

award as gratuity expenditures made by defendant. These deductions will be considered in the order they appear in our findings of March 12, 1957.

In this opinion we shall use the terms "tribe" or "tribal" as applying to an Indian group entity, which shall include bands and identifiable groups when the text requires it.

Gratuity Provisions of the Indian Claims
Commission Act.

The items we set off against the award, which are here under attack, must, to be allowed as a gratuity deduction, come within the categories of "money or property given to or funds expended gratuitously for the benefit of the claimant," the petitioners herein, if our action in allowing them was proper.

The applicable part of the Act governing gratuity offsets reads —

* * the Commission may also inquire into and consider all money or property given to or funds expended gratuitously for the benefit of the claimant and if it finds that the nature of the claim and the entire course of dealings and accounts between the United States and the claimant in good conscience warrants such action, may set off all or part of such expenditures against any award made to the claimant * *." (25 U.S.C.A. 70a).

Following the above are provisions which expressly exclude as offsets certain gratuitous expenditures made by the Government. They, in general, are: Agency, removal and administrative expenses, expenditures for Indian education, health and emergency expenditures for general relief, and the like. These excluded outlays become important only if it is necessary to determine whether any of the claimed offsets come within any of the excepted categories.

Gratuitous expenditures under our act are those made to or for Indian groups without obligation on the part of the Government to make them; they are in essence gifts or donations. They are not, therefore, debts or obligations of the Indians which the defendant could collect in an independent suit. This is shown by the fact that allowable gratuities can only be used, as the statute provides, to "set off * * such expenditures against any award made to the claimant." This is made plain by the Court of Claims in *Alcea Band v. United States*, 115 C. Cls. 463, 516, in which it said:

* * * This contention of defendant completely ignores the fact that the amounts so allowed as offsets are pure gratuities which would not be recoverable by the United States except by virtue of Section 2 of the Indian Claims Commission Act of 1946 (60 Stat. 1049) which provides in part that "offsets * * * may be set off * * * against any award made to the claimant * * *." Emphasis supplied. Since these gratuities were not reimbursable items at the time they were made and since there was no obligation on the part of the Indians to repay such amounts, they cannot be held to have become due to the United States independent of the final determination of the sum due the Indians.

See also *Osage v. United States*, 66 C. Cls. 64, 82; *Blackfeet v. United States*, 81 C. Cls. 101, 136. So, it is amply clear that for reimbursement for such expenditures the Government is confined to the expedient of deducting them from awards against it and then only to the extent allowed by permissive law. Hence, a gratuity is not the subject of an offset merely because it is not excluded by our act, for although the gratuitous expenditure may have been for the benefit of the claimant it must also be tested by the "good conscience" provisions of the act and decided that the nature of the claim and the course of dealings between claimant and the United States warrants the offset. Obviously, then, in this case the first inquiry must be whether the claimed gratuities were for the benefit of the

tribe. If they were not, they cannot be set off and the "good conscience" provision cannot make them tribal benefits even though not excluded by the act.

There are tokens of Congressional intent respecting gratuities to be found in the history of the Indian Claims Commission Act. Without going into the discussions concerning gratuity offsets from awards made to Indian claimants in the many bills before Congress for the creation of an Indian Claims Commission, we shall confine our discussion to H. R. 4497, which was a House Committee substitute for H. R. 1198 and H. R. 1341. It was H. R. 4497 which, with amendments, became the present law. This bill was introduced in 1945 and limited gratuity deductions to claims arising from the fair and honorable dealings clause of the act. The Senate, however, changed that part of the bill to read (Cong. Rec., 79th Cong., 2d Sess., July 17, 1946, p. 9218):

Whenever the Commission shall determine that a claimant is entitled to relief it shall inquire into and consider all counter-claims and set-offs and demands that would be allowable in a suit brought in the Court of Claims under section 145 of the Judicial Code (36 Stat. 1136, 28 U.S.C. 250), as amended; and it may also give weight to all money or property given to or funds expended gratuitously for the benefit of the claimant.

And in its report the Senate Committee said (S. Report No. 1715, 79th Cong., 2d Sess., p. 6):

3. Offsets against claims.--The bill as it passed the House makes no provision for consideration by the Commission of expenditures or grants of money or property including gratuities made by the United States for the benefit of the claimant in cases based on strictly legal or equitable claims. Indian jurisdictional acts have required, in most instances, that the Court of Claims deduct items of this kind from any recovery against the United States found to be due by the Court. Specific standards, however, have varied from act to act. Rather than prejudge the question

of whether, in any particular case, gratuitous expenditures should be deducted from valid claims, the committee proposes that the Commission should be given the authority in each case to give such weight to these items as the circumstances of the case may justify. * * *

The differences between the House and Senate were composed by the conference committee (Conference Report, House 2693, July 27, 1946, p. 2) and the language now appearing in our act was adopted and passed by both Houses. In a statement accompanying the Conference Report by the House Managers, they said:

The conferees agreed that the Senate amendment gave too broad a discretion to the Commission and accordingly rewrote the section to require, first, that all deductions generally allowable in the Court of Claims against non-Indian claimants shall be allowed by the Commission in cases heard under this act, and, secondly, that gratuities of certain specified types, which are not allowable in the Court of Claims against non-Indian claimants, shall not be allowed by the Commission under this act against Indian claimants. The effect of the substitute language is to limit the discretionary authority of the Commission and to remove in large part the possible discrimination against Indian claimants in the matter of gratuities. * * *

* * *

The bill does permit the Commission, where it finds that the nature of the claim and the entire course of dealing between the claimant and the United States warrants such action, to set off other gratuitous expenditures recognized to be for the direct benefit of the Indians, such as expenditures made for the purchase of land.

In all committee reports it is significant that it is expenditures "for the benefit of the claimant" that are mentioned, and the House Managers speak of "expenditures made for the purchase of land" as an example of the type of allowable gratuity intended. At no place in any of the bills that we have examined were payments to individual members of a claimant suggested as an offset nor does the present act expressly make such outlays deductible from awards.

Two decisions of the Court of Claims are helpful in solving the problem confronting us as they indicate that it is only gratuities that are for tribal benefit that may be offset. Those cases are:

Osage v. United States, 66 C. Cls. 65, 82. The jurisdictional act permitted a "set-off or counterclaim, including gratuities, which the United States may have against said Osage Tribe * *." The defendant claimed offsets (8 and 9) for expenditures made in supporting children of the tribe in nonreservation schools. In disallowing such expenditures as offsets the court said:

* * * It may, however, be well to state that as to the counterclaims the special act directed consideration only to counterclaims against the Osage Tribe and not against individuals of the tribe. In this view of the matter, counterclaims Nos. 8 and 9, being for expenditures for education of individual Indians at schools, are not within the meaning of the special act, and could not be considered in any event as an offset against the Osage Indians as a tribe.

And the opinion closed with the statement: "The counterclaims are disallowed and dismissed."

Fort Berthold Indians v. United States, 71 C. Cls. 308, 340-341.

This is what the court said in that case:

The jurisdictional act charges the Indians with "all sums heretofore paid or expended for the benefit of said tribe or any band thereof." The Government under the foregoing provision of the jurisdictional act charges the Indians with \$290,827.25, alleged to be pro rata cost of educating individual children of the bands at various nonagency Indian schools. The amount charged is arrived at by ascertaining the per capita cost of maintaining the schools and charging the same to the Indian tribe as the number of children attending appears. The Government during the period maintained at its expense Indian schools at Carlisle, Pa., Chilocco, Okla., Lawrence, Kan., Pipestone, Minn., and Pierre, S. D. Congress appropriated from the Treasury in accord with a governmental policy to extend the privileges of education to Indian children for the

express intent of eventually changing the hereditary habits and customs of the tribes. The motive involved was more directly beneficial, from a governmental standpoint, to the Government than to the tribe. Of course, educational facilities were of prime necessity and imperative, and eventually resulted in benefit to the tribe, but the immediate beneficial results were individual and not tribal.

We do not believe that the jurisdictional act comprehends a set-off against the claim of the Indians for this item of expenditure in behalf of children of Indian tribes indiscriminately. To so hold might result in sustaining an obvious injustice, for the bands involved in this litigation would be held to contributing a sum toward the maintenance of the schools, while other tribes with much larger attendance would escape payment for benefits of equal value. The sums chargeable, we think, must be restricted to the usually recognized and customary distributions made to the Indians as tribes and bands, unless a contrary purpose is expressed in the act. Public institutions established for the Indian race were maintained from public funds as an adopted public policy, in the nature of gratuity.

In each of these cases the basis for the decision was that the jurisdictional act permitted offsets only for gratuitous expenditures for the tribe, although the phraseology of the jurisdictional acts are not alike. That in the Osage case -- "gratuities, which the United States may have against the Osage tribe" -- was construed as not including expenditures for individual members (children) of the tribe. The language of the jurisdictional act in the Fort Berthold case, supra -- "the United States shall be allowed credit for all sums heretofore paid or expended for the benefit of said tribe or any band thereof" (italics added) -- is perhaps a little more definitive than the Osage Act, but there is no essential difference. It will be noted, however, that in the Fort Berthold jurisdictional act appears the language, "for the benefit of said tribe." This terminology is similar to that appearing in the Indian Claims Commission Act -- "funds expended gratuitously for the benefit of the claimant."

We are of course aware of the decision of the Court of Claims in the case, *Blackfeet et al. v. United States*, 81 C. Cls. 101, wherein the court distinguished between the jurisdictional act there under consideration and that in the *Fort Berthold* case, *supra*, and in effect allowed as offsets expenses paid for children attending nonagency schools. But the decision was founded upon a jurisdictional act the court thought required the allowance of such expenditures as gratuities. But the *Blackfeet* decision does not affect the fundamental doctrine announced in the *Fort Berthold* case —

The sums chargeable gratuities, we think must be restricted to the usually recognized and customary distributions made to the Indians as tribes and bands, unless a contrary purpose is expressed in the act. (*italics added*).

We, of course, recognize the fact that those cases were decided under special jurisdictional acts, but the court adopted principles, quoted above, in its decisions which are applicable to our general act as respects gratuity offsets.

Considering further the text of the act, it is beyond dispute that the term "claimant" as used in the phrase "for the benefit of the claimant" can mean none other than the party prosecuting the claim, against the award for which a gratuity offset is asserted. Under the act, a member of a tribe cannot personally assert a tribal claim, for only a tribe may do that. Of course, under the act (Sec. 70i, 25 U.S.C.A.) a member of a tribe may under certain situations act for a tribe, but he does so in a representative capacity and even then the tribe is in reality the claimant. So it would appear quite plain that a gift by defendant to a member of a tribal claimant is not contemplated by the act as being for the benefit

of the claimant. But the act contains other indicia of Congressional purpose in the requirement that the allowance of a gratuity must rest upon "the nature of the claim and the entire course of dealings and accounts between the United States and the claimant, which in good conscience warrants" the allowance. The claimant here referred to is obviously the tribal claimant, and the "dealings and accounts" are likewise tribal, for the Government deals and keeps accounts only with Indian tribes, not with the members of such groups. Here then, are matters exclusively tribal in character which we must consider as a basis for the allowance of a gratuity offset associated with the phrase "for the benefit of the claimant," which leads to the conclusion that it is only gratuitous expenditures for a tribe, as distinguished from gifts to its members, that can be offset against an award in any case.

With the above conclusions in mind we proceed to reexamine the several groups of offsets we previously allowed.

Cash Payments to Indigent Indians - Finding No. 28..

During the fiscal years 1945 to 1956, the defendant disbursed to individual indigent members of the petitioner tribes the aggregate sum of \$396,844.96 in cash payments. There is no dispute about the total amount of such payments or that they were made from appropriations for the health, welfare, support or rehabilitation of needy Indians generally throughout the United States. These appropriation acts are cited in G.A.O. Report, Def. Ex. 27, and also Def. Ex. 30, and the disbursements are shown in G.A.O. Report, Def. Exs. 26 (pp. 3, 4, 6, 7) and 30. Nor is it questioned that the recipients of the money were members of the petitioner tribes and that the relief aid was paid directly to such individual Indians.

The petitioners' contention is that such disbursements, being for the welfare of individual Indians, were not for the benefit of the claimant tribes, as the act provides. In this connection, it may be said that the defendant was under no legal obligation to provide the money and there is nothing in any of the appropriation acts from which the disbursements were made creating a tribal obligation to repay the outlays. Nor is there any proof that the petitioner tribes requested the aid or assumed any obligation to reimburse the defendant therefor.

It is plain beyond question that the appropriations were made for the relief of individual Indians in need of assistance. In each of the acts for the fiscal years 1945 through 1956, provision was made for the relief of needy Indians. The language differs slightly in the various acts but whatever the words used their purpose was to assist all Indians needing help. And, as the proof shows, the distribution of the funds was not made on a tribal basis but only to individual Indians who proved their need of assistance before the local representative of the Bureau of Indian Affairs. Obviously, therefore, such disbursements were not for the benefit of the claimant, as the act requires, to make such gratuities offsets.

On the bases of the law and facts outlined above we believe we erred in allowing this setoff and the final order of March 12, 1957, will be modified accordingly.

Clearing, breaking and fencing land - Finding 30.

According to the G.A.O. Report (Def. Ex. 26, pp. 39, 41, 46, 48, 53, 56) there was disbursed under appropriations for the "Support of Apaches, Kiowa, Comanches and Wichitas" at the Kiowa Agency, Oklahoma, for barbed

wire and staples for fencing land, the following sums in the fiscal years: 1901, \$2068.41; 1902, \$2416.06; 1905-1908, \$393.05; a total sum of \$4877.52.

The burden of proving the propriety of these offsets rests upon the Government. *Menominee Tribe v. United States*, 118 C. Cls. 290, 326; *Quapaw v. United States*, 128 C. Cls. 45. The only proof offered is that shown in the G.A.O. Report referred to above, which is that the wire and staples were acquired and paid for by defendant and received at the Kiowa Agency, but what these items were used for is not shown. It was incumbent upon defendant to show that the wire and staples were for a tribal purpose and benefit, and not having done so we must reject the amount as an offset. The final award, therefore, will be increased by the sum of \$3560.59, the amount we previously deducted.

Seeds, fruit trees and fertilizers - Finding 31(a).

We allowed defendant 73% of \$1966.99, or \$1435.90, for vegetable seeds and paper bags for distributing it. The testimony of a Kiowa Indian (pp. 1448-1449 of Transcript) indicates that the seed distribution was for individual Indians and not for general tribal distribution. Then the G.A.O. Report (Def. Ex. 27, p. 145) shows an expenditure of the sum of \$1966.99 for "seeds, fruit trees and fertilizer for Indigent Indians" of the Kiowa Agency, and expenditures of that exact sum were made from the appropriation by the Act of June 28, 1941 (p. 186, G.A.O. Report, Def. Ex. 27) for the "Support and Rehabilitation of Needy Indians." In a second and later G.A.O. Report (Def. Ex. 26, p. 32), the same item appears but is broken down to cover: \$15.99 for paper bags for issuing seed to Indians, and \$1951.00 for vegetable seed and listed under "Agricultural Aid," totalling \$1966.99.

The second report was in error in listing the same item under "Agricultural Aid," for obviously the first report shows it was paid from money appropriated for needy Indians and in the absence of proof to the contrary we will presume the expenditure was in accordance with the appropriation and that it was not for a tribal benefit.

The deduction of the sum of \$1435.90 as an offset will be corrected and the final award increased by that amount.

Agricultural Implements and Equipment - Finding 32.

Under the category shown in the caption the defendant claimed offsets in the amount of \$7,011.42 for expenditures during the years 1901 to 1910 (Def. Ex. 26, pp. 15, 39-61). The evidence (Pet. Ex. 143.2, p. 261) shows that such implements and equipment were sold to the Indians of the Kiowa Agency after June 30, 1903, on credit; for this reason we allowed only the sum of \$1601.25 furnished for 1901, and \$652.29 for 1902 fiscal year which ended June 30, 1903. The evidence shows that the agency carried on rather extensive farm operations for agency purposes, and that schools operated under agency administration conducted farming operations. The defendant has offered no proof as to how or who used the implements but seemed to rely entirely upon the fact that expenditures had been made for such items. Such proof falls short of showing the outlays were for the benefit of the petitioners. We, accordingly, shall disallow the amount we formerly set off, \$1644.08, and the final award will be increased by that sum.

Provisions - Finding 39.

The defendant claimed an offset of \$85,329.47 for provisions purchased between the years 1901 and 1910 and \$1179.60 purchased in the years 1930-1936, 1940, a total of \$86,509.07 as shown on page 16, G.A.O. Report, Def.

Ex. 26. Of this amount we allowed the sum of \$27,553.11 for the year 1901 and \$21,310.32 for the year 1902, being disbursements for those two fiscal years aggregating \$48,863.43, for provisions shown in Disbursement Schedule, 10, pages 39 and 40, G.A.O. Report, Def. Ex. 26, of which total defendant was allowed 73%, or \$35,670.30, as an offset.

The G.A.O. Report (Def. Ex. 26, p. 40) shows disbursements for provisions for the fiscal year 1901 (Act of May 31, 1900, 31 Stat. 221, 234) totalling \$27,553.11. This act was for the "subsistence and civilization of the Apaches, Kiowas, Comanches, Wichitas" etc., for the "fiscal year ending June 30, 1901." While Indian witnesses testified in effect that in 1900 food was issued to members of the tribe but after their land was allotted by May 31, 1901, no rations were issued the petitioners herein. (Trans., pp. 1127-1145). The defendant, however, has shown no distribution of food or other supplies to the Indians in the 1901 fiscal year although the statute (25 U.S.C. 146) and the regulations of the Indian Office (Pet. Exs. 114, 115) required reports of supplies issued to Indians. We must assume the statute and regulations were complied with and would show tribal distribution to some extent at least, if such were made. But no such proof has been offered.

The difficulties we encounter would perhaps not be insurmountable were it not for the fact that some 30 Indian employees (Pet. Ex. 120-A) of the agency received rations as part of their pay, which would be an administrative expense, the amount of which is not shown. Furthermore, it is reasonably certain that of the total of 703,000 pounds of beef purchased in 1901, 29,090 pounds (Tr. 1342-1345) were used by agency schools, a purpose excluded as an offset by our act.

The disbursements for the fiscal year 1902 were made under the Act of March 3, 1901, 31 Stat. 1058, 1071, which was for the "subsistence and civilization" of the tribes last mentioned above. The disbursements out of this appropriation aggregated \$21,310.32 (p. 41, G.A.O. Report, Ex. 26). Here again it appears that 20 Indian employees (Pet. Ex. 120-B) received rations as part of their pay in fiscal year 1902, without showing the amount, and the undisputed testimony of Indians (Tr. 1327-1345) is to the effect that no rations were supplied after fiscal year 1901. And in addition to lack of showing distribution of supplies to the Indians of the Kiowa Agency, there is direct proof by the report of the Commissioner of Indian Affairs for fiscal year 1902 (Pet. Ex. 141) that only the Wichitas received the gratuity supplies for that year. This is supported by the report of the Kiowa Agent of September 1, 1902, (Pet. Ex. 143-1(5)), to the effect that the Kiowa, Comanche and Apache Indians did not need assistance.

Because of what is said above respecting the provision items totaling \$48,863.43 of which we allowed \$35,670.30, we now disallow the latter amount as an offset and will make a final adjustment therefor.

Feed and care of livestock - Finding 43.

We formerly confined our allowances under this caption to three items: \$359.00 for hay purchased in fiscal year 1901 and \$209.68 for hay and \$966.00 for corn purchased in fiscal year 1902, a total of \$1534.68, of which 73%, or \$1120.32 was allowed as an offset.

These three items are included in the sum of \$2133.58 shown at page 81 (Def. Ex. 26) for disbursements where the evidence of the purchase (invoice or voucher) shows only the words "Kiowa Agency." The items appear at pages

111 and 112 of the report, Def. Ex. 26. The report does not purport to show tribal use or benefit and for aught that appears therein, or by other evidence, the purchase could have been for agency or school use.

We believe the items should have been excluded as offsets and an adjustment in the sum allowed will be made accordingly for \$1120.32.

Transportation - Finding 47.

The transportation items we allowed in our former Finding No. 47 must fall within our disallowance of the items for which the transportation charges were made.

We, therefore, correct our original finding and disallow the sum of \$873.99 as an offset.

Provisions - \$3468.21 - Finding 39(a).

Counsel for petitioners call our attention to an item of \$3468.21 listed as provisions at page 81 of the C.A.C. Report, Def. Ex. 26, which we inadvertently omitted from our findings, although we intended to disallow it.

A breakdown of the amount shows the following disbursements: \$63.00 for slaughtering cattle in 1902; \$578.12 for food in 1909 and \$2820.16 for food in 1910. (See pp. 112, 120, 122 of Def. Ex. 26, Disbursement Schedules 19 and 20, respectively). As shown by the caption of each disbursement schedule, the disbursements therein listed were made from appropriations for the "Support of Apaches, Kiowas, Comanches and Wichitas." As explained by a representative of the General Accounting Office (Tr., p. 1288): "Section B is shipped to the agency and there is nothing to show it was given to the Indians." The two disbursement schedules mentioned above are in Section B of Part III of the G.A.C. Report and, as the captions

show the "invoice or voucher" indicates a purchase for the Kiowa Agency, as distinguished from purchases for "Indians" as appears in Section A of Part III of the report.

No attempt was made to show distribution of the supplies to the Indians of the petitioner tribes and, in so far as anything appears to the contrary, they may have been acquired for agency or school uses which are expressly excluded as offsets.

The Court of Claims decision in *Menominee v. United States*, 118 C. Cls. 290, 326, states the rule we follow in denying the offset in these words:

* * * The Government has the burden of proving the propriety of the offsets which it asserts. When, therefore, an item is asserted as an offset which so far as the evidence shows may or may not have been expended for one of the purposes for which offsets cannot be made, we must resolve the doubt against the offset.

The disallowance of this item does not change the award because it was not deducted previously. (See original Finding 50).

Just Compensation

As stated at the beginning of this opinion, the petitioners in their motion for rehearing demand that the award of \$2,067,166 be increased by adding thereto 5% per annum from June 6, 1900 — a sum of nearly \$6,000,000 — to give them just compensation for their lands acquired by the defendant under the Act of June 6, 1900, 31 Stat. 672.

No claim based upon the 5th Amendment is alleged in the petition, but in their proposed findings and brief an increment of five per cent per annum from June 6, 1900, is asserted, but not as "just compensation as under the Fifth Amendment as though this were a claim under Clause 1 of

Section 2 [of] the Indian Claims Commission Act." In a footnote tied to this quoted statement the petitioners concede that the case, Lone Wolf v. Hitchcock, 187 U. S. 553, bars the allowance of an increment measured by interest under said amendment.

In our former opinion on the merits (1 Inc. Cls. Com. 520-529) we held that defendant, acting under the plenary power of Congress, had power to take the lands as they did; we also denied interest on the award for the reason that interest on such claims was not authorized by the Indian Claims Commission Act or the Act of June 6, 1900, or any other statute.

Petitioners now, by their motion, reassert their claim for interest.

The rule governing the allowance of interest on claims against the Government is succinctly stated in *United States v. Alcea Band of Tillamooks*, 341 U. S. 48, 49:

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 USC (Supp III), § 2516(a). *United States v. Thayer-West Point Hotel Co.* 329 US 585, 588, 91 L ed 521, 525, 67 S Ct 398 (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 US 203, 85 L ed 776, 61 S. Ct 487 (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 Air Line R. Co. v. United States* 261 US 299, 67 L ed 664, 43 S Ct 354 (1923); *United States v. Thayer-West Point Co.* 329 US 585, 91 L ed 521, 67 S Ct 398, *supra*.

Thus, it will be seen, that in the absence of a statute or contract authorizing it, interest on unpaid claims against the Government cannot be recovered.

The only exception to the so-called traditional rule is when the taking comes under the protection of the Fifth Amendment, that is, where "private property be taken for public use, without just compensation." In such cases an increment to the award for the value of the property, usually measured by interest at a reasonable rate, may be allowed. *United States v. Creek Nation*, 295 U.S. 103, 111.

But the question as to whether the acquisition of the Indian lands by defendant under the Act of June 6, 1900, brought the defendant's action within the protection of the Fifth Amendment is foreclosed by the decision of the Supreme Court in the case, *Lone Wolf v. United States*, 187 U.S. 553, 47 L. Ed. 299. In that case the parties who are petitioners here were petitioners there and that suit involved the same lands and the same act that are the basis of the present claim. Concerning the issues the Supreme Court said:

The appellants base their right to relief on the proposition that by the effect of the article just quoted the confederated tribes of Kiowas, Comanches, and Apaches were vested with an interest in the lands held in common within the reservation, which interest could not be divested by Congress in any other mode than that specified in the said twelfth article, and that as a result of the said stipulation the interest of the Indians in the common lands fell within the protection of the 5th Amendment to the Constitution of the United States, and such interest—indirectly at least—came under the control of the judicial branch of the government. We are unable to yield our assent to this view.

While, as we have said above, the petitioners seem to recognize the effect of the *Lone Wolf* decision, *supra*, they see in the recent decision of the Court of Claims in the case of *Sioux Tribe v. United States*, Appeal No. 4-55, decided November 7, 1956, language which changes the rule plainly laid down in the *Lone Wolf* case and permits the allowance of interest.

The language of the Court of Claims the petitioners rely upon is to the effect that when Congress exercises its plenary power to dispose of Indian lands the Government becomes liable to the Indians for a just compensation for the lands so acquired; they place particular emphasis on the words "just compensation" appearing in the opinion. It is of course true that in several places in the opinion the phrase "just compensation" appears in discussing the Government's power to dispose of Indian lands and the Indians' right to compensation therefor, but the phrase was not used in the constitutional sense; it was used to indicate that in cases where Indian lands are disposed of by the Government the tribal owners are entitled to be paid the value thereof as of the time of disposal. Manifestly, the use of the phrase in that context is far different from its use in a constitutional sense, in fact, at no place in the opinion is the Fifth Amendment mentioned. As shown by the quotation from the Alcea Band of Tillamooks case, supra, even though a statute directs an award for "just compensation" for a particular taking, interest is not allowable in the absence of a statute or contract providing for it. We find nothing in the Sioux case inconsistent with the Alcea case.

Since, then, there was no acquisition of the petitioners' lands by the Act of June 6, 1900, that came within the protection of the Fifth Amendment and there is no relevant statute or contract providing for it, the claim for interest must be again denied.

In accordance with what has been said above, an amended final order will be entered herein awarding the petitioners the sum of \$2,067,166.00.

Concurring:

Edgar E. Witt
Chief Commissioner

Wm. M. Holt
Associate Commissioner

Louis J. O'Marr
Associate Commissioner