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, Plaintiffs, v. THE UNITED STATES OF AMERICA, Defendant.	)	Docket No. 279-C
THE FORT BELKNAP INDIAN COMMUNITY, sometimes referred to as the Gros Ventre Tribe and Assiniboine Tribe of Fort Belknap Indians, Plaintiff, v. THE UNITED STATES OF AMERICA, Defendant.	)	Docket No. 250-A

Decided: October 18, 1973

Appearances:

Jerry C. Straus and Patricia L. Brown, Attorneys for Plaintiffs in Docket No. 279-C. Wilkinson, Cragun and Barker were on the briefs.

John M. Schiltz, Attorney for Plaintiff in Docket No. 250-A. Hutton, Schiltz & Sheehy were on the briefs.

Marvin E. Schneck and A. Donald Mileur, with whom was Mr. Assistant Attorney General Kent Frizzell, Attorneys for Defendant.

OPINION OF THE COMMISSION

Introductory Statement

Commissioner Vance delivered the opinion of the Commission.

Docket 279-C is the Blackfeet and Gros Ventre Tribes' claim against the Government for a general accounting of its management, handling and distribution of their money and other property. The Blood and Piegan Tribes, mentioned occasionally in this opinion, were historic constituents of the Blackfoot Nation, but no longer maintain separate identities from the Blackfeet. See Blackfeet and Gros Ventre Tribes v. United States, Docket 279-A, 18 Ind. Cl. Comm. 241, 242 (1967). Docket 250-A was filed by the Fort Belknap Indian Community, a modern organization consisting of the Gros Ventre and Assiniboine Indians inhabiting the Fort Belknap Reservation. The petition in the latter docket demands an accounting similar to that asked by the plaintiffs in Docket 279-C but only on behalf of the Assiniboines. Dockets 279-C and 250-A were consolidated for trial by order of this Commission dated December 5, 1969.

The Government has filed five volumes which, it contends, contain as complete an accounting as it is required to render. Both plaintiffs have filed extensive exceptions, and the defendant has answered them, thus creating issues for resolution by the Commission. See Sioux Tribe v. United States, Dockets 114, et al., 12 Ind. Cl. Comm. 541 (1963).

A trial was held on April 26, 27, and 28, 1971, at which the evidence was directed to the alleged overall inadequacy of the Government's accounting more than to particular disputed items. The trial was recessed indefinitely, rather than completed; and the record has been left open.

On August 24, 1971, the plaintiffs filed a joint document entitled "Motion for Order for Supplemental Accounting and for Partial Summary Judgment." The Assiniboine Tribe, in addition, filed what it termed a "Separate Motion for Partial Summary Judgment and for Pleading to Conform to the Proof." The defendant filed memoranda in opposition, and oral argument was had on November 16, 1971. These motions are what is now before the Commission for decision.

SUMMARY

I. In Part I of this opinion we consider the plaintiffs' request to order the defendant to bring its accounts down to date. We decide we have no jurisdiction over general accounting for any period after August 13, 1946; but where a course of wrongful action was going on at that cutoff date, we may order particular accounts carried forward in order to enable us to assess the full resultant damage.

II. In Part II we deal with the plaintiffs' request that we order the defendant to account for properties other than money. We hold that the defendant's duty to account is defined by the nature of its trust responsibility for the property involved. In general, the Government has no duty to make Indian trust assets other than money productive of income; but where it has undertaken to do so, it must account. It must also account where it has allowed third parties to use such assets, or has used them itself. It must account for its effort to salvage timber damaged by catastrophic fire. It must answer grave questions concerning its administration of Blackfeet oil and gas. The format of the necessary supplemental accounts is indicated.

III. In Part III we rule on plaintiffs' request for supplementation of the accounts previously filed by the Government.

1. We refuse to order supplementation of disbursement schedules. If a plaintiff questions a disbursement, the remedy is to except. The burden being on the defendant to make a proper accounting, it is up to the defendant to satisfy the Commission as to the legality of the challenged item. The plaintiff, however, has no right to demand that the defendant point out which of its scheduled disbursements was illegal.

2. We order the defendant to produce whatever vouchers, reports, or other proof may be available to show the delivery of goods and performance of services for which it has credited itself in its accounts. We deny the plaintiffs' request to have the defendant make up annualized statements of goods not delivered or delivered in bad condition.

3. We decline to require the defendant to make up annualized statements of misappropriations by its agents.

IV. In Part IV we deal with loss of interest from the defendant's holding funds outside the Treasury, and from reverse spending.

1. We grant the plaintiffs' motion to require the defendant to account for the length of time it kept plaintiffs' trust funds on hand prior to deposit and after withdrawal from interest bearing accounts in the U. S. Treasury.

2. We decline to require the defendant to supply further information showing whether interest-bearing funds or funds bearing a higher rate of interest were expended when non-interest bearing funds or funds bearing a lower rate of interest were equally available.

V. In Part V we order the defendant to present a new accounting of its receipts for either plaintiff from every source other than congressional appropriation. In view of an admitted gross error in allocating a tribal receipt to a Government non-trust account, we order the defendant to account for all its miscellaneous receipts at the Blackfeet and Fort Belknap agencies, including receipts of public and individual Indian funds, so that correctness of the allocations between tribal, public, and IIM accounts can be verified.

VI. In Part VI we refuse to compel the defendant to list the goods and services it provided to the plaintiffs which were paid for by labor of plaintiffs' members, pointing out that this information has not been sought by discovery procedures.

VII. In Part VII we deny the plaintiffs' motion to compel specific accounting for irrigation projects.

VIII. In Part VIII, we order the defendant to produce extant accounts of the revolving loan funds and business enterprises it operated using money or other property of either plaintiff.

IX. In Part IX we deny on the basis of the statute of limitations Fort Belknap's motion to amend its petition to demand an accounting of defendant's expenditures under the Treaty of Fort Laramie.

X. In Part X we adjudicate item by item plaintiffs' motion for summary judgment, disallowing numerous entries on the defendant's disbursement schedules. We hold that on motion for summary judgment, the

characterizations of defendant's disbursements in its accounting reports must be taken at face value. If they are not proper on their face and no evidence in the record, including affidavits, supports their propriety, we must disallow. We cannot reserve judgment on the possibility that the defendant may come up at the trial with some heretofore undisclosed evidence in its favor.

XI. In Part XI we follow Te-Moak Bands of Western Shoshone Indians of Nevada v. United States, Docket 326-A, and determine that the United States is liable in damages for its failure to invest the fund known as Indian Moneys, Proceeds of Labor during the period from 1883 to 1930.

A. We award damages, measured by 5 percent annual interest until 1895 and 4 percent thereafter, for the Government's failure to invest the fund created by the agreement ratified May 1, 1888.

B, C. We hold that the Government is liable for 5 percent interest until 1929 and one percent interest thereafter upon the funds created under the Blackfeet Allotment Act of 1907 and the Fort Belknap Allotment Act of 1921.

XII. In the twelfth and final part of this opinion we comment on the defendant's long delay in complying with Commission orders in accounting cases and propose measures to move our remaining accounting cases to early and just determination.

I.

ACCOUNTING FOR PERIOD FROM 1946 TO PRESENT

The plaintiffs move that we issue an order requiring the defendant to bring its accounting, which now stops at June 30, 1951, down to date. The Government contends we have no jurisdiction over accounting matters which accrued since August 13, 1946--the date of enactment of the Indian Claims Commission Act (25 U.S.C. §§70-70w (1970)). We must, the Government argues, even disregard the portion of its previously filed accounting reports which extend past 1946 to June 30, 1951.

This question appeared to be settled, in favor of our jurisdiction, by the Court of Claims in United States v. Southern Ute Tribe, 191 Ct. Cl. 1, 31 (1970) (aff'g, Docket 328, 17 Ind. Cl. Comm. 42 (1966)). That case, however, was reversed on other grounds, 402 U.S. 159 (1971). The defendant argues that the reversal makes the Court of Claims decision a "complete nullity."

The defendant now urges us to certify the question of our jurisdiction to order post-1946 accounting to the Court of Claims, stating that it intends to apply to the Supreme Court for certiorari if the decision goes against it.

We have decided not to certify the question. The reason for our decision is that we believe certifying would be more likely to lead to delay than to expedition of the adjudication of our pending accounting claims:

First, we have no assurance that the Supreme Court will grant

certiorari (assuming that the Court of Claims will reaffirm its ruling in Southern Ute). We believe the Supreme Court would be considerably more likely to take up the question in the context of an actual decided case than in hypothetical form.

Second, bringing Indian accounts down to date probably constitutes only a minor part of the additional accounting work that must be done before this Commission can dispose of its backlog of accounting matters. In previous cases, discussed below, we have ordered the Government to supplement several aspects of its reports for the period before 1946. The present plaintiffs, and plaintiffs in other pending cases, are moving us to order similar supplementation. Involving, as it does, a search of hundred-year-old documents, supplementing existing accounts may involve substantially more work than bringing accounts down to date. This work should not be postponed while the courts deliberate over the period after 1946.

With the knowledge that the Government wishes to make this a test case for our jurisdiction to order post-1946 accounting, we have, however carefully reconsidered the question.

The first instance in which this Commission ordered the defendant to carry an account forward past 1951 was Southern Ute Tribe v. United States, Docket No. 328, 17 Ind. Cl. Comm. 42 (1966).

The Court of Claims affirmed the Commission, but did not adopt our reasoning. The Court stated, at 191 Ct. Cl. 31:

> Defendant's third procedural contention is that the Commission's order for an up-to-date accounting report is beyond its jurisdiction. 25 U.S.C. 70a (1964) on its face bars the Commission from considering any claims accruing after August 13, 1946. In a previous interpretation of this section, however, we have said that where the Government's initial wrongdoing giving rise to a claim accruing before August 13, 1946, but continued past this time, the Indian Claims Commission was free to determine the extent of its jurisdiction in framing an award. Gila River Pima-Maricopa Indians, et al. v. United States, 135 Ct. Cl. 180, 186 (1956), 157 Ct. Cl. 941 (1962). We expressed agreement in that case with the established principle that "a court once having obtained jurisdiction of the persons and subject matter of a suit, retains such jurisdiction for all purposes including the awarding of all damages accruing up to the date of judgment." We hereby reaffirm our adherence to this principle and hold the Commission correctly ordered an up-to-date accounting for continuing Government wrongdoings which predated and postdated the statutory time bar.

While the Court of Claims vacated its opinion in Southern Ute following remand by the Supreme Court (see 195 Ct. Cl. 540 (1971)), its Gila River decision still stands and supports the conclusions stated in the above quotation.

In two cases decided shortly after the Court of Claims' Southern Ute decision we ordered accounts carried down to date without requiring the plaintiffs to specify in advance the wrongful handling of their funds which they claimed would justify the extension of the accounting period. Te-Moak Bands of Western Shoshone Indians v. United States, Docket 326-A, 23 Ind. Cl. Comm. 70 (1970); Mescalero Apache Tribe v. United States, Docket 22-G, 23 Ind. Cl. Comm. 181 (1970). In Papago Tribe v. United

States, Docket 102, 26 Ind. Cl. Comm. 365 (1971), however, we denied a motion for up-to-date accounting, stating as follows (at page 368):

> Particular cases may require a different breadth of accounting to provide evidence on the claims within the Commission's jurisdiction. In this case, we deem it appropriate that there should be some further proceedings for definition of these wrongdoings regarded as continuing before a motion as broad as the plaintiff's is granted.

Requiring the plaintiff to prove in advance some maladministration of trust extending into the period for which the accounting is sought is not the ordinary rule in equity. A beneficiary suing his trustee for an accounting is not required even to allege the latter's wrongdoing, only that a trust relationship exists and an account has not recently been rendered. G. Bogert, The Law of Trusts and Trustees §§963, 970 (2d ed. 1962); see Dillman v. Hastings, 144 U.S. 136 (1892); Garrett v. First Nat. Bank & T. Co., 153 F. 2d 289 (5th Cir. 1946); Jersawitz v. Kaltenbach, 256 App. Div. 580, 10 N.Y.S. 2d 689, aff'd without opinion, 281 N.Y. 773, 24 N. E. 2d 23 (1939). As Bogert states (§963 at 21):

> The suit is one to obtain information concerning the course of administration, no matter what the current status of the trust should be.

The same rule has been followed by the Court of Claims. Menominee Tribe v. United States, 102 Ct. Cl. 555, 564 (1945).

This Commission clearly has the powers of a court of equity to entertain without prior proof of wrongdoing claims for general accounting covering the period ending August 13, 1946. After that date, we believe,

our jurisdiction to order an accounting is analogous to that of the Court of Claims, not independent but only ancillary to our general, pre-1946 jurisdiction. See Klamath and Modoc Tribes v. United States, 174 Ct. Cl. 483, 487-91 (1966). Our jurisdiction to order the defendant to account for a later period depends upon finding a course of wrongful action which was still going on at the cutoff date. Kiowa, Comanche and Apache Tribes v. United States, Docket 259-A, 24 Ind. Cl. Comm. 393 (1971). Pinpointing such continuing wrongdoing has been made easier for plaintiffs by the Government's practice of carrying its accounting reports up to 1951. An obvious example in which we would have jurisdiction would be the defendant's continuing failure to pay interest on a properly interest-bearing fund which remained in its hands after 1946. An example of a situation in which we would not have jurisdiction would be the case of an embezzlement from the same fund in 1972, committed by an employee hired after 1946. Between these two extremes we prefer not to predict our rulings until confronted by actual cases.

Here the plaintiffs are asking us to order the defendant to render:

> A. An accounting covering the period from June 30, 1951 to date, providing sufficient detail as to defendant's stewardship of petitioners' properties, including moneys and properties other than money, so that the petitioners may know the current status of their trust properties and funds and may readily ascertain whether their properties were properly managed by defendant from the period June 30, 1951, to date. Further, defendant should be required to supplement its accounting at reasonable intervals to the date of judgment.

What is requested is simply an extension of the defendant's general accounting. The above-quoted part of the pending motion will be denied,

without prejudice, however, to the plaintiffs' rights to present further motions following the conference ordered in Part XI of this opinion seeking to make the defendant account for specified funds. Such motions must be supported by reference to the record showing the specific wrongdoing complained of and why it is thought to have continued after August 13, 1946.

II.

ACCOUNTING FOR PROPERTY OTHER THAN MONEY

The defendant's accounting covers money only. Plaintiffs request that the Commission order the defendant to account for their properties other than money, including, but not limited to grazing lands, timber resources, oil and gas, and riprap. Defendant responds that "traditionally and by custom and usage the accounting claims before the Commission consisted of accounting of moneys received and held in various funds and the disbursements thereof". As authority for this proposition defendant cites one case, Miami Tribe v. United States, Docket 76, 9 Ind. Cl. Comm. 580 (1961).

Bogert, supra, §970, states the rule in equity, as follows:

> . . . [T]he account should contain a complete statement of trust capital and income received and expended, present investments and other trust property held. . . For example, a trustee to sell real property and distribute the proceeds should show in his account the dates of the sale of the several properties, to whom sold, the prices received for each and when, payments which he has made, with the dates, amounts, purposes, and names of the payees, and he should present vouchers or other evidence to back his assertions as to payments.

We find nothing in Miami or elsewhere to the effect that the Government is not accountable for trust assets other than money.

But the defendant also urges that plaintiffs have failed to establish the existence of the Government's fiduciary relationship to any of their

property other than money.

This defense is not well taken. The fiduciary obligations of the United States toward restricted Indian reservation land, including minerals and timber, are established by law and require no proof. Navajo Tribe v. United States, 176 Ct. Cl. 502, 364 F.2d 320 (1966); Seneca Nation v. United States, 173 Ct. Cl. 917 (1965) (aff'g in part, rev'g in part, Dockets 342-A, et al., 12 Ind. Cl. Comm. 755 (1963)); Oneida Tribe v. United States, 165 Ct. Cl. 487, cert. denied, 379 U.S. 946 (1964) (aff'g, Docket 159, 12 Ind. Cl. Comm. 1 (1962)).

Plaintiffs have alleged, and defendant has admitted in its accounting reports, that it constructed a number of buildings and bought a substantial quantity of movable property with tribal trust funds. Prima facie such property is part of the trust corpus, and defendant is accountable for it.

The scope of the accounting must be defined by the nature of the trust. Rules for the management of commercial real estate by private trustees have little application here. The primary purpose of establishing Indian reservations was to provide a home for the Indians, where, it was hoped, they might eventually make their living by their own efforts. Consequently the trust status of reservation land never wholly ousted the Indians from its management, for which, in more recent years, they have been encouraged to assume increasing responsibility. Indian reservations are not like apartment houses which a trustee is expected to keep filled with paying tenants at all times. No general law requires the Government to administer Indian land for profit at all.

Leasing of Indian land, except by treaty, was forbidden from 1796 until 1891. See Sec. 12, Act of May 19, 1796, c. 30, 1 Stat. 469, 472;

Sec. 3, Act of February 28, 1891, c. 383, 26 Stat. 795, 25 U.S.C. §397. While a number of later statutes authorize leasing for various purposes, most of them vest power to make the leases in the tribe rather than the Government. Tribal leasing is usually subject to approval by the Secretary of the Interior, but the Indian Reorganization Act (25 U.S.C. §477) dispenses with that requirement under certain circumstances. See F. Cohen, Handbook of Federal Indian Law, 325-29 (1941).

Consequently, the defendant is under no obligation to explain why it did not lease out parts of plaintiffs' lands, much less to account for the Blackfeet and Fort Belknap Reservations acre by acre. The duty to account arises only where the Government has undertaken to permit a third party to use reservation land, to extract reservation minerals, or to cut or haul away reservation timber, or where the Government has done one or more of these things itself. Cf. Seneca Nation v. United States, 173 Ct. Cl. 912 (1965), aff'g, Docket 342-H, 12 Ind. Cl. Comm. 552 (1963).

Thus, while the Government has never been under an obligation to lease out Blackfeet or Fort Belknap land, where it did so, or where it approved a lease made by one or more of the tribes, or where it took upon itself to administer a tribal lease which did not require its approval--for example, by collecting the rents--it must account. Similarly it must account where it used reservation land or resources for its own non-trust purposes, for example, where it took rock or gravel from a reservation for use in constructing an off-reservation dam.

The need for property accounting is particularly acute in the matter of oil and gas. The only reference to revenues from this source which we discover in the defendant's accounting occurs at page 11 of the report

dated July 16, 1969. It shows deposits to the Blackfeet Indian Moneys, Proceeds of Labor (IMPL) fund identified only as "Oil and gas leases", "Oil and gas royalties," and "Oil royalties," in the aggregate sum of $857,442.20. The entries are not annualized, and there is no way to determine even what portions were collected during the period before August 13, 1946, for which the Government concedes it must account, and what portions after that date, during the period which the Government contends to lie beyond our jurisdiction.

Plaintiff's exhibit 118, consisting of photocopies of reports of mining operations on the Blackfeet Indian Reservation in the files of the United States Geological Survey, show the following oil and gas revenues from tribal lands:

Fiscal Year	Bonuses	Rentals, Advance and Compensatory Royalties	Production Royalties
1934	$ 5,004.56		[3,506 bbl.]
1937	732.07	$ 9,150.90	$ 49,193.04
1938			36,505.81
1939		1,147.67	43,223.87
1940		1,092.40	53,345.78
1943	33,903.60	2,033.16	234,976.42
1944	3,933.42	27,044.45	323,888.98
1945	30,889.69	9,531.59	336,239.15
1946	18,159.98	1,849.95	301,272.29
1947	6,300.75	11,288.75	354,226.60
1948	60.00		421,669.15
1949	14,985.39	8,994.26	447,944.52
1950		8,994.26	387,159.74
1951	8,400.00	6,684.52	333,653.33
TOTALS	$122,369.46	$87,811.91	$3,323,298.68

Value of the royalty oil is not stated for 1934. The reports for fiscal years 1935 and 1936 do not segregate revenues from tribal and allotted lands. The reports for 1941 and 1942 are missing.

Plaintiffs' exhibit 118 raises other questions of defendant's management of Blackfeet resources besides the discrepancy with the accounting. For example, natural gas production and the corresponding royalties are shown as follows:

Fiscal Year	Production (cu. ft.)	Royalty
1944	12,133,000	$ 78.84
1945	10,000,000	0
1946	6,000,000	37.50
1947	12,526,000	78.29
1948	11,025,000	68.92
1949	268,000	3.93
1950	416,200	2,617.85
1951	1,115,476	6,955.15
TOTALS	53,483,676 cu. ft.	$9,837.48

To say the least, plaintiffs' exhibit 118 raises extremely serious questions about the adequacy of defendant's accounting.

Rights-of-way differ markedly from leases of Indian land. Almost always they have been granted by the Government rather than the tribe, and prior to 1951, frequently without tribal consent. They may be of unlimited duration and immense extent. See "Disposal of Rights in Indian Tribal Lands Without Tribal Consent," Third Report by the Committee on Government Operations, H. R. Rep. No. 91-78, 91st Cong., 1st Sess. 7, (1969). The defendant clearly has a duty to account to the plaintiffs

for all rights-of-way granted over their respective lands.

The defendant's trust obligation toward tribal timber is particularly strict. The Government is not only required to carefully supervise such logging contracts as it makes, but, when timber is killed by catastrophe, to take affirmative measures to salvage it. Menominee Tribe v. United States, 101 Ct. Cl. 22 (1944). Plaintiffs' exhibit 127, a letter from the Superintendent of the Fort Belknap Agency to the Commissioner of Indian Affairs dated August 2, 1936, states that "practically our entire timber reserve" burned over in the preceding five days, but estimates that about five million board feet of the damaged timber can be salvaged if early steps are taken.

The Government will be ordered (1) to account up to August 13, 1946, for all sales and other dispositions of timber conducted under its supervision on the Blackfeet and Fort Belknap Indian Reservations, and (2) to account for its efforts to salvage the timber damaged in the 1936 catastrophic fire.

As to buildings erected by the Government from Indian trust funds, we believe the defendant has the duty of identifying them, disclosing the year they were built, stating what each was used for with sufficient particularity to enable the Commission to determine whether it was a proper use of trust property, and stating when and how they were destroyed or otherwise retired from service, with the value of any salvage and the account to which it was deposited. To insure proper credit, the Government should state the amounts expended for maintenance and repair of such buildings separately from the amounts expended on buildings originally constructed from Federal funds. In case of buildings turned over to the tribe, we believe the Government's accountability, absent special

circumstances, ceases at the date of turn-over.

Except where the rule de minimis applies, we hold that the defendant has the duty to account for all licenses, permits, and informal and even extralegal arrangements made by its officers and agents with third parties for use of plaintiffs' lands or exploitation of their natural resources.

The property accounting we are herewith ordering for each plaintiff should be in the form of several separate lists or schedules. One schedule should be devoted to grazing leases and permits, one or more to other non-mineral leases, one to oil and gas leases, one or more to other mineral or material leases and permits, one or more to rights-of-way, at least two to timber matters, one to buildings constructed with tribal funds, and one or more to all the other miscellaneous transactions involving plaintiffs' lands in which the defendant has participated and not previously accounted.

Each schedule should list in chronological order the leases, rights-of-way, or other arrangements covered. The identification number of the contract, if any, should be shown, as well as the date, the lessee, grantee, etc., a description of the land involved, the stipulated consideration (bonus, rental, royalty, fee per AUM, etc.) with due dates, and, if defendant does not supply a copy, a reference to where the original of the contract is available for plaintiffs' inspection and copying.

Sufficient data should be given to enable the plaintiffs and the Commission to determine whether the defendant performed its duty of enforcing the contract terms. For example, for oil and gas leases the annual amount and value of the oil, gas, and casinghead gasoline production should be stated, as well as the defendant's annual bonus, rental,

and royalty collections. For grazing leases calling for a fee per animal unit month, the number of animals and the months they were on tribal land should be given; for timber sales, the number of board feet should be shown for each species.

For each listed contract or arrangement the defendant should provide an account showing the dates and amounts for all payments it collected thereunder and the fund to which they were credited. If the collections were handled by tribal personnel not under Government supervision, the defendant's account should so state.

As to movable property purchased by the Government with tribal trust funds, except perhaps as to particular items of great value and long useful life, we believe an acceptable account need consist of no more than the year of acquisition, the cost, and the use to which the property was put, stated with enough detail to distinguish whether that use was governmental, tribal, or individual. The accounting reports already on file appear to contain such information to the extent that the Government is willing and able to supply it. The rule stated by Bogert, _supra_, §962, will serve to fill any gaps in the reports:

> As to a trustee who fails to keep proper records of his trust it is usually stated that "all presumptions are against him" on his accounting, or that "all doubts on the accounting are resolved against him."

See also _First National Bank & T. Co._ v. _Village of Skokie_, 190 F.2d 791, 796 (7 Cir. 1951), _cert. denied_, 342 U.S. 909 (1952); _Fricke_ v. _Weber_, 145 F.2d 737, 729 (6 Cir. 1944). The same rule applies

to the Government in Indian accounting cases. Sioux Tribe of Indians v. United States, 105 Ct. Cl. 725, 802 (1946); Menominee Tribe v. United States, 118 Ct. Cl. 290, 326-327 (1951); Seminole Nation v. United States, 102 Ct. Cl. 565, 631 (1945); cf. Arthur F. Nordstrom v. United States, 177 Ct. Cl. 818, 824 (1966); United States v. Shoshone Tribe, 304 U.S. 111, 117 (1938).

The plaintiffs' motion to require further accounting will be granted as to real property and denied as to personal property. The denial is without prejudice to further motions to require accounting for specific chattels of unusually great value and long useful life that the record may show to have been acquired by the Government with tribal funds.

What we have just stated about personal property has no application to "Enterprises," which are discussed in Part VIII of this opinion.

III.

SUPPLEMENTATION OF EXISTING ACCOUNTS

1. Disbursements. The plaintiffs move for an order requiring the defendant to restate its accounts to provide:

> (1) an annualized statement classifying disbursements and designating their purpose, such as agency, individual Indian, tribal and indicating disbursements for which the purpose cannot be determined;

The defendant opposes the motion. Its position was most clearly stated in the oral argument of November 16, 1971, as follows (Transcript 50-51):

> . . . I think the scheme of the case should be that we made our report. It there's something wrong, they should bring it to our attention. If,

> as I say, it's correct we will admit it. If it's wrong we'll defend it to the best of our ability, and the Commission can make a decision on it.

Insofar as disbursements are concerned, we believe the Government's position is well taken. Its reports contain annual disbursement schedules, and state the purposes of the expenditure, at least in general terms, for most items. The disbursement accounts are not so detailed nor revealing as good practice requires, but they are adequate to start bringing the issues into focus. Accounting reports are, after all, pleadings. If a plaintiff questions a particular disbursement, his remedy is to except, not to ask that the defendant be compelled to plead again. The plaintiff certainly has no right to demand that the defendant point out to him which of the listed disbursements was illegal. Sioux Tribe v. United States, Dockets 114, et al., 12 Ind. Cl. Comm. 541 (1963); Southern Ute, supra, 17 Ind. Cl. Comm. at 59.

The burden is on the defendant to make a proper accounting. Sioux Tribe v. United States, 105 Ct. Cl. 725, 802 (1946). Thus for a particular item to be exceptionable, the test is not whether the report shows it to be improper; it is enough if the report fails affirmatively to show that it was proper. When the plaintiff makes his exception, it then becomes incumbent upon the Government to satisfy the Commission as to the legality of the challenged item.[1/] Southern Ute, supra, 17 Ind. Cl. Comm. at 60; Bogert, supra, §970 at 203.

When the applicable law is thus clearly understood, it can be seen

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1/ Of course, the plaintiff may also except to items proper on their face which it believes to be false, in which event the burden of going forward is upon the plaintiff.

that a motion to compel a new accounting for disbursements will lie only in an extreme case. This is not such a case, and the plaintiffs' motion will be denied.

2. Proof of delivery of goods and performance of services. The plaintiffs also move that the defendant be required to produce:

> (2) records showing the number of Indians present and receiving annuities, rations and other goods for which petitioners were charged and showing that services for which petitioners paid were actually performed;
>
> (3) an annualized statement showing the value of all goods diverted, damaged, or spoiled and any goods or funds misappropriated by defendant's agents, and the dates, amounts, and particular account from which the misappropriation occurred and the amount, date, and basis for all reimbursements.

As we read (2) and the first part of (3), the plaintiffs are demanding vouchers or other proof of delivery of the goods and performance of the services for which the accounting trustee has credited himself.

The defendant responds that the additional records are equally available to the plaintiffs as to the Government, and that it has no duty to produce them. Citing our decision in Miami Tribe v. United States, Docket 76, 9 Ind. Cl. Comm. 580, 585, 685 (1961), the defendant argues:

> Notwithstanding the equitable jurisdiction bestowed upon the Commission by the Indian Claims Commission Act, the Commission in Miami Tribe, supra, declined to exercise its equity powers and concluded that accounting cases before that tribunal must be tried at law where the plaintiffs cannot call upon the defendant to prove their case and carry their burden of proof.

Since the Miami decision, the Commission and the Court of Claims have had occasion to consider the applicable law of accounting in greater depth. Cf. Sioux Tribe v. United States, Dockets 115, et al., 26 Ind. Cl.

Comm. 92, 94 (1971). In any event the defendant's above-quoted interpretation of Miami is wide of the mark. There is no such thing as a trustee's accounting at law; such proceedings are exclusively equitable. Bogert, supra, 2d ed., §§1, 963. If the defendant has a duty to account at all, it has a duty to do so in accordance with equitable principles. One of these is that the trustee's report must contain sufficient information for the beneficiary to readily ascertain whether the trust has been faithfully carried out. Sioux Tribe v. United States, 105 Ct. Cl. 725, 802 (1946); Mescalero Apache Tribe v. United States, Docket 22-G, 23 Ind. Cl. Comm. 181 (1970); Southern Ute Tribe v. United States, Docket 328, 17 Ind. Cl. Comm. 42, 57-60 (1966), aff'd, 191 Ct. Cl. 1, 423 F.2d 346 (1970), rev'd on other grounds, 402 U.S. 159 (1971); Iowa Tribe v. United States, Docket 79, 2 Ind. Cl. Comm. 167 (1952): Bogert, supra, §961.

Under private trust law the plaintiffs' demand for proof of delivery of goods and performance of services would be well taken. Bogert, supra, §972. We granted similar motions in Te-Moak Bands of Western Shoshone Indians v. United States, Docket 326-A, 23 Ind. Cl. Comm. 70, 81-82 (1970); cf. Red Lake, Pembina and White Earth Bands v. United States, 164 Ct. Cl. 398 (1964). The motion will be granted here in part. The defendant will produce such vouchers, reports, or other proof as may be available. An annualized statement will not be required; consequently the Government will not need the services of accountants to comply with this order. The records may be served on the plaintiffs and filed with the Commission on microfilm.

3. Defalcations of Indian agents. The plaintiffs' request that the defendant present an annualized, itemized statement of misappropriations by its agents amounts to asking it to prepare the plaintiffs' case. A number of agents' shortages and reimbursements are shown in the accounting reports on file; and if the plaintiffs wish them extracted and compiled into a separate schedule, they may do so themselves. We deny this much of the motion for the same reason that we deny the motion to require the defendant to restate its disbursements.

IV

LOSS OF INTEREST FROM HOLDING FUNDS
OUTSIDE TREASURY AND FROM REVERSE SPENDING

1. Interest bearing funds held outside U.S. Treasury. According to defendant's practice, interest begins accruing on interest-bearing Indian funds only when they are "covered" into the main United States treasury, and ceases when they are withdrawn, although Federal agents may have custody of the funds for substantial periods both before and after. The accounting reports on file do not show how long any funds were held outside the treasury. Plaintiffs ask us to compel the defendant to full disclosure.

In Menominee Tribe v. United States, 107 Ct. Cl. 23 (1946), it was decided that the Government had a fiduciary obligation to deposit interest-bearing trust fund collections within 30 days. Consequently, the defendant was held liable to pay interest either from the date of "covering" into the main treasury or from 30 days after collection in the field, whichever was earlier.

Unless the amounts and periods are disclosed during which the Government held plaintiffs' legally interest-bearing funds out of the treasury,

it will be impossible to determine whether defendant fulfilled its fiduciary obligation. Accordingly, in Southern Ute, Te-Moak, and Mescalero Apache, we ordered defendant to provide such information. We order defendant to do so here.

The attorneys and accountants for the parties should try to agree on the form in which additional information is to be supplied, at the conference ordered in Part XI of this opinion. Both plaintiffs' and defendant's accountants testified that it would not be necessary to give daily transactions to arrive at a substantially accurate computation of lost interest. Rather, the interest-bearing and non-interest bearing treasury accounts and the sums held in the field could be restated on a yearly basis, treating all receipts and disbursements as having occurred at midpoint.

2. Reverse spending. This term is used to designate the expenditure of interest-bearing funds, or funds bearing a higher rate of interest, when non-interest bearing funds, or funds bearing a lower rate of interest, are equally available. Such practice was condemned, as regards Indian trust funds, in Menominee Tribe v. United States, 101 Ct. Cl. 10 (1944). The plaintiffs contend that the accounting reports in the instant case do not give sufficient information to determine the extent of reverse spending which may have occurred.

Insofar as this matter can be separated from that of holding funds outside the treasury, we believe the reports on file are sufficient. Year-end balances in all the plaintiffs' treasury funds, interest-bearing and non-interest-bearing, can be derived from the yearly schedules of receipts and expenditures--or obtained from published treasury reports. From these we believe the losses from reverse spending can be calculated.

What constitutes reverse spending will necessarily be affected by our decision in Te-Moak Bands of Western Shoshone Indians, Docket 326-A, in which we decide that the IMPL fund should have been invested at 5 percent during the period from 1883 to 1930, when the defendant regarded it as non-interest-bearing.

V.

ACCOUNTING FOR RECEIPTS OTHER THAN APPROPRIATIONS

Plaintiffs ask us to order the defendant to supply more detail about revenue-producing transactions at the reservation level. The defendant has attempted to account for the miscellaneous receipts of the Blackfeet in the GSA report dated July 16, 1969, and of the Fort Belknap Indian Community in the GSA report dated April 3, 1970. The way this was done in both instances was (1) to set out a schedule showing the various sources of revenue and opposite each the total derived therefrom during

the entire period from 1883 to 1951, and (2) at the end of the report to give a schedule of credits to the fund, in chronological order, identified only by "Warrant No." It is thus impossible to match the two schedules for any purpose. The warrants referred to are those upon which credit was entered at the United States Treasury, i.e., the "covering" warrants. No reference is made to the collections in the field which supplied the moneys which were thus finally deposited in the treasury.

In the preceding section of this opinion we have dealt with the plaintiff's complaint that defendant's method of accounting for receipts makes it impossible to determine whether deposits were promptly made to interest-bearing accounts. Plaintiffs contend that defendant's method of accounting for miscellaneous receipts masks two other possibilities of mishandling their funds:

> (1) Without disclosing the nature of individual revenue-producing transactions, it is impossible to determine whether the proceeds were deposited in the proper fund. For example, some of the receipts placed in the IMPL fund, upon which interest was not paid prior to 1930, may have been of such nature that they should have been deposited to an interest-bearing fund.

(2) Collections at the agency were allocated by the agent to various tribal, individual Indian, and Government funds. Unless the original revenue-producing transactions are disclosed, it is not possible to check the correctness of his allocation.

The plaintiffs' motions are obviously well taken. In regard to receipts from other than appropriations, the defendant has supplied nothing but a list of deposit slips and bulk figures of what it claims to have collected from various sources over a 68-year period extending five years beyond the cut-off date of the Indian Claims Commission's jurisdiction. This is not meaningful accounting.

The defendant will be ordered to present a new accounting of all its receipts down to August 13, 1946, of moneys of each of the plaintiffs from every source other than congressional appropriations, showing, item by item:

1. Date of first receipt (i.e., if item was collected in the field, the date of such collection).

2. Amount.

3. Nature of transaction which produced the receipt. Where the collection was under a contract, for example, if it represented an installment of rent under a lease, the contract should be identified.

4. Date the item was covered into the treasury, and the account in which it was placed. If the item was never covered into the treasury, what other disposition was made of it should be disclosed.

Since the same agent who handled tribal receipts also handled individual Indian moneys and certain Government collections, it is possible that he placed plaintiffs' moneys in someone else's account or vice versa. The plaintiffs point out, and defendant admits, that $39,266.35 derived from the proceeds of sale of the Blackfeet tribal herd was not deposited to a tribal account, but rather to miscellaneous receipts of the Government. While we would ordinarily be loath to order the defendant to account to plaintiff for receipts of its own and third parties' moneys, we can see no alternative in this case, in the face of an admitted error of such magnitude. It happened once;and unless a complete accounting of all miscellaneous receipts at the Blackfeet and Fort Belknap agencies is made, it is not possible to say it happened only once. Accordingly, the accounting of receipts from other than appropriations will include all moneys collected at the two agencies, as well as tribal Indian moneys collected elsewhere. Individual Indian and Government funds collected at the agency level will be reported in the same detail above specified for tribal funds, so that the propriety of the agents' allocations can be determined definitively.

VI

GOODS AND SERVICES PAID FOR BY INDIAN LABOR

Plaintiffs move that defendant be required to provide:

> With respect to goods and services paid for by Indian labor, a statement showing the date, value and nature of all services performed by members of the petitioner tribes in return for goods and services.

Plaintiffs point out that §3 of the Act of March 3, 1875 (c. 132, 18 Stat. 449), required certain Indians to perform labor in return for supplies and annuities distributed to them. Where the supplies and annuities were promised by a prior treaty, the Court of Claims held in Rogue River Tribe v. United States, 105 Ct. Cl. 495, 64 F. Supp. 339 (1946), that the defendant's application of this statute gave rise to liability.

Plaintiffs contend the statute of 1875 was enforced on the Blackfeet Reservation, and that in addition the Indians were made to labor for subsistence paid from their own IMPL funds.

Evidence in the record indicates that the Blackfeet performed labor in return for "rations;" but it is not clear whether these were paid out of treaty funds. It appears also that reservation Indians generally were required to labor in return for relief during the Depression (Pl. ex. 39). It is not apparent how the latter requirement would give rise to a liability, if the relief was provided from federal funds.

The plaintiffs, however, are not asking for summary judgment at this point, but merely for more information. They are surely entitled to that. See Te-Moak Bands of Western Shoshone Indians v. United States, Docket 326-A, 23 Ind. Cl. Comm. 70, 76-78 (1970).

The present motion of the plaintiffs, however, has a similar infirmity to their motion to make the defendant list the defalcations of its Indian agents--the defendant is not required to search its accounts and pull out the incriminating items. The disbursements of treaty funds for which labor was required are presumably among those scheduled in the previously-filed accounting reports. Plaintiffs are entitled to know which disbursements of treaty goods or annuities were made under a labor requirement. It appears such information can be obtained without further order of the Commission, under Rule 14 of our Rules of Practice (25 C.F.R. § 503.14 (1968)).

The motion will be denied, without prejudice to the plaintiffs' rights to serve interrogatories upon the defendant or utilize other discovery devices under the Rules of Practice. Any interrogatories, to avoid the same infirmity as the instant motion, should be specific, asking for example, whether the Blackfeet Indians were required to perform labor in return for the disbursements shown in line 1 of Schedule A on page 10 of the report of such and such a date. If such interrogatories are served the Commission will expect the defendant to make a good faith search of its records for the answers.

VII

IRRIGATION PROJECTS

The plaintiffs move that we compel the defendant to file:

> With respect to petitioners' funds used in the construction, operation and maintenance of irrigation projects on petitioners' reservations, an annualized statement showing all expenditures of tribal funds for irrigation work, all receipts from operation and maintenance charges on irrigation projects and from the sale of power and water and operation of mercantile enterprises in connection with irrigation work and all reimbursements to petitioners for tribal funds, or any proportional share thereof, expended for irrigation projects on their respective reservations and the basis on which such reimbursements were computed.

1. Blackfeet. The following reference to irrigation appears at page 129 in the "gratuities" section of the accounting report of March 28, 1929:

> Disbursements under the appropriation "Irrigation System, Blackfeet Reservation, Montana (Reimbursable)" are not included in this report because all money expended for irrigation on the Blackfeet Reservation is to be reimbursed by the individual Indian benefited by the irrigation, and not to be reimbursed by the tribe (see act of May 18, 1916, 39 Stat. 140).

We have read the cited act and find the above construction to be correct.

The 1929 report discloses that $4,544.40 was transferred to "Irrigation System, Blackfeet Reservation, Montana (Reimbursable)" from the fund established under the Act of March 1, 1907 (c. 2285, 34 Stat. 1015, 1038), entitled "Proceeds of Blackfeet Reservation, Montana;" but an

equal sum was transferred back, as required by the Act of May 18, 1916 (c.125, 39 Stat. 123, 141-142).

The only other mention of irrigation we have found in the Blackfeet reports appears at page 98 of the report of July 16, 1969. It shows an expenditure of $2,000 from the fund entitled "Interest on Blackfeet, Blood, and Piegan Tribe of Indians 4% Fund" made at the request of the Blackfeet Tribal Council in fiscal year 1938 at the Two Medicine Irrigation Project.

The parties in Docket No. 279-C have heretofore settled the matter of offsets. See Docket No. 279-A, 19 Ind. Cl. Comm. 363 (1968). Thus any federal funds expended for irrigation on the Blackfeet Reservation can have no bearing on the instant case.

If the Blackfeet plaintiff wishes to challenge the expenditure at the Two Medicine Irrigation Project, or other irrigation expenditures shown in the reports which we may have overlooked, or if it contends that there were expenditures of tribal funds for irrigation which are not shown in the reports, it may assert its position at the trial.

2. Fort Belknap. The Sixth Claim of the original petition of this plaintiff in Docket 250 prayed for an accounting of its tribal funds expended on irrigation projects. Said claim was dismissed by a final order of this Commission dated November 20, 1962. The accompanying findings and opinion appear in volume 11 of our reports

at pages 479 and 520, respectively. An appeal from the Commission's order was dismissed by the Court of Claims on April 5, 1965. Accordingly, the matter is res judicata, and the motion must be denied insofar as it requests information about expenditures of Fort Belknap tribal funds on irrigation projects.

3. Reimbursements, power revenues and other receipts. In Part V of this opinion, above, we have already ordered the defendant to re-account for all miscellaneous receipts it has collected on behalf of either of the plaintiffs. The new accounting will necessarily include reimbursements of contruction costs, power revenues, and water charges, if any were received.

4. Mercantile enterprises. The mercantile enterprise referred to in plaintiffs' motion appears to have been a company store operated by the Bureau of Reclamation during the construction of the Blackfeet Irrigation Project. It was alleged to have charged excessive prices. We are at a loss to see how such a situation gives rise to a tribal claim.

The motion to require the defendant to account specifically for irrigation projects will be denied.

VIII

ENTERPRISES

Plaintiffs ask the Commission to order the defendant to provide

the following additional information:

> H. With respect to petitioners' funds used to establish or maintain revolving loan funds, an annualized statement showing the amounts, dates, and persons involved in all transactions and all amounts repaid and in default.
>
> I. With respect to assets purchased with petitioner's fund, such as tribal herds, sawmills, shops and agency buildings, a statement showing the cost of such assets, including operation and maintenance costs, and the funds from which they were purchased, increases and decreases in their value, the dates and amounts of all revenue produced, the manner of their ultimate disposition and any proceeds derived from their sale or salvage and the accounts into which they were deposited.

Some of the activities mentioned appear to be in the nature of business enterprises. A trustee operating a business, like all trustees, owes the beneficiary a duty of full disclosure and can be compelled to account. Bogert, supra, §§ 574, 578, 861 at 4.

We will not ordinarily require the defendant to change the form of its accounts, if the information sought is contained in some comprehensible form in its existing reports. In the case of enterprises, we feel an understandable picture of their operation and their success or failure cannot be obtained if the amount of trust moneys invested in each, and its operating expenses and revenues, are buried among extraneous material in general schedules of receipts and disbursements.

The defendant's accountant, who helped prepare some of the later accounting reports, Mr. Martin Gallagher, testified that they were based, for transactions up to 1922, on the treasury ledgers, and for more recent transactions, on treasury cash cards. These documents show the

movement of tribal funds to and from Washington. The nature of the entries would be further particularized by examining the receipts and vouchers available at the National Archives, the National Record Center, or a regional Federal Record Center. The accountants, Mr. Gallagher testified, were not empowered to go to the Department of the Interior, the Indian agencies or Area Offices for further information. Even those files in the archives maintained by the agency which produced them rather than by the General Services Administration were off limits to the accountants. They did not examine the basic documents: for example, if a receipt indicated that an incoming item represented rent on a grazing lease, they did not examine the lease, and consequently could not state whether the payment was in the correct amount. Tr. April 26-28, 1971, pp. 240-241, 261, 287-290, 298, 300, 328-330.

It is obvious that accounts prepared by such a method, under such limitations, would not even disclose the existence of a business enterprise, much less whether or not the trustee managed it prudently.

Detailed accounts on all revolving loan funds and other reimbursable programs using the Indians' trust funds almost surely were kept, and can be retrieved from the archives. Walter W. Ligett, an investigator for the Senate Committee on Indian Affairs, for example, reported from the Blackfeet Agency in 1929 (pl. ex. 89, p. 12758):

> I found no evidence whatever of financial irregularities under the reimbursable plan. The accounts were in good order and the balance of each individual Indian easily ascertainable.

The defendant will produce all existing financial records of

revolving loan funds and other reimbursable programs it operated or supervised using a plaintiff's money.

Evidence in the record indicates that the Government managed tribal herd enterprises on both the Blackfeet and Fort Belknap Reservations. *See* pl. exs. 57, 89-93 (excerpts from Part 23 of Hearings before a Subcommittee of the Committee on Indian Affairs, United States Senate, 72d Congress, First Session [1929], entitled "Survey of Conditions of the Indians in the United States"). Referring to the Blackfeet tribal herd, Superintendent Campbell testified, "Yes, we have a financial statement of it." Pl. ex. 90, page 12650. Presumably the statement is still in existence in the archives. The defendant will be ordered to produce it and any other available financial records on the Blackfeet Tribal Herd.

Defendant's management of the Fort Belknap Tribal Herd was the subject matter of the Fourth Claim of the original petition in Docket 250 and is res judicata under our order of dismissal dated November 20, 1962.

Plaintiffs' exhibit 57 sheds light on the shops at Fort Belknap:

The blacksmith shop, flour mill, harness shop, and carpenter shop are referred to at page 12602 as "provided by the agency." The Senate Hearings also state (pp. 12601-12602):

> The agency furnishes a sawyer, fireman, and water hauler and the Indians provide the rest of the labor and sawing. The Government takes a toll of every eighth log.

Plaintiff's Exhibit 15 states:

> The harnessmaker at this agency is supposed to do the harness repairing of the reservation, agency,

> and school, and during the school period he has the repairing of the children's shoes.

James H. Monteath, United States Indian Agent, reported as follows in 1902 on the shops at the Blackfeet Agency (pl. ex. 40):

> During the year the positions of one carpenter, one blacksmith, and the harnessmaker have been abolished. A member of this tribe has been helped to open a custom blacksmith and wheelwright shop, and a license granted to the harness maker. Both shops are well patronized, and to this extent the practice of doling out alms has been abolished.

The mills and shops may or may not have been operated as enterprises. Several of them appear merely to have been support activities necessary to maintain a government installation on the frontier. The defendant will produce such financial records as may exist on any mills or shops it operated as enterprises utilizing tribal funds or other tribal property.

The defendant will not be required at this time to make up new accounts for enterprises, but to make a diligent and good-faith effort to produce such financial records as may exist. We emphasize that the United States of America is defendant here, not the Department of Justice or the General Services Administration; and a search for records which does not extend to the Bureau of Indian Affairs, the Geological Survey, or any other Federal agency which has relevant files, is neither diligent nor in good faith.

Any relevant and material information desired by the plaintiffs which is not shown on the records produced may be obtained by discovery procedures under the Rules of Practice. The manner of liquidation of specific enterprises and the disposition of their assets, if not

revealed in the records, would be appropriate objects for interrogatories.

Agency buildings are clearly not enterprises. We have ordered accounting for buildings paid for out of tribal funds in Part II of this opinion.

IX

PROPOSED AMENDMENT OF PETITION IN DOCKET 250-A TO REQUIRE ACCOUNTING FOR MONEYS EXPENDED UNDER TREATY OF FORT LARAMIE

The Fort Belknap Indian Community, plaintiff in Docket 250-A, asks permission to amend its pleading so as to require an accounting of the defendant's expenditures under the Treaty of Fort Laramie of September 17, 1851, 11 Stat. 749, 2 Kapp. 594. The petition now on file asks for an accounting commencing only with May 1, 1888. The plaintiff contends the proposed amendment would conform to the proof, since the defendant has filed an accounting report going back to 1851. This report was originally filed many years ago in case No. J-31 in the Court of Claims, Assiniboine Indian Tribe v. United States, 77 Ct. Cl. 347 (1933). It has been refiled here by order of the Commission, after the defendant attempted to incorporate it in the record by reference. The accounts under the treaty of Fort Laramie form a relatively minor part of the massive document.

Under such circumstances, we believe it would be unrealistic to hold that the defendant has given its express or implied consent to trial of the pre-1888 accounting issue. See Rule 13(b), General Rules of Procedure of the Indian Claims Commission.

Section 1 of the Act of March 2, 1927, 44 Stat. 1263, the jurisdictional act under which Case J-31 was brought, conferred power on the Court of Claims to hear, among other claims, "any and all claims arising under or

growing out of the Treaty of Fort Laramie" asserted by the Assiniboine Tribe.

In its original petition, filed January 30, 1928, the tribe did ask for an accounting of the Fort Laramie Treaty annuities. But it dropped this demand in its amended petition, filed April 5, 1930, after the Government's accounting report had been prepared. In its proposed findings of fact (at 511 of the printed record in the Court of Claims library), the tribe admitted, "The Government expended the sums of money for the benefit of the Assiniboines specified in the treaty". The Court thus had no occasion to and did not adjudicate any accounting question under the Fort Laramie Treaty in case J-31.

We do not rule on the defendant's contention that the question is nevertheless res judicata. Cf. Assiniboine Indian Tribe v. United States, 128 Ct. Cl. 617 (1954). For we believe the plaintiff's proposed amendment is banned by the limitation of time for presenting claims in Section 12 of the Indian Claims Commission Act, 25 U.S.C. § 70k. See Sioux Tribe v. United States, Dockets 115, et al., 26 Ind. Cl. Comm. 92, 95 (1971).

Leave to amend the petition in Docket 250-A will be denied.

X

MOTIONS FOR PARTIAL SUMMARY JUDGMENT

Both plaintiffs join in one motion for partial summary judgment on various items of account, and the Assiniboines have a separate motion on several additional items.

While the joint motion asks summary judgment for "All amounts shown on the face of the defendant's reports to have been improperly expended. . .," we have ruled only on the items specified in the plaintiffs' accompanying memorandum. There are four exceptions to this statement: we have disallowed

four disbursements which the defendant has expressly admitted to be improper, despite plaintiffs' failure to point them out.

A. Tribal funds spent for governmental purposes of the United States. The joint motion contains five single-spaced pages of items which the plaintiffs contend that the defendant's various accounting reports show on their face to have been spent for nontribal purposes. The defendant does not dispute that many of the challenged items represent agency expenses and salaries of Government employees, but contends this is not incompatible with their being proper charges against the Indians.

In support of their opposing contentions, the plaintiffs and the defendant rely on the same case, Sioux Tribe v. United States, 105 Ct. Cl. 725, 64 F. Supp. 312 (1946). Plaintiffs rely on the holding that agency expenses are *prima facie* an improper use of tribal funds held by the Government, and the defendant on dicta that "in more recent years" pay of agency employees working on projects exclusively or primarily for the benefit of the Indians may be legal and equitable charges against Indian funds.

The defendant argues:

> The accounting reports and the categorizations of disbursements therein were prepared by nonlegal personnel and the placement of a disbursement within a category indicating an agency expense does not equate that disbursement as being an obligation of the United States.
>
> . . . .
>
> . . . Defendant has an absolute right to introduce evidence to show that all or a portion of the disbursements listed in defendant's report as agency expenses were not obligations of the United States and were proper charges against the plaintiff.

The accounting reports are part of the defendant's pleadings. Sioux Tribe v. United States, Dockets 114, *et al.*, 12 Ind. Cl. Comm. 541 (1963). Rule 11(c)(1)(v), Indian Claims Commission General Rules of Procedure,

states in part:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, will be entered against him.

The defendant has failed to set forth any specific facts tending to prove that the items to which plaintiffs take exception were expended for purposes other than those shown in the reports. Defendant is resisting plaintiffs' motions for supplementary accounting, stating it has already accounted "properly and fully" (Opposition to Plaintiffs' Motion for Order for Supplemental Accounting and for Partial Summary Judgment, page 15). The defendant is thus not even resting on its pleading; it is claiming a right to present evidence in contradiction to its pleading. Such a right is not recognized by the Courts nor by this Commission. As stated in 6 Moore's Federal Practice ¶ 56.23 at 2854 (2d ed.,1965):

> . . . it is certainly well settled that the opposing party is not entitled to hold back his evidence until trial, and is not entitled to a trial on the possibility that an issue of material fact might arise if the case were to go to trial on the merits.

Further, as the Court of Claims stated in its 1946 Sioux decision, supra (105 Ct. Cl. at 802):

> The Government cannot escape its primary obligations by including, among improper charges against the Indians, expenditures which it now says, without proof, may have been to some unknown and unascertainable extent proper charges against the Indians.

Under the circumstances, we must take the characterizations of the disputed expenditures in the accounting reports at face value. In making

our rulings on individual items, however, we have also considered whatever relevant evidence we can find in the record. Where any evidence supports the propriety of an item, we deny the motion for summary judgment, since we do not weigh conflicting evidence at this stage of the proceedings. See Ind. Cl. Comm. Rule 11(c)(1)(iv); Moore, supra ¶ 56.04 [1]. But where neither the accounting reports nor the existing evidence disclose a proper purpose for an expenditure, we disallow.

The items toward which the plaintiffs direct their joint motion for summary judgment are shown on the following 13 lists, taken verbatim from the motion. We have noted our rulings opposite each item.

LIST 1. Report of March 28, 1929, Statement No. 1, Disbursements for Blackfeet and Gros Ventre pursuant to Treaty of October 17, 1855 (11 Stat. 657):

Page 39	Hardware	$ 23,832.92	Denied.
	Household equip.	16,791.24	Denied.
	Pay Misc. employees	1,555.00	Granted.
	Misc. agency expenses	1,949.33	Granted.
	Agency building and repairs	60,223.49	Granted.
	Misc. building material	6,130.00	Denied.
	Pay interpreters	145.00	Granted.
	Pay agents	825.80	Granted.
	Presents	4,712.45	Denied.
Page 40	Disbursements for Crow, Bannock, etc.	8,953.78	Denied.
	Value of goods lost on "Chippewa" and not replaced	333.62	Denied.
	Uncollected balance from agents	33.91	Denied.
	Fulfilling treaty with Kansas	.80	Denied.

Article 9 of the Treaty of 1855 required the expenditure annually for ten years of $20,000 "for such useful goods and provisions, and

other articles as the President, at his discretion, may from time to time determine. . ." The items listed on page 39 of the accounting report for which we have denied summary judgment prima facie fall into the category of "useful goods," etc. The denial of summary judgment, of course, is without prejudice to the right of the plaintiffs at a trial on the merits to prove, if they can, that any of these expenditures was actually for agency purposes or otherwise improper.

Article 10 of the Treaty contemplated the provision of vocational training, education, "and in any other respect promoting. . . civilization and christianization" of the plaintiffs. Thus it authorized the use of treaty funds to hire teachers and similar employees and to build schoolhouses and other structures for educational purposes. But it did not authorize the Government to charge the Indians for its general agency expenses. Sioux Tribe v. United States, 105 Ct. Cl. 725, 797 (1946). In passing upon the remaining items on page 39, in List 1, we have followed the rule of Sioux (105 Ct. Cl. at 802), which puts the duty on the defendant so to set up its accounts that the Court or Commission can tell what part went for proper and what part for improper purposes. No one can tell in the case of the items we disallow.

Page 40 of the accounting report of March 28, 1929, is a statement of the dispostion of the total funds ($418,000) appropriated by Congress during the period 1857 to 1866 under the heading "Fulfilling Treaty with Blackfeet Indians." The statement does not purport to be limited to disbursements for the benefit of the Blackfeet. See page 36 of 1929 report, and note (a) on page 39. The only portion of the total on page 40 which the

Government contends it spent for the benefit of the Blackfeet, Blood, Piegan and Gros Ventre Tribes ($399,993.79) is included in Statement No. 1 on page 39. Statement No. 1 also accounts for additional funds not appropriated under the heading "Fulfilling Treaty with Blackfeet Indians." We deny the plaintiffs' motion to disallow the items to which it objects on page 40, for the reason that the Government has not claimed credit for them.

Statement No. 1 shows a grand total of $430,057.60 as expended for the benefit of the Blackfeet and Gros Ventres under the 1855 Treaty. $15,659.04 of that sum, however, represents a double charge against the Indians; and $5,863.27 represents expenditure of the Indians' own miscellaneous receipts. See pages 37-38 and 40 of the March 28, 1929, report. The actual amount claimed by the Government to have been spent out of Government funds, thus, is $408,535.29. The defendant's maximum liability under Articles 9 and 10 of the treaty was $350,000. The excess expenditure, amounting to $58,535.29, was used as an offset in Blackfeet Nations v. United States, 81 Ct. Cl. 101, 137 (1935). Accordingly, the sum of the items marked "Granted," above, represents a shortage in the defendant's obligatory expenditures under the Treaty of October 17, 1855. Summary judgment in favor of the plaintiffs in Docket No. 279-C will include $64,698.62 for the 1855 Treaty shortage.

LIST 2. Report of March 28, 1929, Statement No. 10, Disbursements for Blackfeet pursuant to Agreement of June 10, 1896 (29 Stat. 353):

Page 96	Hardware	$ 15,582.68	Denied.
	Household equip.	13,371.06	Denied.
	Pay of mechanics	36,847.14	Denied.

Pay of misc. employees	$ 81,113.12	Denied.
Misc. agency expenses	29,947.90	Granted.
Agency building and repairs	28,556.84	Denied.
Misc. building materials	18,931.97	Denied.
Shop equip.	1,456.44	Denied.
Pay Indian Police	249.13	Granted.
Pay farmers	28,370.99	Denied.
Expenses of surveying and allotting	502.39*	Granted.

*One-half the difference between $5,039.43 and $6,044.21, as Article VI of the Agreement requires the Government to pay one-half the survey costs.

Page 97 Disbursements for other Indians	82.97	Granted.

The 1896 Agreement provided for the payment by the United States to the Blackfeet of the sum of $1,500,000, in installments, as consideration for a land cession. Article II stated in part:

> Such sums [the annual installments of $150,000.00 each], or so much thereof as may be necessary in any one year, shall be expended in the purchase of cows, bulls, and other live stock [sic], goods, clothing, subsistence, agricultural implements, in providing employees, in the education of Indian children, in procuring medicine and medical attendance, in the care and support of the aged, sick, and infirm, and of helpless orphans, in the erection and keeping in repair of such new agency and school buildings, mills, blacksmith, carpenter, and wagon shops as may be necessary, in assisting the Indians to build and keep in repair their houses, inclose and irrigate their farms, and in such other ways as may best promote their civilization and improvement.

Under the 1855 Treaty, supra, List 1, the United States assumed the obligation of general administration and law enforcement on the Blackfeet Reservation. Sioux Tribe of Indians v. United States, 105 Ct. Cl. 725, 795, 64 F. Supp. 312, 328 (1946). A construction of the 1896 Agreement as superseding that treaty so as to authorize the Government to

use funds due the Indians for the purpose of discharging its own prior obligations would violate the rule that doubtful expressions in Indian agreements are to be resolved most favorably to the Indians. Carpenter v. Shaw, 280 U. S. 363 (1930); Marlin v. Lewallen, 276 U. S. 58, 64 (1928); Standing Rock Sioux Tribe v. United States 182 Ct. Cl. 813 (1968); cf. Menominee Tribe v. United States, 391 U.S. 404 (1968); Squire v. Capoeman, 351 U.S. 1 (1956); Choctaw Nation v. United States, 119 U.S. 1 (1886); Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 582 (1832). Accordingly, we disallow the item for pay of police.

The 1896 Agreement similarly does not authorize payment of miscellaneous agency expenses out of amounts due to the Indians.

The other items listed on page 96, except that for surveying and allotting, fall within the literal meaning of the terms "goods," "providing employees," and "erection and . . . repair of . . . buildings" recited in the Agreement. They will not be disallowed upon motion for summary judgment. Under the rule of ejusdem generis, however, the general words following specific words in an enumeration must be interpreted as embracing only objects similar in nature to those named in the preceding specific words. 2 J. Sutherland, Statutory Construction §4909 (3d ed., F. Horack, Jr., 1948). Thus, the expenditures for goods, employees, and agency buildings will be disallowed if at the trial the Government does not show some reasonable connection between them and the purposes of spending specifically authorized in Article II.

In fulfillment of Article II of the 1896 agreement Congress appropriated only the exact amount of its obligation of $1,500,000 (see 1929 accounting report, page 97, item (c), and page 99, item (a)). Consequently, expenditure of any portion of the appropriation for Indians other than the plaintiffs was improper. The amount of $82.97 shown in item (g) on page 97 of the 1929 accounting report as disbursed for the benefit of Rocky Boy's Band of Chippewa Indians will be disallowed.

Article II further provided:

> . . . any surplus that may remain from any annual payment provided for herein, shall also be placed in the United States treasury to the credit of said Indians, and shall bear interest at the rate of four per centum per annum.

There was in fact a surplus, which went to establish the "Blackfeet Reservation 4% Fund." The improper expenditures discussed above served to diminish this fund. Accordingly, the plaintiff is entitled to recover for lost interest. United States v. Blackfeather, 155 U.S. 180 (1894); Te-Moak Bands of Western Shoshone Indians v. United States, Docket 326-A, 23 Ind. Cl. Comm. 70, 84 (1970); Seneca-Cayuga Tribe v. United States, Dockets 341-A, et al., 26 Ind. Cl. Comm. 625, 632-633 (1971); cf. Peoria Tribe v. United States, 390 U.S. 468 (1968). Interest at the rate of 4 percent per annum until the date of payment of the final judgment will be allowed from the close of each fiscal year as to improper expenditures made in that year from 1896 treaty appropriations or from the Blackfeet 4% Fund. Disbursement Schedules Nos. 7 and 8 at pages 105 to 117 of the 1929 accounting report show the fiscal years in which the

disallowed disbursements occurred.

We cannot pinpoint the date of the unauthorized expenditures for the benefit of the Rocky Boy Chippewas, except that it was in 1910 or later. See 1929 Accounting Report, p. 89. Following the familiar rule that an account will be construed most strongly against the trustee, we allow 4 percent interest on the $82.97 Rocky Boy item from and after June 30, 1910.

Article VI of the Agreement provided for the Indians and the Government to pay equal shares of the expenses of survey. The account shows that the Indians paid $1,004.78 more than the Government. The defendant will be charged for half that amount. There is no provision for payment of interest under Article VI.

Summary judgment in favor of the plaintiffs in Docket 279-C will include $30,782.39 for a shortage in fulfillment of the Government's financial obligations under the 1896 Agreement, plus interest as above specified.

LIST 3. Report of February 26, 1964,
Disbursements for Blackfeet pursuant to
Agreement of June 10, 1896:

Page 4	Carried to Surplus	$ 55.22	Granted.
Page 7	Hardware, glasses	15.97	Denied.

By the provision of Article II quoted above on page 112, unexpended balances of the appropriations to fulfill the 1896 Agrement were

required to be placed in the Blackfeet Reservation 4% Fund. Accordingly, it was improper to carry the $55.22 item to surplus. Although the surplus warrant for this sum was not drawn until May 2, 1951, the balance existed in the treasury since June 30, 1927, at which time it should have been placed in the Blackfeet Reservation 4% Fund. Interest, therefore, will be allowed from the earlier date.

Summary judgment for the "hardware, glasses" item will be denied, without prejudice to the plaintiffs' again asking judgment if the defendant fails at trial to connect this item with 1896 Agreement purposes.

An additional sum of $55.22, plus interest as above indicated, will be included in the summary judgment for further unauthorized expenditure under the 1896 Agreement.

The reference in List 3 to page 132 actually refers to the March 28, 1929, report's account of disbursements made for the benefit of the Blackfeet Indians under the act of March 1, 1907 (c. 2285, 34 Stat. 1015). Accordingly the items will be considered under List 4 below.

LIST 4. Report of July 16, 1969, Statement No. 7, Disbursement for Blackfeet pursuant to Act of March 1, 1907:

Page 58	Agency Buildings	$ 6.00	Granted.
Page 59	Carried to surplus	8.41	Granted.
	Reimbursed U.S. (25 U.S.C. 145)	1,270.00	Denied.

Page 132, 1929 report [transferred from List 3]:

Misc. agency expense	2,202.98	Granted.
Hardware	2,310.42	Granted.
Household equip.	112.31	Granted.
Pay Misc. employees	228.37	Granted.

The act of March 1, 1907 (c. 2285, 34 Stat. 1015, 1035, 1038) authorized the expenditure of tribal funds for the construction and maintenance of irrigation ditches, the purchase of stock cattle, horses, and farming implements, and in the Indians' education and civilization. No connection is shown between any of the disallowed items and such purposes. The Act does not authorize the expenditure of funds for agency buildings nor contemplate transferring funds to surplus. On the other hand, it clearly does contemplate reimbursement of the United States for surveying and land classification. Accordingly, the item of $1,270 is proof against a motion for summary judgment, without prejudice to the plaintiffs' right under their third exception to show at trial on the merits, if they can, that the disbursement was improper.

Summary judgment will be ordered for a total of $4,868.49 representing funds misapplied under the 1907 act as indicated above. The question of interest payable on funds governed by the 1907 act is discussed in Part XI of this opinion.

LIST 5. Report of July 16, 1969, Statement No. 1, Disbursements for Blackfeet pursuant to Acts of March 3, 1883 and June 13, 1930:

Page	Item	Amount	Disposition
Page 7	Agency building	$ 2,532.88	Granted.
	Pay farm labor	317.50	Granted.
	Autos, vehicles	17,163.52	Granted.
	Hardware, glass, etc.	2,130.92	Granted.
	Household equipment	2,700.14	Granted.
Page 8	Pay blacksmith	$ 2,039.25	Denied.
	Misc. agency expense	10,715.45	Granted.
	Music instruments for agency	176.13	Granted.
	Pay of farmers	8,619.71	Denied.
	Pay field matron	340.19	Granted.
	Pay range riders	24,089.11	Denied.
	Pay auctioneers	50.00	Denied.
	Pay butchers	4,078.00	Denied.
	Pay carpenters	2,353.85	Denied.
	Pay clerks	9,731.36	Granted.
	Pay cooks	408.50	Granted.
	Pay engineers	1,247.50	Granted.
	Pay foreman	434.00	Granted.
	Pay herders	705.32	Denied.
	Pay interpreters	5.00	Granted.
	Pay laborers	20,102.46	Granted.
Page 9	Pay laborers (trespass)	$ 133.50	Denied.
	Pay line riders	202.00	Denied.
	Pay mechanics	9,766.51	Granted.
	Pay stablemen	45.00	Denied.
	Pay stenos	1,792.17	Granted.
	Pay stockmen	20,372.66	Denied.
	Pay teamsters	1,081.25	Granted.
	Pay truck drivers	45.52	Granted.
	Pay watchman	36.00	Granted.
	Unidentified items	1,860.99	Granted.

The foregoing items are from the Blackfeet Indian Moneys, Proceeds of Labor (IMPL) fund. No special rules apply to this fund, such as prevail under the 1896 agreement and the 1907 statute, supra. Expenditures from the IMPL fund are governed by the act of March 2, 1887, as amended, 25 U.S.C. § 155 (1970), which requires merely that they be for the

"benefit" of the Indians. Guidelines for the propriety of expenditures under the general standard of Indian benefit are established by decisions of the Court of Claims and this Commission.

Administrative expenses of the United States Indian Agency are not proper objects for the expenditure of tribal trust funds. _Sioux Tribe_ v. _United States_, 105 Ct. Cl. 725, 783, 64 F. Supp. 312, 322, (1946); _Rogue River Tribe_ v. _United States_, 105 Ct. Cl. 496, 551, 64 F. Supp. 339, 343-44 (1946); _Seminole Nation_ v. _United States_, 102 Ct. Cl. 565, 624, 626, _cert_. _den_. 326 U.S. 719 (1945). _Sioux_ lists the following items among this category of illicit expenditure: pay of miscellaneous agency employees, incidental agency expenses, agency buildings and repairs, building material, automotive repairs and maintenance, automobiles, motor trucks, pay of agent. Moreover, the Government has the burden of making a proper accounting; where it does not affirmatively show that an expenditure was for the tribe's benefit, as in the case of the "unidentified items" and the salaries of several classes of employees, we must disallow. _See_ 105 Ct. Cl. at 782, 802. The items in list No. 5 above, which we have marked "Granted" all appear indistinguishable from those disallowed in _Sioux_. _See also Quapaw Tribe_ v. _United States_, 128 Ct. Cl. 45, 54-79, 120 F. Supp. 283, 288-304 (1954).

We have denied the motion for summary judgment on all items which appear to be connected with the tribal herd or other enterprise for which the defendant may be required to produce records under Part VIII of this opinion. The denial is without prejudice to plaintiffs' right to again challenge these items after the Government has had an opportunity to comply with Part VIII.

In the absence of a treaty or statutory obligation resting on the United States, expenditures by it for education appear a proper use of trust funds. Accordingly we deny the motion as to the pay of farmers (i.e., instructors in farming). Cf. Sioux, supra, 105 Ct. Cl. at 797-800.

The order for summary judgment will contain a further sum of $82,587.99 for improper expenditure of IMPL funds. The final award will include interest on this amount at the rate of 4% per annum, commencing July 1, 1930, for improper disbursements made before that date, and commencing on the date of withdrawal from the treasury for improper disbursements made thereafter. See 25 U.S.C. §161(b). The liability of the United States for failing to make the IMPL fund productive between 1883 and 1930 is discussed in Part XI of this opinion.

LIST 6. Statement No. 2:

Page 10 Amounts unaccounted for by:

F.R. Stone	$ 1.70	Granted.
A.E. McFatridge	68.25	Granted.

Although the plaintiffs have not specified the following items in their memorandum, the Government's admissions in footnotes (f) and (h) to Statement No. 2 leave no possibility of satisfactory explanation:

Transferred to:

"Indian Moneys, Proceeds of Labor, Colville Indians, Washington"	$620.92
"Miscellaneous Receipts, Class II"	2.60

Accordingly the preceding two items will be included along with

the amounts unaccounted for by Stone and McFatridge in the $693.47 to be added to the summary judgment in plaintiffs' favor for disallowed expenditures in Statement No. 2. The plaintiffs are entitled to 4% yearly interest on this sum commencing on July 1, 1930, or in the case of later disbursements, on the date of withdrawal from the Treasury.

LIST 7. Statement No. 3:

Page 13	Reimbursed to U. S. (25 U.S.C. §145)	$ 1,022.09	Denied.

Note (d) to Statement No. 3 states that this disbursement of interest on the IMPL fund "represented implement and seed purchases for the Blackfeet Tribe from reimbursable appropriations which had not been repaid by the tribe." Such an expenditure is not improper on its face; and the plaintiffs have supplied no evidence, by affidavit or otherwise, to show why summary judgment should be granted disallowing it.

LIST 8. Report of July 16, 1969, Statement No. 17, Disbursement for _Blackfeet_ pursuant to _Acts of March 13, 1924_, _August 12, 1935_, and _June 20, 1936_:

Page 88	Hardware, glass	$ 239.00	Denied.
	Pay of carpenter	12.00	Denied.
	Misc. agency	1.70	Granted.
	Misc. building material	389.60	Denied.
	Moving buildings	1,241.40	Denied.
	Pay game warden	2,700.00	Denied.
	Pay stenos	540.00	Denied.
	Pay Indian assistants	160.00	Denied.
	Pay laborers	187.00	Denied.

Statement 17 lists disbursements from the Indians' $622,465.57 recovery in _Blackfeet Nations_ v. _United States_, 81 Ct. Cl. 101 (1935), and from the interest thereon. They were all incurred in

fiscal year 1937 and succeeding years. The constitution of the Blackfeet Tribe of the Blackfeet Indian Reservation, adopted under authority of the Indian Reorganization Act (25 U.S.C. §§461-479) came into force on December 13, 1935. Thereafter the tribe had the power "to prevent the. . . disposition . . . of . . . tribal assets without the consent of the tribe." 25 U.S.C. §476. That the power was exercised, and respected, is apparent from the annual accounting under the IMPL fund (Disbursement Schedule No. 1, pages 15-33 of the July 16, 1969, accounting report). The flagrant conversions of the Indians' moneys to the use of the Federal Government which we have commented upon and disallowed under List 5, above, ended with the fiscal year 1935.

A Joint Resolution of June 20, 1936 (c. 649, 49 Stat. 1568), provided for an $85.00 per capita distribution from the judgment fund to the Blackfeet, Bloods, and Piegans, and that the remainder of their share should "be available for dispostion by the tribal council of said Indians, with the approval of the Secretary of the Interior, in accordance with the constitution and bylaws of the Blackfeet Tribe of the Blackfeet Indian Reservation." Another Joint Resolution of the same date (c. 650, 49 Stat. 1568) provided for complete per capita distribution of the Gros Ventre share of the judgment.

In the context of the entire accounting of this fund, contained in Part II of the July 16, 1969, report, we are unable to say that any of the challenged expenditures, save the $1.70 for "Miscellaneous agency expenses," is prima facie improper.

Both the 1888 and the 1896 Agreements (25 Stat. 113, 29 Stat. 350) provided for the erection of buildings for the tribe. The items for "Hardware, glass, oils, and paints," "Pay of carpenter" (a subhead under "Mills and Shops"), "Miscellaneous building material," "Moving buildings," and "Pay of laborers," therefore, in the absence of further explanation, appear normal expenses for the upkeep of tribal property. The pay of the game warden appears to be a similar expense for conserving another kind of tribal asset. The items for "Pay of Indian assistants" and "Pay of stenographers" do not appear out of line with the business requirements of a tribe the size of the Blackfeet; perhaps they were incurred, in part, in connection with "Council meetings and delegations," a $2,604.96 item in Statement No. 17.

The summary judgment will include an increment of $1.70 for improper expenditure from the proceeds of the 1935 Court of Claims judgment. The $1.70 disbursement was made from interest on the original judgment. See 1969 Accounting Report, page 98.

LIST 9. Report of March 28, 1929, Statement No. 25, Disbursements for Gros Ventre and Assiniboine Tribes, pursuant to Agreement of June 10, 1896:

Page 305	Hardware	$ 4,898.82	Denied.
	Household equip.	8,070.72	Denied.
	Pay of mechanics	18,259.28	Denied.
	Pay of misc. employees	29,026.09	Denied.
	Agency building	917.45	Denied.
	Misc. building material	929.05	Denied.
	Shop equip.	323.50	Denied.
	Pay of farmers	9,027.18	Denied.
	Pay of interpreters	9.90	Granted.

Article II of the Fort Belknap Agreement of 1896 (29 Stat. 350) contains substantially identical provisions to the Blackfeet Agreement of the same year. Our discussions under Lists 2 and 3 are applicable here, and explain our grounds for denying the motion as to all items but one. A total of $9.90 will be disallowed as an administrative expense of the United States.

The entire monetary consideration of the 1896 Fort Belknap Agreement, $360,000, was deposited in the United States Treasury on July 1, 1898, in a lump sum, out of which the Secretary of the Interior made all disbursements, while the unexpended balance bore interest at the rate of four percent per annum. Accordingly, the plaintiffs are entitled to interest on the disallowed item. The exact date not being supplied, we presume, under the rule of strict construction against the trustee, that it was made on the first day of the 1903 fiscal year, in which it is scheduled (see Disbursement Schedule No. 92, page 313 of 1969 GAO report).

LIST 10. Report of July 16, 1969, Statement No. 5. Disbursements for Gros Ventre and Assiniboine Tribes, pursuant to Agreement of June 10, 1896:

Page 45	Transferred to "Opening Ind. Res."	108.27	Granted

The actual entry in the accounting report is:

Transferred to:

"Opening Indian Reservations (Reimbursable)"	(c)	108.27

is almost as obscure as the "Unidentified items" we disallowed under List 5, above.

Second, the 1896 Agreement, which governs the fund from which this disbursement was made, does not authorize its use either for "opening Indian reservations" or for repayment of debts due to the United States. Cf. Cook County Nat. Bank v. United States, 107 U.S. 445, 452 (1882); Navajo Tribe v. United States, 177 Ct. Cl. 365, 368 F.2d 279 (1956); 25 U.S.C. §145 (1970--referring to funds "applicable to use for reimbursement").

The summary judgment will include the additional sum of $108.27 for misappropriation of proceeds of the Fort Berthold Agreement of 1896, plus interest thereon at the rate of 4 percent per year from February 5, 1930.

LIST 11. Report of March 28, 1929, Statement No. 29, Disbursements for Gros Ventre and Assiniboine Tribes, pursuant to Act of March 3, 1921:

Page	Item	Amount	Disposition
Page 326	Pay mechanics	$ 3,756.06	Granted.
	Pay misc. employees	10,370.88	Granted.
	Pay farmers	6,559.89	Denied.
	Hardware	885.44	Granted.
	Household equip.	95.20	Granted.
	Misc. agency expenses	625.10	Granted.
	Shop equip.	448.44	Denied.

The Act of March 3, 1921 (c. 135, 41 Stat. 1355), provides for granting certain school sections within the Fort Belknap Reservation to the State of Montana, in consideration of the payment by the United States of $5.00 per acre to the Indians. The defendant placed the $5.00 per acre in a trust fund. The challenged items in List 11

are disbursements from this fund. Since the 1921 Act contains no rules for the fund's administration, the general guidelines for Indian trust funds apply. We have discussed these guidelines above under List 5, the Blackfeet IMPL fund entries, and follow them in passing upon these items.

The summary judgment will be increased by $15,732.68. The obligation of the United States to pay interest upon this sum, or invest it, is discussed in Part XI of this opinion.

LIST 12. Report of July 16, 1969, Statement No. 10 Disbursements for Gros Ventre and Assiniboine Tribes, pursuant to Act of March 3, 1921:

Page	Item	Amount	Ruling
Page 68	Agency building	$ 43.36	Granted.
	Autos	3,778.35	Granted.
	Household equip.	226.72	Granted.
	Pay blacksmith	396.00	Denied.
	Misc. agency	327.86	Granted.
	Misc. building	346.91	Granted.
	Pay farmers	2,390.52	Denied.
	Pay field matrons	720.00	Granted.
	Pay clerks	5,594.50	Granted.
	Pay cooks	27.50	Granted.
	Pay engineers	310.50	Granted.
	Pay fireman	26.25	Granted.
	Pay harness maker	1,074.33	Denied.
	Pay laborers	1,900.50	Granted.
	Pay millers	302.00	Denied.
	Pay separators	112.00	Denied.
	Pay teamsters	177.50	Granted.

We have followed the principles discussed above under List 5 in ruling on the above items. The denial of summary judgment for pay of blacksmith, harness maker, millers, and separators is without prejudice, pending the defendant's opportunity to comply with Part VIII of this opinion.

Total disallowed in List 12, to be included in summary judgment: $13,479.95. The liability of the United States for lost interest on this sum is discussed in Part XI of this opinion.

LIST 13. Report of April 3, 1970, Statement No. 1 Disbursements for Gros Ventre and Assiniboine Tribes, pursuant to Acts of March 3, 1883 and June 13, 1930 (IMPL Fund):

Page	Item	Amount	Ruling
Page 6	Agency building	$ 2,239.27	Granted.
	Pay farm laborers	10,282.62	Granted.
	Autos	7,319.41	Granted.
	Hardware, glass	615.13	Granted.
	Household equip.	1,682.50	Granted.
Page 7	Pay blacksmith	709.00	Denied.
	Pay carpenter	834.00	Denied.
	Pay labor flour mill	3,256.82	Denied.
	Pay labor saw mill	4,165.73	Denied.
	Pay millers	960.00	Denied.
	Pay sawyers	259.00	Denied.
	Misc. building materials	1.11	Granted.
	Misc. agency	7,343.33	Granted.
	Pay farmers	9,744.55	Denied.
	Pay field matron	43.00	Granted.
	Pay range riders	1,830.00	Denied.
	Pay butcher	352.22	Denied.
	Pay clerks	21,917.18	Granted.
	Pay cooks	1,232.86	Granted.
	Pay engineers	1,385.50	Granted.
	Pay harness makers	14,027.20	Denied.
	Pay herders	12,334.70	Denied.
	Pay horse wranglers	90.00	Denied.
	Pay laborers	5,382.23	Granted.
	Pay mechanics	480.00	Granted.
	Pay range foreman	181.50	Denied.
	Pay roundup bosses	75.00	Denied.
	Pay stockman	7,609.35	Denied.
	Pay supt. and agents	319.23	Granted.
	Pay teamsters	578.00	Granted.
Page 8	Unidentified items	73.82	Granted.
Page 9	For Blackfeet	141.13	Granted.

Our rulings here are based on the same principles applied above in

List 5. The following items merit special comment:

"Pay farm laborers." This appears in the 1970 accounting report as a subheading under "Agricultural aid." The earliest entry, in the amount of $1,917.65 occurs in fiscal year 1916. Entries of $176.75, $63.75, and $391.60 occur in 1917, 1919, and 1920, respectively; but the item does not again exceed a thousand dollars until 1921. Entries for that and following fiscal years are as follows (see pages 21-27, 1970 report):

1921	$1,319.00
1922	1,637.90
1923	1,799.47
1924	1,953.25
1925	1,023.25

There are no entries after 1925. Allotment of almost the entire Fort Belknap Reservation to individual tribespeople was required by the Act of March 3, 1921, _supra_. Plaintiffs' exhibit 20 refers to an agency farm. Plaintiffs' exhibit 57, page 12621, refers to a school farm. We have found no reference to a tribal farm. But even if one existed, the item for "Agricultural aid, pay of farm laborers" must be disallowed _in toto_, since the defendant has not specified what part of the $10,282.62, if any, was expended for tribal as opposed to individual or government benefit. _See Sioux Tribe_ v. _United States_, 105 Ct. Cl. 725, 797, 802 (1946).

"Autos." Plaintiffs' exhibits 11, 13, 17 and 21 refer to proposed purchases of automobiles from Fort Belknap IMPL funds. All were for use of Government officials.

We have denied the motion for summary judgment on all items which appear to be connected with the tribal herd or other enterprises for

which the defendant may be required to produce records under Part VIII of this opinion. The denial is without prejudice to plaintiffs' right to again challenge these items at a later time.

The items to be included in the judgment under this List 13 total $61,036.32. Interest at the rate of 4% per annum is payable from and after July 1, 1930, on those disallowed expenditures made prior to that date, and from the time of withdrawal from the treasury on subsequent disallowed expenditures. The defendant's liability for failure to invest the IMPL fund between 1883 and 1930 is discussed in Part XI of this opinion

B. Attorneys' Fee in Court of Claims Litigation. Plaintiffs state:

> Defendant's Report of July 16, 1969, page 88, discloses a payment of $45,564.00 for payment of attorneys' fees in the Case of Blackfeet, et al., Nations v. United States, 81 Ct. Cl. 101 (1935). The Act of March 13, 1924, 43 Stat. 21, 22, the jurisdictional act under which this claim was prosecuted, clearly limits attorneys' fees to an amount not to "exceed $25,000 for the Indians residing on each respective reservation. . . ." The report shows on its face an improper expenditure of $20,564.00 of petitioner Blackfeet's funds and this amount should be returned to petitioners' account with interest.

The defendant has no acceptable explanation for the apparently excessive payment.

Both the plaintiffs and the defendant have overlooked that the $25,000 limit was removed by the Act of February 3, 1931 (c. 101, 46 Stat. 1060). The excess of the Blackfeet fee over $25,000 is not subject to disallowance.

C. Deposit to non-trust account of proceeds of sale of Blackfeet tribal herd. Under Part V of this opinion we have mentioned the $39,266.35 realized from sale of the Blackfeet tribal herd which in

Fiscal Year 1920 was deposited to a Miscellaneous Receipts account, i.e., was treated as the Government's own money rather than as a trust fund. In its answer to Exception 5, filed herein on April 26, 1971, the defendant expressly admits liability for this transaction.

The summary judgment will include $39,266.35 to restore the erroneous deposit. We reserve ruling on damages for loss of interest on this sum pending further information on where the moneys invested in the Blackfeet tribal herd came from. They should be credited back to a fund paying the same interest as the one they came out of. See Menominee Tribe v. United States, 102 Ct. Cl. 555 (1945).

D. Assiniboine Separate Motion for Partial Summary Judgment. The Fort Belknap plaintiff asks for partial summary judgment for the Assiniboine proportionate share of the following disbursements:

Accounting Report of April 28, 1928, Statement No. 16 (p. 73), of Disbursements for Assiniboine and Gros Ventre Indians pursuant to Agreement ratified May 1, 1888

Agency buildings and repairs	$ 36,921.90	Granted.
Agricultural aid	58,826.77	Denied.
Attorneys' fees	962.00	Granted.
Hardware, glass, oils and paints	9,668.63	Denied.
Household equipment	33,773.93	Denied.
Miscellaneous agency expense	739.12	Granted.
Miscellaneous building material	6,288.66	Denied.
Pay of mechanics	25,773.01	Denied.
Pay of miscellaneous employees	42,725.77	Denied.

Accounting Report of April 28, 1928, Statement No. 1 (p. 13), Disbursements for Assiniboine Indians pursuant to Treaty of September 17, 1851

Pay and expense of agents and interpreters	$ 1,563.00	Denied.

The Agreement of 1888 provided for expenditures for the following

purposes (see Article III, 25 Stat. 114):

> Purchase of cows, bulls, and other stock
> Goods
> Clothing
> Subsistence
> Agricultural and mechanical implements
> Providing employees
> Education of Indian children
> Procuring medicine and medical attendance
> Care and support of the aged, sick, infirm, and helpless orphans
> Erection of such new agency and school buildings, mills, blacksmith, carpenter, and wagon shops as may be necessary
> Assisting the Indians build houses and inclose their farms
> In any other respect to promote their civilization, comfort, and improvement

As with the Agreement of 1896, discussed above under List 2 of the joint motion for summary judgment, the general words in the foregoing enumeration must be construed to embrace only objects similar in nature to the specific words; and all the words, general and specific, must be construed in a manner consistent with the overall purpose of the Agreement. The latter is stated thus in the preamble: ". . . to enable them [the Indian parties to the Agreement] to become self-supporting, as a pastoral and agricultural people, and to educate their children in the paths of civilization."

As in the case of the 1896 Agreement, the burden is on the United States to show a reasonable connection between the expenditure for which it claims credit and a general or particular purpose for which the spending of trust funds is authorized by the agreement. We have denied the motion for summary judgment where the challenged item is within the literal language of the agreement; but if the defendant

fails to show the connection before the record is closed the item will be disallowed in our final award.

The items for "Attorneys' fees," and "Miscellaneous agency expense" are plainly not authorized by the agreement under any circumstances. The item "Agency buildings and repairs" commingles expenditures which are prima facie proper ("new . . . agency buildings") with those that are improper (repairs). Accordingly, it must be disallowed in its entirety. Sioux Tribe v. United States, 105 Ct. Cl. 725, 797, 802 (1946).

Article III of the 1888 agreement called for the defendant to expend a total of $1,150,000 for the benefit of the Assiniboine and Gros Ventre Indians at Fort Belknap. Summary statements of the disposition of money available pursuant to the 1888 agreement, appearing at page 77 of the 1928 GAO report and at page 289 of the 1929 report, show that while Congress appropriated the full $1,115,000, $3,305.12 of this sum was expended for Indians other than the proper beneficiaries, and only $169.92 of the improper expenditure was restored. Since the shortage is admitted by the Government, it will be included in the summary judgment despite the plaintiff's failure to point it out.

In Part IX of this opinion we have ruled that the Assiniboine claim for accounting prior to 1888 is barred. In any event, while the 1851 treaty obligated the United States to provide no more than $750,000 to the Indians, Congress actually appropriated $1,050,439.13. See Art. 7, Treaty of Fort Laramie, 2 Kapp. 595, and compare page 10, 1928 accounting report. The item for pay and expenses of agents and

interpreters, being less than the overpayment, and never having been used as an offset, thus could not subject the United States to liability even if disallowed in full.

The summary judgment will include an additional amount of $41,758.22 for the disallowed items under the 1888 agreement. The liability of the defendant for interest under the 1888 agreement is discussed in Part XI of this opinion.

All Fort Belknap items are subject to apportionment between the Assiniboine and the Gros Ventre. Since the parties have not yet presented their views on how the apportionment should be made, the matter will not be covered in this interlocutory order. After the record is closed the parties should suggest the proper manner of apportionment in their proposed findings. The final jdugment cannot include the Gros Ventre share of the disallowance, since that tribe has settled its accounting claim in other litigation.

XI

INTEREST ON IMPL AND OTHER NON-INTEREST-BEARING FUNDS; COMPOUND INTEREST

The defendant paid no interest in plaintiff's IMPL funds prior to 1930, nor, prior to 1898, on the fund established under Article IV of the agreement ratified May 1, 1888, 25 Stat. 113. It did not pay interest prior to 1929 on the funds created, respectively, under the Blackfeet

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2/ See Assiniboine Indian Tribe v. United States, 77 Ct. Cl. 347, 361-62 (1933); Assiniboine Tribes v. United States, Docket 279-A, 21 Ind. Comm. 310 (1969).

Allotment Act of March 1, 1907, c. 2285, 34 Stat. 1035, and the Fort Belknap Allotment Act of March 3, 1921, c. 135, 41 Stat. 1355. It has never paid interest on accumulations of interest left on deposit in its treasury.

Plaintiffs contend that defendant was obligated to pay interest on all of their funds under its control.

In _Te-Moak Bands of Western Shoshone Indians of Nevada, et al._ v. _United States_, Dockets 326-A, et al., recently decided, we concluded that the United States had a duty to make all its Indian trust funds productive.

As to the IMPL fund, we decided in _Te-Moak_ that the measure of damage is the loss of growth of the plaintiffs' respective shares therein due to the Government's failure to invest. What we wrote in _Te-Moak_ is applicable here and need not be repeated.

We also decided in _Te-Moak_ that moneys due under or appropriated to fulfill a treaty are not trust funds unless specially made so by the treaty or by subsequent action. Therefore, we have not allowed interest upon the shortages under the Treaty of October 17, 1855, 11 Stat. 657, discussed in List 1 of Part X of this opinion.

The agreement and two statutes discussed below created trust funds, but did not contain any applicable interest provisions.

We draw on the historic and legal discussion of _Te-Moak_ in determining what interest to include in our award.

A. Agreement Ratified by Act of May 1, 1888, c. 213, 25 Stat. 113

By this agreement various tribes of Indians, including these plaintiffs, the Fort Peck Indians, and others, ceded a large reservation which they held in common in Montana in exchange for smaller, separate reservations and stated sums of money to be expended in annual installments over ten years in providing them certain good and services. Article IV of the agreement reads as follows:

> It is further agreed that whenever in the opinion of the President the annual installments provided for in the foregoing article shall be found to be in excess of the amount required to be expended in any one year in carrying out the provisions of this agreement upon either of the separate reservations, so much thereof as may be in excess of the requirement shall be placed to the credit of the Indians of such reservation, in the Treasury of the United States, and expended in continuing the benefits herein provided for when said annual installments shall have expired.

In Fort Peck Indians v. United States, Docket 184, 28 Ind. Cl. Comm. 171 (1972), we held that the land cession under the 1888 agreement was a direct sale to the United States and not a "relinquishment in trust." Accordingly, we held the Act of April 1, 1880, c. 41, 21 Stat. 70, which provides 5 percent interest on the proceeds of Indian lands relinquished in trust, to be inapplicable. We adhere to that holding.

We reserved decision in Fort Peck on the question of whether the unexpended portions of the annual installments under the 1888 agreement were "funds held in trust by the United States" within the meaning of the Act of September 11, 1841, 31 U.S.C. § 547a. The identical question is again before us in the instant case.

In view of the decision of October 4, 1973, in Te-Moak we now hold

that those unexpended balances were trust funds within the meaning of the 1841 act; they and the annual interest accruing thereon should have been invested in United States bonds bearing not less than 5 percent interest.

Calculating the damages for the failure to invest is not inherently difficult, but has been made so by the Government's accounts. The annual schedules, in volume II of the 1928 GAO report, pages 642 to 652, set out total receipts but only partial disbursements under the 1888 agreement. Disbursements for the sole benefit of the Assiniboine Indians and for the joint benefit of the Assiniboines and Gros Ventres are shown, but not disbursements for the sole benefit of the Gros Ventres, which appear only in the 1929 report. The illegal disbursements for other Indians, which we disallowed in Part X, D, of this opinion, are not identified in the annual schedules of either report.

To add to the confusion, the 1929 report's annual schedules of disbursements for the joint benefit of the Assiniboines and Gros Ventres, while totalling the same as those in the 1928 report, do not agree on numerous individual items. For example, the 1929 report, at page 288, shows "Agency buildings and repairs" in the amount of $40,128.31, rather than the $36,921.90 of the 1928 report, which we disallowed in Part X, D.

Article IV of the 1888 agreement states that the unexpended surplus of each annual installment shall be placed in the treasury "and expended in continuing the benefits herein provided for when said annual installments shall have expired." 25 Stat. 114. This language seems to say that the fund made up of the surpluses must be held inviolate until

fiscal 1899, the year after appropriation of the last installment. Such an interpretation would necessarily limit the expenditures in each year before 1899 to the amount of the annual installment, $115,000 in the case of Fort Belknap.

This interpretation was not followed. Unexpended balances were carried forward at the end of each fiscal year and added to the next year's installment. More than $115,000 was expended in three of the ten fiscal years between 1889 and 1898, viz., $130,994.64 in 1890, $129,190.02 in 1891, and $127,684.93 in 1892. Since the plaintiff has not objected, and disbursement from the unexpended balances before 1899 is conceivably authorized under Article IV, we accept the practical construction and do not segregate the annual surpluses into a separate fund for the purpose of calculating damages.

The balance forward shown at the top of the second and each subsequent schedule in the 1928 GAO report does not equal the receipts less expenditures on the preceding schedule, even when the annual disbursements for the sole benefit of the Gros Ventres, shown only in the 1929 report, are taken into consideration. There is a net shortage of $3,137.47, not explained in any way on the schedules.

This sum equals the net illegal expenditure for non-beneficiary Indians, plus the sum of $2.27 shown on page 77 of volume I of the 1928 report as transferred to the Fort Belknap 4 percent fund. Thus we are able to pinpoint the years of the improper expenditures, but only at the expense of considerable effort which would have been unnecessary if the annual schedules had explained the shortages in the balances forward.

The following is our calculation of damages for the Government's failure to invest the fund made up of the unexpended portions of the installments under the 1888 agreement. For the purpose of calculating interest we have treated all receipts and disbursements as occurring at the midpoint of each year and have added the illegal expenditures for "Agency buildings and repairs," "Attorneys' fees," and "Miscellaneous agency expenses" back into the fund. The balances forward shown in the following table are our own; we have disregarded the short figures in the accounting report. The illegal expenditures for non-beneficiary Indians are restored to the fund in this manner. The final damage figure below includes the total of disallowed items as well as the unpaid interest.

DAMAGES UNDER 1888 AGREEMENT

scal Year:	1889	1890	1891	1892	1893	1894	1895	1896	1897	1898	1899	Totals
ge, 1928 GAO Report:	642	643	644	645	646	647	648	649	650	651	652	77
lance forward		$ 41,969.91	$ 62,735.00	$ 52,255.72	$ 43,177.52	$ 75,571.24	$111,529.91	$148,332.72	$185,845.50	$218,764.95	$245,436.03	
propriation	$115,000.00	115,000.00	115,000.00	115,000.00	115,000.00	115,000.00	115,000.00	115,000.00	115,000.00	115,000.00		$1,150,000.00
sc. Receipts	176.67	166.46	563.24	993.94	1,016.67	1,172.98	1,010.21	1,085.82	1,156.81	1,046.01		8,388.81
allowed expenditures:												
gency bldgs. & repairs	100.00	34,459.27			885.19	712.54	72.40	175.00	277.50	240.00		36,921.90
ttorneys' fees										838.40	123.60	962.00
isc. agency expenses	67.48	35.50	20.75		479.76	7.00	90.00		22.77	15.86		739.12
Int. on rior year's urplus		2,098.50	3,126.75	2,612.79	2,158.88	3,778.56	5,576.50	7,416.64	9,292.27	10,938.25		46,999.14
	$115,344.15	$193,729.64	$181,445.74	$170,862.45	$162,718.02	$196,242.32	$233,279.02	$272,010.18	$311,594.85	$346,843.47	$245,559.63	$1,244,010.97
eduled xpenditures	72,062.52	125,688.69	123,314.55	125,959.03	87,146.78	84,712.41	84,946.30	86,164.68	92,829.90	101,407.44	9,957.39	994,189.69
s Ventre xpenditures from 1929 eport, pp. 92-293)	1,311.72	5,305.95	5,875.47	1,725.90								14,219.04
Surplus	$ 41,969.91	$ 62,735.00	$ 52,255.72	$ 43,177.52	$ 75,571.24	$111,529.91	$148,332.72	$185,845.50	$218,764.95	$245,436.03	$235,602.24	$ 235,602.24

Subtract:	
Transferred to Ft. Belknap 4% Fund	2.27 146,842.61
Damages for disallowed expenditures and unpaid interest	$ 88,757.36

The 1896 agreement provided that "any surplus accumulated under and remaining at the expiration of payments" under the 1888 agreement should bear 4 percent interest. The amount actually placed in the Fort Berthold 4 percent fund pursuant to this clause was deficient by $88,757.36. Hence, in addition to all other damages we have awarded, 4 percent annual interest is due on the latter sum from July 1, 1898, to the date of payment of the final award in this case.

No interest was paid for the fiscal year 1899 on the $146,842.61 (plus $2.27) which actually was placed in the Fort Belknap 4 percent fund. See 1928 GAO report, pp. 655-656. The 1896 agreement plainly required interest to start immediately upon expiration of the 1888 agreement's installments, that was, on July 1, 1898. Accordingly, the Government is liable, in addition to the damages assessed above, for one year's unpaid interest at 4 percent on $146,844.88, or $5,873.80.

All the foregoing damages are subject to apportionment between the Assiniboines and the Gros Ventres.

B. Blackfeet Allotment Act of March 1, 1907, c. 2285, 34 Stat. 1035. This law provided for the allotment of the Blackfeet Reservation to the individual Indians in 320-acre tracts, and for the sale of the remaining land to homesteaders or other entrymen, except for agency, school, and religious reserves. The school sections were granted to the State of Montana, the Federal Government paying the Indians a purchase price of $1.25 an acre. The net proceeds of the land sales

were to be paid into the Treasury, one third to be expended by the Secretary of the Interior for the benefit of the Indians, and the remainder to be segregated on the books of the Treasury into separate accounts for each individual member of the tribes of the Blackfeet reservation. After segregation, the individuals were to be paid 4 percent annual interest.

The tribal trust fund resulting from the act of 1907 was thus originally intended to be of short duration.

In fact the fund was never divided into individual accounts. The provisions for sale of the surplus land, except in townsites, and for individualization of the fund were repealed by the act of June 30, 1919, c. 4, 41 Stat. 16. By this time, however, a substantial amount of land had been sold, much of it on time payments; and a tribal fund had accumulated and continued to receive the delayed payments.

Neither the 1907 nor the 1919 act makes provision for payment of interest on this tribal trust fund, and the Treasury paid none until after passage of the act of February 12, 1929 (c. 178, 45 Stat. 1164). This law provides for 4 percent interest on Indian trust funds "upon which interest is not otherwise authorized by law."

Except for the prices paid by the Government for the agency and school reserves,[3/] the fund established by the 1907 act consists entirely of

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3/ We believe the $1.25 per acre the Federal Government paid the Indians for the school sections it granted to the State of Montana was essentially the proceeds of sale of such sections. In any event, the Government in 1919 took back the $65,000 it had paid the Indians, in a lump sum, for the school sections and agency and school reserves. See 1929 accounting report, page 133.

"sums received on account of sales of Indian trust lands", upon which the act of April 1, 1880 (25 U.S.C. § 161) requires payment of interest at the rate of 5 percent. Confederated Salish and Kootenai Tribes v. United States 186 Ct. Cl. 947 (1968); cf. Fort Peck Indians v. United States, Docket 184, 28 Ind. Cl. Comm. 171, 177-180 (1972). Indeed, the Blackfeet Allotment Act of 1907 is in almost the exact language of the act of April 23, 1904, c. 1495, 33 Stat. 302, at issue in Confederated Salish. The memorandum order in Confederated Salish, provided for payment of interest at the 5 percent rate until the effective date of the act of February 12, 1929, and thereafter at the 4 percent rate provided in that act. We believe the Court of Claims overlooked the fact that the 1929 act is applicable only to funds "upon which interest is not otherwise authorized by law." It perhaps was not aware, either, that the reference in the 1880 act to "the rate per annum. . .prescribed by law" specifically meant the 5 percent rate prescribed by the act of September 11, 1841 (31 U.S.C. § 547a). See Te Moak, Docket 326-A. Accordingly, we hold that interest on the fund created under the 1907 act should have been paid at the rate of 5 percent during its entire life, and that the defendant is liable for 5 percent annual interest until February 12, 1929, and an additional 1 percent interest from that date until the date of payment of the final award herein.

C. The Fort Belknap Allotment Act of March 3, 1921, c. 135, 41 Stat. 1355. This statute provided for the allotment of virtually all of the Fort Belknap reservation, pro rata, among the members of the tribes having rights thereon, except for the school sections, which were granted

to the State of Montana (the Federal Government paying the Indians $5.00 per acre therefor) and certain townsites. The 1921 act, thus, was almost identical in effect to the 1907 act after the latter's amendment in 1919.

What we have stated about the trust fund created by the 1907 act is applicable to the trust fund created by the 1921 act. The United States should have paid 5 percent interest on it at all times, down to the present date. Thus, on the balances from time to time in the Treasury, it owes the Assiniboine plaintiff 5 percent interest for the period ending February 12, 1929, and 1 percent thereafter over and above the interest it has paid since that date. On the disallowed expenditures from the 1921 fund, the defendant must pay 5 percent interest until the date of payment of the final award herein.

D. Accumulations of interest. The question of the Government's possible liability for failure to invest funds in the non-interest-bearing treasury accounts made up of the interest earned on interest-bearing Indian trust funds, raised in these cases by appropriate exception, will be dealt with at a later date in a separate opinion.

In Te-Moak we ordered the lawyers and accountants of the parties to confer within 30 days of the date of the opinion, and within 45 days of the date of the opinion to file a joint statement with the Commission stating their agreements and disagreements on the technical questions of how the interest determination should be accomplished. We stated that they might accompany their joint statement with appropriate motions to obtain our rulings on the matters in disagreement or to obtain orders of any

nature which they may believe necessary or desirable to expedite the early and fair adjudication of these accounting cases.

We order the parties to the instant cases either to join in the joint conference we ordered in Te-Moak, or to hold a separate conference, and either to join in the joint statement there, or to submit a separate one -- all to be accomplished within the same time limits specified in Te-Moak.

As in Te-Moak, we will expect the conference to be held and the report on it to be filed regardless of whether any motion for reconsideration of this opinion or the accompanying order is presented.

XII

NON-COMPLIANCE WITH COMMISSION ORDERS IN ACCOUNTING CASES

This Commission first ordered the Government to supplement an accounting seven years ago. Since then we have ordered supplementation in five additional cases. Only one of our orders has been complied with.[4/]

4/ The first case was Southern Ute Tribe v. United States, Docket 328, 17 Ind. Cl. Comm. 42 (1966), aff'd, 191 Ct. Cl. 1, 423 F.2d 346 (1970); rev'd on other grounds, 402 U.S. 159 (1971). Our decision ordered the defendant to account for interest-bearing funds held outside the treasury and for reverse spending as well as to bring the accounting down to date.

The second case was Te-Moak Band of Western Shoshone Indians, Docket 326-A, 23 Ind. Cl. Comm. 70 (1970). This is the only case in which a supplemental accounting, consisting of a compilation of published treasury balances, has been supplied. The third was Mescalero Apache, Docket 22-G, 23 Ind. Cl. Comm. 181 (1970). The fourth was Shoshone-Bannock Tribes, Fort Hall Reservation, Idaho, Docket 326-C (by unreported order of June 10, 1970). In the fifth case, Jicarilla Apache Tribe, Docket 22-K, supplementation was ordered at pretrial by requiring the plaintiff to serve interrogatories. Service was made on July 30, 1970. The sixth case is Fort Peck Indians of the Fort Peck Reservation, Montana, Docket 184, 28 Ind. Cl. Comm. 171 (1972).

The Court of Claims ordered supplemental accounting for reverse spending as long ago as 1944 in Menominee Tribe v. United States, 101 Ct. Cl. 10, 15. In 1946 it ordered further proceedings to determine the loss of interest from delays in "covering" collections into interest-bearing treasury funds. Menominee Tribe v. United States, 107 Ct. Cl. 23. It expressed displeasure the same year at the jumbled accounting presented in Sioux Tribe v. United States, 105 Ct. Cl. 725, 802; and did so again in 1954 in Quapaw Tribe v. United States, 128 Ct. Cl. 45, 63, 66.[5/]

Yet the GSA reports filed in the instant case do not account for funds held outside the treasury. The latest accounting, that for Fort Belknap, was filed April 3, 1970, some four years after our Southern Ute decision and 26 years after the first Menominee decision cited above. It is substantially identical in format to the oldest report filed in this case, the Assiniboine report of April 28, 1928.

Thus the defendant's difficulties in presenting acceptable accounts are not, as has been stated, caused by any novel requirements of this Commission, but by failure of the accountants to follow long-standing case law.[6/]

5/ In another Sioux case, No. C-531 (11), 105 Ct. Cl. 658, 715 (1946), the defendant failed entirely to submit an account contemplated by treaty; and the court had to make its own.

6/ There appears to have been a failure of communication between the defendant's lawyers and accountants. See page 105 , supra.

There were approximately 40 employees in the Tribal Claims Section of the General Services Administration in 1966, when Southern Ute gave a clear signal that there might be much more work to do. Nevertheless the section was allowed to dwindle by attrition to a complement of two. Meanwhile additional restrictions were placed on the activities of the accountants, such as that referred to in Part VIII of this opinion, which forbade them from consulting records not in the custody of the General Services Administration.

Delay is particularly inappropriate in Indian cases, when one remembers that the tribes had already to wait an excessive time before the Indian Claims Act in 1946 first provided a forum for their complaints. As the Court of Claims stated in Kickapoo Tribe v. United States, 178 Ct. Cl. 527, 542 (1967):

> Judged strictly in terms of abstract moral principles, much more is owed the American Indian than the simple legal right to collect today what honorable dealings should have bestowed long ago.

The delay is all the more unfortunate in view of the fact that Indian claims which accrued in the days of the gold standard are paid in depreciated and still depreciating paper currency. Nooksack Tribe v. United States, 162 Ct. Cl. 712 (1963). The dollar has declined in

value 54.4% since 1946 when the Indian Claims Commission was created. Currently, it is losing buying power at the rate of approximately 6% per year, or half again the rate of interest payable on most Indian trust funds in the treasury, including the proceeds of our awards. See 25 U.S.C. 161a-161c (1970).

If the Government's failure to comply with our orders in accounting cases were deliberately adopted as a defense tactic it would indeed be an effective one.

After continued urgings by the Indian Claims Commission, last year the Office of Management and Budget requested additional funds for the Tribal Claims Section of GSA; and the 92nd Congress provided $1,800,000 by supplemental appropriation in its closing hours. See Pub. Law 92-607, October 31, 1972, 86 Stat. 1498.

We were informed that six months to a year would be required to train new personnel hired to work on Indian accounts; but the Section is not yet in effective operation.

The most decisive action of which we are capable appears necessary to move our accounting cases on to adjudication. This realization of urgency as well as the unique opportunity to provide guidance to a new team of GSA accountants has caused us in the course of this opinion to reconsider a number of our previous accounting rulings, some of them quite recent.

The first step toward the objective of clearing our accounting docket, we believe, is to fix definite time limits for compliance with our orders and not extend them. We fix such limits in the accompanying order.

The next step is to take a hard look at motions for supplementation. If we can adjudicate an issue on the basis of the reports on file, we ought not delay for further accounting. Thus, while the restatement of disbursements ordered in Fort Peck Indians v. United States, Docket 184, 28 Ind. Cl. Comm. 171 (1972), would be useful if rendered promptly, it was not essential. We do not follow the Fort Peck precedent in the instant case. When the Government's burden of making a proper accounting is strictly enforced, supplementation of disbursement schedules will very rarely be necessary. Unless each contested item is shown to have been expended exclusively for a trust purpose, we will disallow, as we have in our rulings on the instant motion for summary judgment.

As to issues we cannot possibly adjudicate without further accounting, we suggest that plaintiffs carefully evaluate whether they are really worth urging. For example, they should carefully consider whether the possible increase in recovery will equal the depreciation in the dollar while the supplemental accounting is being made.

We surely need not waste time for the briefing and arguing of motions to compel the defendant to supply information the plaintiff has never tried to obtain by discovery procedures.

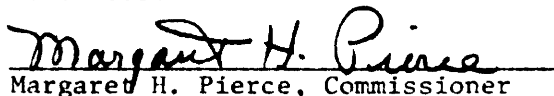
Nevertheless, despite our own best efforts and even though the life of the Indian Claims Commission has been extended until 1977,[7/] we will not be able to finish our task without increased cooperation from the executive branch.

Without supplemental accounting, for example, there is no way that we can adjudicate claims for loss of interest on funds held out of the treasury or for mishandling of moneys collected in the field, or for property other than money. When the defendant fails or refuses to comply with our orders in these matters, our jurisdiction is wholly frustrated.

We hope the recent revivial of the Indian Claims Division of the General Services Administration is the harbinger of a continuing good faith effort of the executive departments to help move the too long delayed Indian accounting claims to adjudication.

John T. Vance, Commissioner

We concur:



Margaret H. Pierce, Commissioner

Brantley Blue, Commissioner

7/ By the Act of March 30, 1972, Pub. L. 92-265, 86 Stat. 114.

Yarborough, Commissioner, and Kuykendall, Chairman, concurring:

We concur, since we are now bound by the authority of _Te-Moak Bands of Western Shoshone Indians_ v. _United States_, Dockets 326-A, _et al._, 31 Ind. Cl. Comm. 427 (1973), in which we dissented from the views of the majority of the Commission concerning the proper measure of damages for defendant's failure to make the plaintiffs' IMPL funds productive. We stated that the proper measure of such damages is simple interest on the unproductive balances which were in, or should have been in, these accounts. Since the majority decided otherwise, we now are bound to follow the authority of _Te-Moak_, _supra_, in the instant case.

Richard W. Yarborough, Commissioner

Jerome K. Kuykendall, Chairman