1855 (11 Stat. 657), the Blackfeet Nation (which included the Blackfeet, Piegan, Blood, and Gros Ventre tribes of Indians) were given the exclusive control of a large reservation, described in the treaty; and that by certain acts of Congress, Executive orders, and agreements set forth in said paragraph 8, 12,261,749.76 acres of such reservation were taken from said Indians by defendant without compensation.

It is further alleged (par.7) that under the jurisdictional act of March 13, 1924 (43 Stat. 21), the Blackfeet Nation sued the defendant in the Court of Claims for the lands so taken, and on April 8, 1935, obtained a judgment against defendant for the value thereof, $6,130,874.88, which award was reduced to $622,465.57 by allowed offsets. (Def. Ex. No. 6, pp. 11-12). No allowance of interest was awarded for the period between the taking of the land and the date of the judgment, and the Indians now allege that their lands were taken under circumstances that entitled them to just compensation under the Fifth Amendment, which required the payment of interest at 5% per annum from the dates of the taking to the date of the judgment - amounting to a sum of approximately $18,000,000.00 As to the effect of the judgment, petitioners allege (par.7):

> * * * Petitioners are advised, believe, and therefore aver that the findings of fact and conclusions of law therein determined between the parties are conclusive and binding on both petitioners and defendant, and that defendant is estopped by the said judgment to deny any of the matters or facts therein put in issue and determined.

It is this judgment, rendered by the Court of Claims (E-427), which defendant pleads as res judicata in its motion for summary judgment,

contending that the Court of Claims had full power and authority, under the 1924 jurisdictional act under which the former case was tried, to award a judgment for just compensation for the lands "taken," including interest if it had been requested. As to this judgment, petitioners claim that under the jurisdictional act that court could not allow interest as a part of just compensation under the Fifth Amendment because under that act the court could only award a judgment for the value of the land taken but, as to the conclusiveness of the judgment, they state in their brief:

> It is admitted that (1) petitioners were parties to the prior Blackfeet case, supra; (2) the Court of Claims had jurisdiction to render the judgment that it handed down in the prior case; and (3) the judgment rendered was on the merits of the claims asserted in the prior case.

As we understand petitioners' position, it is that because the former special jurisdictional act of March 13, 1924, which is set out above, made no mention of the acts of Congress, Executive orders, and agreements by which the lands were taken, and permitted only a claim "arising directly" from the October 17, 1855 treaty, the Court of Claims had no jurisdiction to award interest as a part of just compensation under the Fifth Amendment; so, as they allege, they are now suing for such interest which can be allowed under the Indian Claims Commission Act.

An examination of the findings of fact, judgment and opinion (Def. Ex. No. VI, pp. 1-29) plainly shows that the Court of Claims considered the claim it adjudicated and for which an award was made, arose out of the 1855 treaty because it was the Indians' right of occupancy given by that treaty that was violated when their lands were

taken by the several acts of Congress, Executive orders and agreements pleaded in the petition herein. It is difficult to see how the mention of such acts of Congress, Executive orders, etc., in the jurisdictional act would have added anything to the powers it had and exercised, namely, the power to compensate the Indians for the lands unlawfully taken from them. There certainly was nothing in the jurisdictional act to prevent the allowance of interest as a part of just compensation, had the court considered the taking protected by the Fifth Amendment.

In support of their contention, petitioners cite these cases: Yankton Sioux v. United States, 272 U.S. 351; United States v. Creek Nation, 295 U.S. 103; United States v. Klamath & Modoc Tribes, 304 U. S. 119; Shoshone Tribe v. United States, 299 U. S. 476; United States v. Alcea Band, 341 U. S. 48; and Rogue River Tribe v. Unites States, 116 C. Cls. 454. An examination of the jurisdictional acts in these cases will show how inapposite they are. Take the Shoshone case, for instance. There the jurisdictional act authorized the consideration of claims "arising under or growing out of the treaty of July 3, 1868 * * *, or arising under or growing out of any subsequent treaty or agreement * * * or any subsequent Act of Congress affecting such tribes." Clearly the reference to subsequent treaties, agreements, or acts of Congress was to permit the assertion of any additional claims resulting therefrom, and did not add anything to the court's power to adjudicate claims arising out of the 1868 treaty. In fact, the award made in that case was based entirely on the violation of the 1868 treaty. The other cases are to the same effect.

It is a well-established principle of law that where private property is taken or appropriated for public use, without payment of compensation, the landowner is entitled to just compensation, which includes not only the value of the property when taken but such additional amount, usually measured by interest, as will produce the full equivalent of that value paid contemporaneously with the taking. This just compensation is provided by the Fifth Amendment of the Constitution and its ascertainment is a judicial function which cannot be taken away by statute. Monongahola Navigation Company v. United States, 148 U. S. 312, 37 L. ed. 463 (1893); Seaboard Air Line Railway Company, et al. v. United States, 261 U. S. 299, 304 (1923). This rule has been followed since 1926 by the Supreme Court in Indian cases where there has been a "taking" or appropriation of Indian lands by the United States, within the meaning of the Constitution, and interest has been allowed as a part of just compensation, although the jurisdictional act was silent as to the allowance of interest. Yankton Sioux v. United States, supra, (1926); United States v. Creek Nation, supra; Shoshone Tribe v. United States, supra; and United States v. Klamath, supra. It should be noted also that the Court of Claims was aware of this rule in 1923, for in the case of Cook & Company v. United States, 80 C. Cls. 708, the Court of Claims in dismissing a petition in which the plaintiff sought to recover interest as a part of just compensation on a former judgment rendered for the value of property taken and appropriated by the Government, said:

> As a matter of law, this court in ordinary just compensation cases prior to the decision of the Supreme Court in the Seaboard Air Line case was of the opinion

> that under Section 177 of the Judicial Code interest could not be included in the judgment. The Seaboard Air Line case, 261 U. S. 299, was decided by the Supreme Court March 5, 1923, and since then this court has included interest.

Since the jurisdictional act in the former Blackfeet case contained no restrictions concerning the allowance of interest, and required the Court of Claims to determine all legal and equitable claims against the United States, a reasonable interpretation of the act would be that the Court of Claims had the power and authority to grant petitioners whatever relief they were legally entitled to receive by reason of the loss of lands secured to them by the 1855 treaty. It is possible that both the court and petitioners may have believed that interest was not allowable as a part of just compensation under the facts in the case, although the language of the opinion shows that the court considered the taking of the land as having been done under Congressional authority, for at page 130 of the opinion the court said:

> The United States did not, subsequent to the conclusion of the treaties, restore the lands ceded to the public domain until 1874, and only then in pursuance of congressional authority so to do, * * *.

Nevertheless, the cause of action for the value of the land with the interest increment thereon was inseparable, and just because the Court of Claims did not include such interest in awarding compensation for the lands taken does not alter the fact that the court had authority and jurisdiction to grant such relief if the facts shown established that the taking of the land by the defendant was under such circumstances as would give rise to an implied promise by the Government to pay just compensation therefor.

In considering the effect of the former judgment of the Court of Claims as res judicata, we also have the question of whether the present claim for interest is upon the same cause of action asserted and adjudicated by that court. The well established rule is that if it is upon the same cause of action, the judgment upon the merits in the prior case is an absolute bar to the subsequent action between the same parties not only in respect of every matter which was actually offered and received to sustain the demand, but also as to every ground of recovery which might have been presented. But if the second suit be upon a different cause of action, the prior judgment operates as an estoppal only as to matters actually in issue or points controverted, upon a determination of which the judgment was rendered. Cromwell v. Sac County, 94 U. S. 351, 24 L. ed. 195. It is plain that the actionable wrong suffered by petitioners was the taking by the defendant of the lands secured to them by the 1855 treaty. This taking, in our opinion, gave rise to a single cause of action for all damages resulting from the loss of the lands, and therefore the first branch of the rule applies. It was this cause of action that was submitted to the Court of Claims, and the damages that court considered had been sustained by petitioners were fixed and determined and a final judgment entered. What the petitioners are now asking in the present petition is the allowance of additional damages which were not requested in the former action. Such a claim does not present a new or different cause of action, but only seeks additional relief upon the same cause of action adjudicated by the Court of Claims in the former case.