

BEFORE THE INDIAN CLAIMS COMMISSION

THE PEORIA TRIBE OF INDIANS	)	
OF OKLAHOMA, et al.,	)	
	)	
Petitioners,	)	
	)	
v.	)	Docket No. 65
	)	
THE UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	

Decided: November 13, 1968

Appearances:

Jack Joseph and Louis L. Rochmes, Attorneys for Petitioners.

Craig A. Decker, with whom was Mr. Assistant Attorney General Clyde O. Martz, Attorneys for Defendant.

OPINION OF THE COMMISSION

Yarborough, Commissioner, delivered the opinion of the Commission.

This case is now before the Commission on remand from the United States Supreme Court and the United States Court of Claims and upon petitioners' motion for entry of final judgment on remand. In the matter of the cause of action which has been entitled Claim II the Commission determined that the United States had breached its duty to the petitioners when it failed to sell the Peoria lands at public auction, as had been required by express provisions in the Treaty of May 30, 1854. Accordingly, the petitioners were found to be entitled to recover from the defendant the difference in the

prices paid for the lands sold and the fair market value which could have been obtained if each of the parcels had been sold at public auction. That sum was found to have been \$172,726.04, and an interlocutory order was entered, on March 17, 1965, in that amount, less any allowable gratuitous offsets, to be determined in later proceedings.

The defendant, in its amended answer filed on July 7, 1965, alleged that it was entitled to credit for gratuitous offsets in a total amount of \$1,075.38. In their reply thereto, filed on July 20, 1965, petitioners stated that the allowable gratuitous offsets should not exceed \$829.14, and that a final judgment in the amount of \$171,896.90 should be entered. Defendant responded that there was no objection to the entry of a judgment in that amount. Accordingly, on August 4, 1965, the Commission entered a final award in favor of the petitioners in the amount of \$171,896.90.

Petitioners appealed to the Court of Claims on the grounds that the award was insufficient. The Court of Claims affirmed the decision, and petitioners petitioned the United States Supreme Court for a writ of certiorari. The writ was granted, and the Court reversed the determinations below and remanded the case.

The Supreme Court concluded its opinion with the following direction:

Since the Indian Claims Commission and the Court of Claims erroneously held that the United States is not liable for its failure to invest the proceeds that would have been received had the United States not violated the treaty, they had no occasion to determine the measure of damages resulting from this liability. Accordingly, we remand this case to the Court of Claims for further remand to the Indian Claims Commission to determine that question.<sup>6</sup> (88 S. Ct. 1137, 1139)

And in footnote 6 to this direction the Court offered the further guidelines:

6. The respondent did not brief or argue the question of how to measure these damages. The petitioner suggested that these damages might be measured by looking to the rate of interest which the United States has paid on Indian funds over the same period, arguing for this approach by analogy to private trust law. The petitioner also points out that Congress at one time considered the United States' treaty obligations to "invest in safe and profitable stocks" satisfied by an annual appropriation for the Indians of an amount equivalent to an interest payment. See Report of the Commissioner of Indian Affairs, November 30, 1852, S. Doc. No. 1, 32d Cong., 2d Sess., 293, 300-301; Report of the Commissioner of Indian Affairs, November 26, 1853, *supra*, n.2.

Because the United States is not liable for interest on judgments in the absence of an express consent thereto, it cannot be liable for interest on the annual income payments not made. Therefore, if an interest rate measure is adopted by the Commission, it must be simple and not compound interest.

(88 S. Ct. 1139-1140)

The parties have submitted briefs on the remanded issue -- how to compute the damages resulting from the liability of the United States on account of its failure to invest the proceeds, namely \$172,726.04, that would have been received had the United States not violated the Treaty of May 30, 1854. The parties are in agreement that interest is the most practical and convenient method of computing the damages. They do not agree, however, as to the rate to be applied, the period involved in the computation, and the treatment of the \$829.14 credit to which defendant is entitled as a gratuitous offset.

Petitioners contend that a 5% per annum interest rate should be used to compute the damages. Petitioners rely, in part, on the provisions of a special statute dealing with the investment of proceeds received from the sale of lands. It provides:

## Investment of proceeds of land

The Secretary of the Interior shall invest in a manner which shall be in his judgment most safe, and beneficial for the fund, all moneys that may be received under treaties containing stipulations for the payment to the Indians, annually, of interest upon the proceeds of the lands ceded by them; and he shall make no investment of such moneys, or of any portion, at a lower rate of interest than 5 per centum per annum. R.S. §2096. (25 U.S.C.A. §158)

This provision was derived from the Act of January 9, 1837, C. 1, §4, 5 Stat. 135, which in turn adopted the provisions of the 4th section of the Act of June 14, 1836, C. 88, 5 Stat. 36, 47, which dealt with annual payments of interest on the proceeds of lands ceded by Indians. That provision required that the "..... Secretary [of War] shall make no investment of the said sum or any portion of it, at a lower rate of interest than 5 per centum per annum."

In support of their contention that a 5% interest rate would be a reasonable figure to be used in the computation in this case petitioners have also referred to Judge Davis' dissenting opinion in the Court of Claims decision. He wrote:

For some years before this 1854 treaty, the Federal Government construed similar agreements calling for investments in "safe and profitable stocks" yielding "interest" of not less than five per cent as being satisfied with an appropriation, from year to year, of a sum equal to five percent interest. See Annual Report of the Commissioner of Indian Affairs, Nov. 30, 1852, p. 10 (H. Doc. 1, pp. 300-01); Annual Report of the Commissioner of Indian Affairs, 1853, pp. 10-12 (H. Doc. 1, p. 263).<sup>3</sup> The only change in the 1854 treaty was the deletion of the specific reference to five per cent; the reason for this change seems

to have been the wish to assure the Indians the possibility of a greater amount obtainable from private investments, not to cut off the Indians right to the fair proceeds of their moneys which were retained by the Government and not handed over to them. Ibid. That right was preserved.

(177 Ct. Cls 762, 772)

Defendant argues that the statute, 25 U.S.C. §158, "applies only to funds actually in existence" and therefore has no application to the situation in this case. We cannot agree. We are now concerned in computing damages for the failure of the United States to invest funds which should have been received. And a statute which would have controlled such an investment, if it had been made, is material to our determination at this time. While the statute may not strictly speaking control our determination, we find it very persuasive indeed.

Defendant urges that we adopt the standard applied by the Court of Claims in Alcea Band of Tillamooks v. United States, 115 Ct. Cls. 463 (1950), rev'd on other grounds, 341 U.S. 48 (1951), in computing just compensation for a Fifth Amendment taking of lands. In that case the Court allowed 5% up to November 9, 1934, and 4% thereafter. The Court took judicial notice of the fact that in 1934 depressed economic conditions in the country had lowered interest rates on large investments. Accordingly, the 5% rate was applied from November 9, 1855 to November 9, 1934, with the 4% rate used from that date to the date of judgment, January 3, 1950. Of course, the Alcea case was decided over 18 years ago, and we may now take judicial notice of the ending of the depressed economic conditions and the return of higher interest rates. In fact we have for some period experienced interest rates above the 5% figure.

In any event, we do not feel constrained to follow the Alcea case in this instance. In that case the Court was assessing a reasonable standard of damages in the absence of any statutory standard; here a statute provides guidance. The application of a straight 5% per annum interest rate is reasonable and proper in this case as a means to compute the measure of damages.

We have determined that July 13, 1857, should be the starting date for computing interest. This is the date upon which the sales of the Peoria trust lands were completed (Finding of Fact No. 27). Petitioners have suggested that June 30, 1857, would be a proper "median date" to employ, while defendant would select a later date (in August or November, 1857) on a theory that the government should have a reasonable time for deposit of funds to draw interest. We cannot accept either position. This is not a case involving interest as such. There were no funds to be invested. Interest is in issue only in so far as it is being utilized as a means of measuring damages. The date upon which the sales in question were concluded is the logical and, we believe, a proper starting point for the computation of damages.

The final question to be resolved concerns the treatment of the \$829.14 credit to which defendant is entitled as a gratuitous offset. Defendant would deduct the offsets from the principal sum on various dates in 1885 and 1886 (when the gratuities were given the Peoria). Petitioners would deduct the offsets from the interest. We conclude that the offsets should be deducted from the "interest" and, therefore, the 5% per annum simple interest will run on the full principal sum for the entire period from July 13, 1857, to the date of payment of the principal sum.

The offsets to which defendant is entitled credit are for gratuities, and, as such, they would not be recoverable at all by the United States except by virtue of the provision of Section 2 of the Indian Claims Commission Act of 1946 (60 Stat. 1049) which provides that "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 any part of such expenditures against any award made to the claimant...." (emphasis added). There follows a listing of certain types of gratuities which shall not, in any event, be offset. The gratuities were not "legal offsets" when made. Nor are they legal offsets at this time. The Indians were not obligated to repay the amounts. They are only deductions which may be permitted after the determination of the award due the Indians. We have determined the amount of the award due the petitioners, as of the date of this judgment, and deducted the gratuitous offsets from that figure. As noted by the Supreme Court, the 5% interest will continue to run on the entire principal sum until that sum shall be paid.

Our computations are as follows:

November (11), 13, 1968  
July (7), 13, 1857

Interest period	4 months	111 years
(to date of award)		

\$ 172,726.04	Principal sum
<u>      X .05</u>	Interest

8,636.3020

\$8,636.30 Interest per year

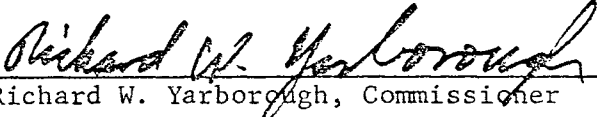
\$8,636.30 x 111-1/3 years = \$961,508.07

\$961,508.07 total interest to date of award  
 - 829.14 gratuitous offsets

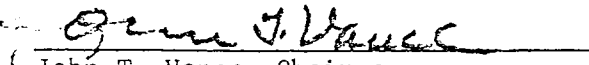
\$960,678.93

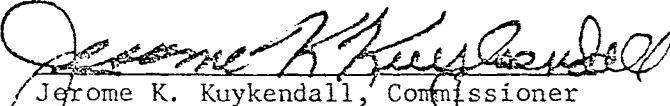
\$ 172,726.04 principal sum  
 + 960,678.93 net interest to date  
 \$1,133,404.97


Accordingly, our award is for the sum of \$1,133,404.97 together with an additional amount of damages, measured by simple interest at the rate of 5% per annum on the principal sum of \$172,726.04 from the date of this award, November 13, 1968, to the date of payment of said principal sum.

  
 Richard W. Yarborough, Commissioner

Concurring:

  
 John T. Vance, Chairman

  
 Jerome K. Kuykendall, Commissioner

  
 Margaret Pierce, Commissioner