> its property rights when taken by the Government, which is necessary to the award of just compensation. The parties agree that such additional amount should be measured by interest at a reasonable rate on the value of the property rights taken in 1878 to the date of payment (p. 47) * * * We think a rate of 5 per cent is reasonable between the parties here." (p. 48)

Aside from the interest due over a period dating as far back as 1869 or earlier, therefore, a reasonable valuation for the 7,226,623.18 acres appropriated, would be $9,033,278.75.

8th Proposition.

That the Offsets Claimed by Defendant Must in Part be Denied as Duplications; in Part Denied as Expenditures Which Should be Borne by the United States as a Cost of Its Own Public Policy, and in Part as Contrary to the Policies Established by Section 2 of the Act of August 12, 1935.

The burden of proof rests on the defendant to establish specifically all offsets claimed. It it submitted that very substantial portions of the offsets, in the seven different schedules asserted by defendant, pages 488 to 499 of Record, are not so established.

Section 2 of the Deficiency Appropriation Act of August 12, 1935, (49 Stat. 590) provides:

> "In all suits now pending in the Court of Claims by an Indian tribe or band which have not been tried or submitted, and in any suit hereafter filed in the Court of Claims by any such tribe or band, the Court of Claims is hereby directed to consider and to offset against any sum found due the said tribe or band all sums expended gratuitously by the United States for the benefit of the said tribe

> or band; * * * Provided, that expenditures made prior to the date of the law, treaty or agreement, or Executive order under which the claims arise shall not be offset against the claim or claims asserted * * * "

That Congress intended to confine set-offs and gratuities to *tribes* or *bands* is confirmed by Congressman Cochran, of Missouri, the author of the amendment in the Act of August 12, 1935, *supra,* who stated on the floor of the House of Representatives on February 10, 1938 (Cong. Record, February 10, 1938, page 2368):

> "In order to protect the Government against these (Indian) suits, there was added to the deficiency bill in 1935, following that testimony (of Asst. Attorney General Blair) a paragraph giving the Government the right to charge off as offsets gratuities and advances made to tribes of Indians, *not individual Indians.*"

That act establishes two definite limits to offsets in this case. First, any expenditures made prior to the law, treaty or agreement under which the claims in this cause are made; and, second, that such offsets must be confined to expenditures made for tribal purposes only. It is plainly intended to limit expenditures in time to the date of liability under treaty or agreement or law, and to limit expenditures to such as were for a common tribal or other public tribal purpose; that is, not to include expenditures for the benefit of individual Indians.

The defendant denies, in its brief, (Rec. 503), that any claim to land can be asserted under the Treaties of 1835 and 1846. The first agreement with these Indians which definitely promised a right to assert original territorial rights, as to the existence of which the

said treaties are evidence, was under date of June 4, 1891, and this was not ratified until March 2, 1895, (28 Stat. 764). Under the provisions of Sec. 2 of the Act of August 12, 1935, therefore, no offsets can possibly be allowed which ante-date March 2, 1895.

The defendant, however, asserts in its brief that the claims of the Wichitas are not, in fact, founded on any agreement or treaty, and hence could not be asserted until the date of the jurisdictional act, June 4, 1924. If this court should find that the treaties of 1835 and 1846 and the agreement of June 4, 1891, ratified March 2, 1895, are merely evidence of recognition of title to the territory claimed, and that the right to assert claims against the United States did not exist prior to the date of the jurisdictional act, June 4, 1924, then the entire groups of items of offsets asserted by defendant must fail, without in any way impairing the right of petitioners to recover.

The public policy embraced in said Sec. 2 of the said Act of August 12, 1935, requires the elimination of every item for the benefit of individual Indians, although such expenditures may be in line with a recognized public policy of the United States. For example, all expenditures for individual education of Indians, while a sound national policy, is not a tribal charge under this act. The benefit from such expenditures is individual primarily, then a national policy and only remotely of tribal advantage, as the governmental policy was to discourage the individuals to return to tribal relations and to incorporate them into the body politic.

The public policy described above is in accord with the opinion of this court in the *Osage* case, 66 Ct. Cl. 64, where the court, page 82, said:

> "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 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."

The Osage act (41 Stat. 1097) contained the same provision as to offsetting gratuities as the Wichita act, and now the Congress has endorsed the sound policy formerly laid down by this court, but does not confine it to educational expenditures.

If Congress had meant to include "individuals" in conjunction with tribes or bands, it would have so provided in the act.

In support of this statement counsel refer to the Sisseton-Wahpeton Bands of Sioux Indians' Act approved April 11, 1916 (39 Stat. 47), which provided:

> " * * * and in determining the amount to be entered herein the court shall deduct from any sums found due said Sisseton and Wahpeton Bands of Sioux Indians any and all *gratuities* paid said bands or *individual members* thereof * * * " (Italics supplied)

Counsel assert that the provision in the Wichita Act covering gratuities comes squarely within the principle of "expressio unius est exclusio alterius"; the mention of one is the exclusion of another.

Under this policy of exclusion of expenditures for the benefit of individuals, the items set out as offsets in this case for individual education of a small number of Indian children at Anadarko, Carlisle, Haskell and

Chilocco, amounting to $322,325.73 must be denied. (Rec. 494 to 499)

Under this policy likewise, the expenditures for presents to individual Indians claimed by defendant and amounting to the sum of $21,190.73, must be denied. (In Schedule I, Rec. 489)

Attention is also invited to apparent duplication of setoff items found on pages 488-489 with items found on page 490 of defendant's brief. In item I, page 488-489, defendant claims setoffs from direct benefit gratuities for petitioners of $2,780,401.54. In item II, page 490, defendant, for exactly the same period as the former Item I, sets out gratuities for petitioners jointly with other tribes of $2,898,978.65, and on page 492 prorates to petitioners $762,809.09 of this amount. In the classification of these expenditures in both instances the leading items are exact duplications. It would not seem to be possible that the expenditures under Item I, with no place of expenditure specified, for exactly the same period of time, would also call for the joint expenditures for exactly the same items in said Item II. These expenditures for identical items were apparently for similar items for other Indians under joint expenditures. The defendant should be required to make its claims to offsets in these particulars certain and specific and to eliminate any apparent duplications. In the absence of such showing the apparent duplicate offset of $762,809.09 should be denied.

Items on page 489, for the pay of teachers, blacksmith and mechanics, should be eliminated also, on the ground that the 13th article of the Treaty of 1846 (Rec. 225) provides for teachers and blacksmiths and by implication includes the erections of school buildings and the employment of mechanics. These items amount to $188,328.79.