BEFORE THE INDIAN CLAIMS COMMISSION

THE FORT PECK INDIANS OF THE FORT PECK RESERVATION, MONTANA, Plaintiff, v. THE UNITED STATES OF AMERICA, Defendant.	)	Docket No. 184

Decided: May 3, 1974

Appearances:

Richmond F. Allan and Ruth W. Duhl, Attorneys for Plaintiff. Weissbrodt and Weissbrodt were on the briefs.

A. Donald Mileur, Gordon W. Daiger, and D. Lee Stewart, with whom was Assistant Attorney General Kent Frizzell, Attorneys for Defendant.

OPINION OF THE COMMISSION

Vance, Commissioner, delivered the opinion of the Commission.

INTRODUCTORY STATEMENT

In our previous opinion in this case, reported at 28 Ind. Cl. Comm. 171 (1972), we reserved for later decision the questions whether the Government was liable for its failure to make productive of income certain admittedly idle funds it held for the plaintiff.

The plaintiff has adopted the briefing and argument on the duty of the United States to make Indian trust funds productive presented by the Te-Moak Bands of Western Shoshone Indians, in Docket 326-A, and the Mescalero Apache Tribe, in Docket 22-G. We recently entered an

opinion in those two dockets, and another opinion in Docket Nos. 279-C and 250-A, Blackfeet and Gros Ventre Tribes, et al., where the same briefing was adopted. Together, these opinions dispose of the questions presented in Exception Nos. 3 and 5, reserved in the earlier decision in this docket. See Te-Moak Bands v. United States, Dockets 326-A, et al., 31 Ind. Cl. Comm. 427 (1973), and Blackfeet and Gros Ventre Tribes v. United States, Dockets 279-C, et al., 32 Ind. Cl. Comm. 65 (1973).

Cross motions for reconsideration of our 1972 decision in the instant case are also pending. Both parties ask us to modify our ruling under Exception No. 1, where we held that we have jurisdiction to order accounting beyond August 13, 1946, but refused to issue such an order in advance of a determination that the defendant has been guilty of some wrongdoing starting before that date and continuing afterward. The plaintiff also asks us to reconsider other rulings under Exceptions 3, 13, and 14.

Because of conflict with our more recent Blackfeet decision, the Commission on its own motion is reconsidering that part of its prior ruling under Exception 14 where defendant was ordered to submit a more detailed explanation of disbursements.

We discuss the matters for decision or reconsideration in the numerical order of the plaintiff's original exceptions. All those exceptions are not involved in this decision, so there are gaps in the numbering of the parts of the following opinion.

SUMMARY

Exception No. 1: Post-1946 Accounting

On the authority of **Blackfeet**, we hold that our jurisdiction to order accounting for any period after August 13, 1946, depends upon finding a course of wrongful action by the defendant starting before and continuing past that cutoff date. We deny plaintiff's motion for a general accounting from 1946 to date, and defendant's motion that we declare the Commission lacks all jurisdiction to order post-1946 accounting.

Exception No. 3: 1888 Agreement Funds

(1) We reaffirm that the phrase "Indian trust lands" in the Act of April 1, 1880, 25 U.S.C. §161, providing for payment of five percent annual interest on proceeds of sales of Indian trust lands in the U. S. Treasury, means lands ceded to the United States for the purpose of sale to third parties and does not include reservation lands sold direct to the Government itself. Hence the 1880 act cannot authorize interest upon the price paid by the Government for plaintiff's lands sold to it under the agreement ratified by Act of May 1, 1888, c. 213, 25 Stat. 113.

(2) The balances of the annual appropriations in excess of the amount required to carry out agreement purposes in the year for which appropriated were required by Article IV of the 1888 Agreement to be placed to the credit of the Indians in the U. S. Treasury. Under these circumstances, we hold that the balances constituted a "fund held in trust by the United States," which the Act of September 11, 1841, 31 U.S.C. §547a, required to be invested in Government bonds. For non-investment, we hold the defendant liable in damages.

Exception No. 5: The IMPL Fund, 1883-1930

Following Te-Moak, we hold plaintiff entitled to damages for the Government's failure to invest the IMPL fund between 1883 and 1930.

Exception No. 6: Failure to Reinvest Interest

We hold that the 1841 act requires defendant to invest the non-interest-bearing funds in its treasury made up of interest on Indian trust funds, and that defendant is liable in damages to plaintiff for having failed to do so. A list of the securities legal for investment of Indian trust funds is set out.

Exception No. 13: Reservation Lands Sold for $1.25 an Acre Under Act of May 30, 1908

We reverse our prior ruling and hold that the petition in this case is broad enough to authorize the plaintiff to prosecute, without amendment to the pleadings, its claim for additional compensation for lands alienated from its reservation in return for payment of a flat $1.25 per acre, by the Act of May 30, 1908, c. 237, 35 Stat. 558.

Exception No. 14

A. Expenditure of 1888 Agreement Consideration

We explain certain language in our earlier opinion in this case which states that the plaintiff may not invoke the "fair and honorable dealings" provision of the Indian Claims Commission Act, 25 U.S.C. § 70a, Clause (5), to challenge expenditures for administrative purposes of the United States purportedly authorized by the 1888 agreement. Expenditures under the agreement, including those for "providing employees" and

"erection of . . . new agency . . . buildings," to be allowable must have been for the specific purposes of Article III and consistent with the overall purpose of the agreement. We do not view such expenditures as for administrative purposes of the United States. All other expenditures would be unauthorized by the terms of the agreement itself. We did not rule on the question of whether the fair and honorable dealings clause can ever be applicable in an accounting case.

B. Supplemental Accounting for Disbursements

On our own motion we vacate our prior order requiring defendant to present a new account of disbursements, but allow until August 26, 1974, for defendant to do so voluntarily.

Conclusion

In the conclusion we fix a schedule of subsequent proceedings.

DISCUSSION

Exception No. 1: Post-1946 Accounting

The plaintiff's motion to have the accounting brought down to date is similar to one we rejected in Blackfeet. In that case we wrote as follows: (32 Ind. Cl. Comm. at 74-75):

> 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 . . . not independent but only ancillary to our general, pre-1946 jurisdiction . . . 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.

Blackfeet expresses our most mature consideration of a problem we have struggled with for over seven years. See e.g., Southern Ute Tribe v. United States, Docket 328, 17 Ind. Cl. Comm. 42 (1966), aff'd, 191 Ct. Cl. 1 (1970), rev'd on other grounds, 402 U. S. 159 (1971). Nothing in the present plaintiff's argument persuades us to change our mind. The motion to order general updating of the accounts will be denied.

What we have just stated also disposes of the defendant's contention that we have no jurisdiction at all to order post-1946 accounting.

The defendant argues, however, that even assuming we have limited jurisdiction after 1946, no exception on file in the instant case invokes it.

Even failure to pay interest, year after year, on a legally interest-bearing fund, the Government contends, is not a continuing wrong, but rather a series of separate wrongs occurring on each date the interest should have been paid but was not. We consider ourselves bound on this question by the Court of Claims decisions in Gila River Pima-Maricopa Indians v. United States, 135 Ct. Cl. 180 (1956), and 157 Ct. Cl. 941 (1962). The Court wrote (135 Ct. Cl. at 186):

> . . . Where a tribe is suing on a claim involving the recovery of periodic installments of compensation such as rent under a lease, and several of the

> installments fell due and were unpaid prior to the passage of the Indian Claims Commission Act while others fell due and were unpaid subsequent to that date, the question arises as to whether or not, on a claim therefor filed in the Commission, that body has authority to render judgment for all such installments of unpaid rent up to the date of its final judgment, or whether its jurisdiction is or should be held to be cut off and limited to rendering judgment for only those installments due prior to August 13, 1946, so that suit for the remaining installments must be brought in the Court of Claims. There is no express provision in the Indian Claims Commission Act one way or the other on this point, nor in the legislative history of the act insofar as we have been able to determine. It is the usual rule 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. This is a good rule and we find nothing that would prevent its application here.

We cannot see any material distinction between rent and interest unpaid on successive due dates, and accordingly reject the defendant's contention.

In the present record, the plaintiff's exceptions charging failure to make trust funds productive are sufficient to invoke our jurisdiction to award damages measured by interest calculated until time of payment. Cf. Peoria Tribe v. United States, Docket 65, 20 Ind. Cl. Comm. 62, 68 (1968). If, because of fluctuating balances in the funds, or other reason, further accounting is necessary to the calculation, our jurisdiction extends to ordering it.

In any event, given the defendant's failure so far to comply with our 1972 order to provide supplemental accounting, we cannot assume that the plaintiff has made all the exceptions it is going to make. Future exceptions occasioned by information the defendant has not yet provided may again invoke our jurisdiction to order post-1946 accounting.

The defendant's motion for reconsideration of our ruling under Exception 1 will be denied.

Exception No. 3: 1888 Agreement Funds

In our 1972 decision in the instant case we held that the Act of April 1, 1880, 25 U.S.C. § 161, did not apply to the unexpended balances of the annual appropriations to fulfill a certain agreement between plaintiff and defendant ratified by the Act of May 1, 1888, c. 213, 25 Stat. 113. The agreement provided for a direct land sale by the Indians to the Government, and the appropriations in question represented installments on the purchase price. The 1880 act authorized, but did not direct, the Secretary of the Interior to deposit in the United States Treasury at interest "all sums received by him on account of sales of Indian trust lands." We held that "Indian trust lands" meant lands ceded to the Government for the purpose of sale to third parties and did not include reservation lands sold directly to the Government itself.

In its motion for rehearing the plaintiff contends "Indian trust lands . . . means simply land to which the United States holds legal title in acknowledged trust for the use and benefit of Indians." While such usage of the phrase is common today, we are not advised that this was so in 1880.

In Te-Moak we reexamined the legislative history of the 1880 act in the context of a review of Federal Indian trust legislation and administrative practice from 1797 to 1930 and came to the same conclusion

about the pharase "Indian trust lands" as we did in our earlier opinion in this docket.

We pointed out (31 Ind. Cl. Comm. at 482) that the Senate bill upon which the 1880 act is based, as originally reported by the Indian Affairs Committee, applied to "any or all sums belonging to the Indian trust fund". Senator Edmunds objected that this language would require the United States to pay interest upon interest deposited in the treasury. The bill was passed over, and some days later the Indian Affairs Committee reported out a substitute, accompanied by a printed report, S. Rep. 186, 46th Cong., 2d Sess.

The Committee went further in limiting the classes of funds to which the bill would apply than the minimum necessary to meet Mr. Edmunds' objection. The second paragraph of the report quotes Rev. Stat. § 2096, based upon the fourth section of the Act of January 9, 1837, c. 1, 5 Stat. 135. This section refers to "the proceeds of the lands ceded by them [Indians]." There is no doubt that the 1837 act applied only to the proceeds of sales to third parties of land ceded by Indians to the Government. 31 Ind. Cl. Comm. at 434-35.

After reciting that all the 5 percent Government bonds then held in the Indian trust funds were about to mature, the 1880 Senate report continued:

> The bill reported by the committee provides that moneys arising from the three sources, to wit, (1) the redemption of these United States bonds, (2) the sales of lands ceded by the Indians, (3) the sales of the four per cent. bonds of the United States recently bought as a

> temporary investment, shall be deposited in the Treasury and shall draw interest at the rate required by law.

The phrase "Indian trust lands" in the statute, accordingly, refers to lands ceded by the Indians. There must be both a cession and a sale. The Indian cession to the Government made the lands a trust res in the Government's possession; and the subsequent sales to third parties executed the trust. Cf. United States v. Mille Lac Chippewas, 229 U.S. 498, 509 (1913). The words of the statute and the report just do not fit the case of direct purchases of Indian land by the Government.

Our interpretation, moreover, is confirmed by the enactment, only seven years later, of section 5 of the General Allotment Act (25 U.S.C. § 348) providing for interest on the purchase price paid by the United States for surplus reservation lands. There would have been no need for such legislation if the 1880 act applied to direct purchases by the Government.

In using the phrase "Indian trust lands," we are convinced, the 1880 act harked back to the 1837 act and referred to the proceeds of sales of ceded lands to third parties. It did not anticipate today's loose usage of the phrase.

Plaintiff's motion for reconsideration of our ruling under Exception 3 presents nothing we have not already considered carefully and rejected. It will be denied.

We reserved the question in our 1972 opinion of whether the unexpended balances under 1888 treaty appropriations were "funds held in trust by the United States" within the meaning of the Act of September 11, 1841, Rev. Stat. § 3659, 31 U.S.C. § 547a.

Article IV of the 1888 agreement read as follows (25 Stat. 114):

Article IV

> 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. 1/

In Blackfeet (32 Ind. Cl. Comm. at 134) we construed Article IV as creating a trust fund. We adhere to that construction.

The entire appropriation for each annual installment, being for the purpose of paying a legal debt of the United States, morally belonged to the Indians. Quick Bear v. Leupp, 210 U.S. 50, 81 (1908). The language of Article IV which speaks of placing the excess money "to the credit of the Indians" is, in our opinion, sufficient manifestation of Congress' intention to create an express trust. Cf. Restatement of Trusts § 24, quoted in Te-Moak, 31 Ind. Cl. Comm. at 502. We consider the phrase "to the credit of" in Article IV as effectively synonymous with "in trust for," since a deposit in the treasury of moneys belonging to Indians is necessarily also a trust fund. Menominee Tribe v. United

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1/ The record here as in Blackfeet does not show any official act of the President declaring parts of the annual installments in excess of the Indians' current requirements; but it does show that a fund consisting of the unexpended balances existed in the treasury, and that disbursements were made therefrom up to and including fiscal year 1900. See GAO report herein, page 7. Under the presumption of regularity, we presume the President made the necessary determinations. See United States v. Chemical Foundation, 272 U.S. 1 (1926); Nofire v. United States, 164 U.S. 657 (1897).

States, 101 Ct. Cl. 10, 19-20 (1944); cf. Burnell v. United States, 44 Ct. Cl. 535 (1909).[2/]

Our interpretation that the unexpended balances constituted a trust fund is consistent with Te-Moak, where we held that the phrase "funds held in trust by the United States" is to receive an inclusive definiton and that no particular formula or technicality is required to bring a fund within the purview of the 1841 act. See 31 Ind. Cl. Comm. 498-505.

We reaffirm that Article IV of the 1888 agreement provided for the creation of a trust fund.

At page 138 of the Blackfeet opinion we included a table showing a method of calculating the damages for failure to invest the 1888 fund. This was done for illustrative purposes. We do not intend to make a practice of performing our own calculations of damages in accounting cases, but will expect the parties to submit such calculations in their proposed findings--with adequate explanation of how they were made.

It does not appear that damages for noninvestment of the Fort Peck 1888 fund during the twelve years of its existence will be extremely high. As to damages measured by interest on disallowed expenditures, only $65.50 has thus far been disallowed (see 28 Ind. Cl.

2/ This is contrary to the rule with respect to ordinary depositors' accounts in commercial banks, where no trust is superimposed on the debtor-creditor relationship. 10 Am. Jur. 2d Banks § 339 (1963). The situation of banks appears to be a solitary exception to the general rule, stated as follows in Appeal of Rogers, 361 Pa. 51, 62 A.2d 900, 903 (1949):

> Every deposit is a trust, except possibly general bank deposits; every person who receives money to be paid to another or to be applied to a particular purpose is a trustee, if so applied, as well as when not so applied.

Comm. 194). The date of disbursement cannot be ascertained from the accounting currently on file. The amount of $43.20, shown on pages 11 and 17 of the CAO report as expended for Fort Peck Indians from Fort Belknap treaty appropriations in fiscal year 1898, should be credited against the $65.50.[3/] See Rogue River Tribe v. United States, 105 Ct. Cl. 495, 552 (1946). It is immaterial whether credit be taken against principal or interest, because under the 1841 act interest as well as principal should have been invested at 5 percent. Cf. Peoria Tribe v. United States, 20 Ind. Cl. Comm. 62, 67 (1968).

In Blackfeet, an agreement ratified by Congress in 1896 provided for 4 percent simple interest on the balance of the 1888 treaty appropriations remaining unexpended on June 30, 1896. No similar provision applies in the case of Fort Peck. Accordingly, damages measured by 5 percent compound interest on the interest which ought to have been earned during the 1888-1900 period and on the disallowed expenditures of 1888 treaty appropriations will continue to accrue until February 12, 1929, the approval date of the statute (c. 178, 45 Stat. 1164) directing payment of 4 percent simple interest on Indian trust funds in the treasury upon which interest was not otherwise authorized by law.

3/ In Blackfeet, 32 Ind. Cl. Comm. at 131, we included the $43.00 in the net disallowed sum of $3,135.20 expended from Fort Belknap treaty appropriations for nonbeneficiary Indians.

Exception No. 5: The IMPL Fund, 1883-1930

Under this exception, the plaintiff contended that it was entitled to "credit for interest" on its share of the fund "Indian Moneys, Proceeds of Labor,"[4/] which the defendant held idle during the period from March 3, 1883, to June 30, 1930. We reserved this question in our 1972 opinion in the instant case, pending decision of Te-Moak. The Fort Peck Indians, who are represented by the same attorneys as the Mescalero Apache Tribe in Docket 22-G (the companion case to Te-Moak), joined in the Te-Moak briefing and argument. Our decision in the latter case, dated October 4, 1973, which we have already referred to several times in this opinion, essentially supported the position of the plaintiffs.

The Fort Peck Indians of the Fort Peck Reservation, Montana, therefore, will be entitled to damages measured by interest, in accordance with Te-Moak, for the defendant's failure to invest the IMPL fund.

Exception No. 6: Failure to Reinvest Interest

The plaintiff excepted to the failure of the defendant to invest, credit interest on, or otherwise make productive the funds made up of interest earned upon trust funds of the plaintiff. We reserved decision on this question also in our 1972 opinion.

Two funds are involved. The earlier established of the two consists of interest on the proceeds of Fort Peck reservation land sold under authority of the Act of May 30, 1908, c. 237, 35 Stat. 558.

4/ This fund is misnamed. It consisted of all miscellaneous revenues derived from Indian reservations not the result of the labor of any member of the tribe. It included, among other things, rents, royalties, and proceeds of timber sales. See 25 U.S.C. § 155. We use the name "Indian Moneys, Proceeds of Labor" for the common trust fund which existed from 1883 to 1930, and "Proceeds of Labor" for the separate tribal funds set up thereafter pursuant to the Act of June 13, 1930, 25 U.S.C. §§ 161b-161d. See Te-Moak, supra, 31 Ind. Cl. Comm. at 518, 525.

Section 15 of the act provided that these proceeds should be placed in the U. S. Treasury at 4 percent annual interest. Such interest was not credited back to the fund upon which earned, like interest on a passbook savings account, but was set up on the books of the treasury in a separate, non-interest-bearing account entitled "Interest and Accruals on Interest, Fort Peck Reservation Four Percent Fund."

The second fund consists of the interest on the fund established in 1930, entitled "Proceeds of Labor, Fort Peck Indians, Montana." Such interest also is placed in a separate non-interest-bearing treasury fund, entitled, "Interest and Accruals on Interest, Proceeds of Labor, Fort Peck Indians, Montana."

The GAO report shows that substantial sums were kept idle for extended periods in both non-interest bearing trust funds. During several years, the idle balances were the result of reverse spending. That is, expenditures from principal equalled or exceeded the accruing interest which was allowed to pile up in the non-interest-bearing accounts. However, it is apparent that even after correction of the accounts for reverse spending, which has been ordered by our earlier decision, appreciable moneys were kept idle during several years. We are not, therefore, ruling on an academic or minimal question.

The Court of Claims held in Menominee Tribe v. United States, 97 Ct. Cl. 158 (1942), that the Act of February 12, 1929, c. 178, 45 Stat. 1164, providing for simple interest on Indian trust fund accounts in the treasury upon which interest was not otherwise authorized by law, did not apply to trust funds made up of the interest on other trust funds. The interest on "Proceeds of

Labor" funds is paid under authority of an amendment to this act adopted in 1930, which tightened the 1929 language to refer only to "principal" trust accounts. See Act of June 13, 1930, c. 483, 46 Stat. 584.[5/] It is therefore clear that defendant is not required to pay interest on the fund "Interest and Accruals of Interest, Proceeds of Labor."

The legislative history of the Act of April 1, 1880, c. 41, 21 Stat. 70, the first general legislation authorizing deposit of Indian trust funds in the U. S. Treasury at interest, leaves no doubt that this law authorized simple interest only. See discussion under Exception 3, above, and Te-Moak, 31 Ind. Cl. Comm. 483. The 1880 act appears to have set a pattern for future legislation of allowing only simple interest on trust funds in the treasury. The Act of May 30, 1908, did not depart from the pattern.

The defendant is not required to pay interest on the fund "Interest and Accruals on Interest, Fort Peck Reservation Four Percent Fund."

But was the defendant required to invest these idle trust funds? We know of only one case where this question has been considered, Manchester Band of Pomo Indians, Inc. v. United States, No. 50276-CBR, U. S. Dist. Ct., N. D. Cal. (June 25, 1973). The court stated (at page 14):

> . . . [The Government] could choose to deposit moneys in the Treasury and earn 4 per cent per annum where no higher return was available, but the failure to reinvest

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5/ For the 1929 act as amended by the 1930 act, see 25 U.S.C. § 161a-161d (1970).

> the interest generated on the funds would constitute a breach of duty, in the absence of any special circumstances which would demonstrate that such failure was in the best interest of the beneficiaries and in accord with the care and diligence which a man of ordinary providence would exercise in dealing with his own property.

We agree with the conclusion in Manchester Band, although we reach it by a different route.

In its 1942 Menominee decision, supra, 97 Ct. Cl. at 164, the Court of Claims spoke as follows of the treasury accounts made up of interest on Indian trust funds:

> . . . These interest accounts were funds held by the defendant in trust for the plaintiff tribe, but we think it is clear that they were not trust-fund accounts, as that term was used and intended in the Act of 1929, on which payment of interest was authorized.

Thus, the interest accounts have been held to be funds held in trust by the United States. The act of September 11, 1841, Rev. Stat. § 3659, 31 U.S.C.§547a, uses this very phrase. It reads:

> All funds held in trust by the United States, and the annual interest accruing thereon, when not otherwise required by treaty, shall be invested in stocks of the United States, bearing a rate of interest not less than five per centum per annum.

This statute, unlike the 1929 act, clearly extends to the interest accounts. The 1841 act's express requirement for investment of "the annual interest accruing" on funds held in trust by the United States, in our opinion, closes the question.

The non-interest-bearing accounts made up of interest on Indian trust funds should have been invested, and the defendant is liable to

the plaintiff for the resulting loss of income.

Twentieth century statutes, starting with section 28 of the Act of May 25, 1918, c. 86, 40 Stat. 591, have greatly broadened the range of permissible investments for Indian trust funds. In Manchester Band, supra, the court enumerated the following:

(1) Bank deposits insured by the Federal Deposit Insurance Corporation (authorized by 25 U.S.C. §162a).

(2) Public debt obligations of the United States (same authority).

(3) Bonds, notes, or other obligations unconditionally guaranteed as to both principal and interest by the United States (same).

(4) Bonds, and other obligations issued by the Tennessee Valley Authority (16 U.S.C. § 831n-4(d)).

(5) Obligations issued by the Federal Home Loan Banks (12 U.S.C. § 1435).

(6) Bonds, notes or debentures issued by the Commodity Credit Corporation (15 U.S.C. § 713a-4).

(7) Obligations issued by the Government National Mortgage Association and the Federal National Mortgage Association (12 U.S.C. § 1723c).

(8) Savings accounts in savings and loan associations insured by the Federal Savings and Loan Insurance Corporation (12 U.S.C. § 1730b).

The following classes of investments are also authorized, although not mentioned in Manchester Band:

(9) Obligations of the Postal Service (39 U. S. C. § 2005).

(10) Obligations of the Environmental Financing Authority (§ 12(k), act of October 18, 1972, Pub. L. 95-500, 86 Stat. 833, 33 U.S.C. § 1281 note).

(11) Obligations of the Washington Metropolitan Area Transit Authority (§ 12(a), Act of July 13, 1972, Pub. L. 92-349, 86 Stat. 464).

The foregoing list is not exhaustive.

The wide range of legal investments for Indian trust funds emphasizes the inexcusable abuse of discretion inherent in letting such funds lie idle even for relatively short periods.

In Manchester Band the court decided to assess damages for non-investment on the basis of evidence of which investments a reasonably prudent trustee would have chosen in the course of discharging his fiduciary responsibilities. We rejected this approach in Te-Moak in favor of a uniform 5 percent interest rate, stating (31 Ind. Cl. Comm. 519-520):

> . . . It would be a hopeless undertaking, however, to attempt reconstruction of the investment programs of the many individuals who served as Secretary of the Interior during that period, especially after 1918, when they had discretion to choose between different kinds of investments.

We adhere to Te-Moak, and will measure damages for failure to invest the accounts consisting of interest on other trust funds, by five percent interest per annum compounded annually. We shall allow the defendant

to adjust the accounts for reverse spending before calculating the damages, since, as we held in Te-Moak, the 1841 act's requirement for reinvestment of interest applied only to surplus income. See 31 Ind. Cl. Comm. at 463, 497. Income held on deposit while principal is being spent is not truly surplus.

While 5 percent interest may have been higher than that obtainable on authorized trust investments during the earlier periods of idleness involved in this case,[6/] it is substantially below current rates. Recently treasury bills sold at a discount resulting in 9.016 percent

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6/ See, however, the following passage from the Annual Report of the Commissioner of Indian Affairs for fiscal year 1928 at page 30 (item 60 in Appendix B to plaintiff's memorandum on Indian trust funds in Dockets 326-A and 22-G, adopted by reference in the instant case):

> A total of $1,158,994 in interest was paid by banks holding Indian funds, $391,842 of which accrued to Osage Indians and $287,950 to members of the Five Civilized Tribes. The usual rate obtained on time deposits was 3 1/2 per cent, but in some instances rates as high as 4 and 5 percent were paid by depositories. Aggregate deposits averaged during the year approximately $35,000,000 . . . .
>
> Whenever banking facilities proved inadequate, surplus funds were invested in Government securities of various issues, yielding from 3 3/8 to 4 1/4 per cent. The total amount of such investments was $25,365,000 on June 30, and of this amount $16,000,000 represented Osage funds and $8,000,000 funds of members of the Five Civilized Tribes.

The quoted passage suggests that the total of uninvested funds, to which the instant decision will apply as a precedent, may be relatively small.

annual interest, and long-term treasury bonds bearing an 8 1/2 percent coupon are being offered as this opinion is written. As we stated in Three Affiliated Tribes of the Fort Berthold Reservation v. United States, Docket 350-F, 28 Ind. Cl. Comm. 264, 300 (1972):

> . . . It appears that in the long term 5 percent is a rate that conveniently averages the ups and downs of economic activity.

It should be unnecessary to say that we will not award damages for any period when the funds consisting of interest earned on other trust funds were prudently and lawfully invested, even though the investments may have yielded less than 5 percent.

We award damages measured by compound interest because the act of 1841 expressly mandates the reinvestment of interest. Section 28 of the Act of May 25, 1918, c. 86, 40 Stat. 591, which authorized the deposit of Indian trust funds in banks, also contemplated that compound interest would be earned.[7/] As stated by the United States Court of Appeals

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7/ Comptroller General J. R. McCarl ruled as follows in a letter to the Secretary of the Interior dated February 11, 1926 (reprinted in H. R. Rep. No. 897, 69th Cong., 1st Sess. -- B-57 in the Docket 326-A appendix):

> It is evident from the language used in this law that the interest on Indian moneys segregated and placed in banks in some cases for the express purpose of drawing interest should not again become a part of the common fund in the Treasury after such interest has accrued. It would appear rather from the provision of law quoted that the amount of interest accruing on such funds should become a part of the principal amount thereof. This view is strengthened by the proviso that any part of tribal funds required for support of schools or pay of tribal officers should be excepted for [from] segregation or deposited [sic] the same to be expended for such purposes.

(continued)

in United States v. Glasser, 287 F.2d 433, 434 (7th Cir. 1961):

> . . . While there is authority for the proposition that the law does not favor compound interest or interest on interest, it is recognized that this consideration will not prevail in the face of a statute authorizing it. 47 CJS Interest § 4, p. 15.

In any event, one cannot logically accept the principle that funds made up of interest on other funds are "funds held in trust by the United States" within the meaning of the 1841 act without requiring successive reinvestment of interest. For if the reinvestment of interest stopped at any stage, a fund held in trust by the United States would be kept idle in violation of the act. Thus we cannot legally or consistently measure damages by only simple interest on the idle interest accounts at issue here.

This case is similar to that given in our Blackfeet opinion (32 Ind. Cl. Comm. at 75) as a hypothetical example of where we would have jurisdiction to order accounting carried down to date. The defendant's failure to invest trust funds which started before 1946 continued afterward and was still going on in 1951, the last year covered by the

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7/ (continued)

> The revenues thus derived from interest on tribal funds deposited in banks under the act of May 25, 1918, supra, are therefore, not for credit to the trust fund, Indian moneys, proceeds of labor, but should be credited to the principal amount so deposited, such interest having become a part of the moneys segregated and placed on deposit, unless specific statutory authority is granted for the use thereof under the trust fund in question.

The quoted statement is equally applicable to the Act of June 24, 1938, 25 U.S.C. § 162a, which superseded the 1918 act.

GAO report on file. The uninvested trust funds were active, with numerous and varying deposits and withdrawals. Further accounting, therefore, is indispensable to an award of full damages. The defendant will be required to account for uninvested balances in the two interest funds until date of final judgment herein.

At this time, the defendant will be ordered to:

(1) Restate its accounts of the funds "Proceeds of Fort Peck Reservation, Montana," "Fort Peck Reservation Four Per Cent Fund,"[8/] and the corresponding interest account, "Interest and Accruals on Interest, Fort Peck Reservation Four Per Cent Fund," so as to correct reverse spending and late postings of interest, and to show year-end balances.

(2) Restate in a similar manner starting from June 30, 1930, the funds "Proceeds of Labor, Fort Peck Indians, Montana" and "Interest and Accruals on Interest, Proceeds of Labor, Fort Peck Indians, Montana."

(3) Carry the restated accounts down to the end of the last fiscal year before the date of filing with this Commission.

8/ These are essentially the same fund. Proceeds of the parts of the Fort Peck reservation alienated under authority of the 1908 act before 1917 were labelled "Proceeds of the Fort Peck Reservation, Montana" and no interest paid upon them. Proceeds received after the beginning of 1917 were labelled "Fort Peck Reservation Four Per Cent Fund," and interest was paid upon them. See GAO Report, pages 206, 231, 235. At some date not disclosed by the report, the balance remaining in the Proceeds fund was transferred to the Four Per Cent Fund. In our 1972 opinion, under Exception No. 4 (28 Ind. Cl. Comm. 181-187) we have already ordered the defendant to restate the Proceeds account, showing all entries, and to calculate the interest that should have been earned upon it.

(4) Calculate 5 percent annual interest, compounded annually, on the uninvested balances in the restated "Interest and Accruals on Interest" funds.

(5) File the restated, updated accounts and the calculations of interest with this Commission, and serve copies on the plaintiff, on or before August 26, 1974.

Exception No. 13: Reservation Lands Sold for $1.25 an Acre Under Act of May 30, 1908

Plaintiff asks us to reconsider our ruling that it cannot prosecute the claim stated in its thirteenth exception in the instant accounting suit. The plaintiff sought under this exception to recover the difference between fair market value and the $1.25 per acre price fixed by the Act of May 30, 1908, c. 237, 35 Stat. 558, for 6,736.71 acres alienated from its reservation. 9/ The exception reads as follows:

> Petitioner excepts to respondent's report on the ground that it shows respondent, in breach of its fiduciary obligation to petitioner, mismanaged petitioner's trust property by purchasing 6,736.71 acres of petitioner's lands at $1.25 per acre whereas said lands were worth substantially in excess of $1.25 per acre. Petitioner further excepts to the failure of respondent's report to show the interest lost to petitioner by reason of respondent's failure to credit petitioner's funds with the fair market value of said lands.

9/ 2,642.70 acres were granted to the State of Montana for support of public schools under section 7 of the act, and 4,094.01 acres were reserved under section 3 of the act for Federal agency and school use, making a total of 6,736.71 acres removed from reservation status. For these the Indians were paid $8,420.89, by per capita distribution in fiscal year 1917. The lands reserved for agency and school use, 4,094.01 acres, were restored to the Fort Peck Indians by the Act of March 3, 1927, c. 376, 44 Stat. 1401-1402; and $5,117.52, representing their purchase price at $1.25 an acre, was charged to the Fort Peck Reservation Four Percent Fund and credited to the United States. See GAO report herein at pages 27, 33.

In the supporting statement under Exception No. 13, the plaintiff cited Three Affiliated Tribes of the Fort Berthold Reservation v. United States, 182 Ct. Cl. 543 (1968), as a precedent entitling it to just compensation for the alienated lands as provided by the Fifth Amendment.

We based our 1972 decision on procedural grounds. We held that under the plaintiff's accounting claim we could consider only whether the defendant had fulfilled the obligations imposed by the 1908 act and the agreement upon which that act was, in part, based. Since the defendant had paid the stipulated $1.25 an acre, we concluded that the plaintiff could not obtain relief in this suit.

We overlooked the fact that the Government, prior to 1908, in an agreement ratified by the Act of May 1, 1888, c. 213, 25 Stat. 113, set aside the Fort Peck Reservation as a permanent home for the plaintiffs, thus assuming a fiduciary duty to protect the integrity of the reservation. See American Indians Residing on the Maricopa-Ak Chin Indian Reservation v. United States, Docket 235, 31 Ind. Cl. Comm. 384, 390 (1973). See also United States v. Assiniboine Tribes, 192 Ct. Cl. 679, 687-691, 428 F. 2d 1324, 1328-1330 (1970), aff'g Docket 279-A, 21 Ind. Cl. Comm. 310 (1969); Seminole Nation v. United States, 102 Ct. Cl. 565, 602 (1945); Blackfeet, supra, at 77; cf. Morrison v. Work, 266 U. S. 481, 485 (1925); United States v. Payne, 264 U. S. 446, 448 (1924).[10/] While the Government's

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10/ In Fort Peck Indians v. United States, Docket 183, 3 Ind. Cl. Comm. 133, 138 (1954), aff'd 132 Ct. Cl. 373 (1955), we held the 1908 act did not create a "technical trust." This is not equivalent to stating it did not create a trust at all. Te-Moak Bands v. United States, Docket 326-A, et al., 31 Ind. Cl. Comm. 427, 504 (1973). In any event, our 1954 Fort Peck decision affirmed that the United States had the duties and liabilities of a guardian under the 1908 act--a statement equally applicable under the 1888 agreement. Guardianship is a fiduciary relationship in which self-dealing is subjected to even stricter scrutiny than in trusteeship. 2 Pomeroy's Equity Jurisprudence § 961; cf. §§ 956, 958 (3d ed. 1905).

duties may derive exclusively from written law, old obligations are not wiped out, and the fiduciary relationship does not start afresh, every time Congress passes a new law. The new act of Congress itself may be a breach of trust. United States v. Mille Lac Chippewas, 229 U. S. 498, 508-509 (1913); Confederated Salish and Kootenai Tribes of the Flathead Reservation v. United States, 175 Ct. Cl. 451, cert. denied, 385 U. S. 921 (1966); cf. United States v. Kiowa, Comanche and Apache Tribes, 143 Ct. Cl. 534, 163 F. Supp. 603 (1958), cert. denied, 359 U. S. 934 (1959) (aff'g Docket 32, 5 Ind. Cl. Comm. 72 (1957)).

Thus, even under the restrictive view of the pleadings which we took in 1972, the defendant's alleged failure to pay full value for the alienated lands might be considered a breach of fiduciary obligation of the kind commonly urged in accounting cases.

The Government here, by the 1908 act, in a single transaction, bought lands from the Indians and gave them away to the State of Montana or reserved them to itself for agency and school use. Without going into the adequacy of the consideration, the mere fact that the trustee purchased from the beneficiary places a burden of explanation on the trustee.

Transactions between persons in fiduciary relations are presumptively invalid; equity casts upon the party in the position of superiority the burden of proving affirmatively its compliance with equitable requirements and thereby overcoming the presumption. 2 Pomeroy's Equity Jurisprudence, § 956 (3d ed. 1905). See also id. §§ 958, 961; cf. Klamath and Modoc

Tribes v. United States, 193 Ct. Cl. 670, 689, n. 25 (1971). Equity's traditional remedy was to decree restoration in kind; but where, as under the Indian Claims Commission Act, it is impossible to restore property disposed of in breach of trust, the beneficiary is entitled to personal judgment for complete indemnification and compensation. 3 Pomeroy, supra, § 1080. In such case, of course, the plaintiff has the burden of proof of damages.

The defendant contends that the plaintiff's petition was not broad enough to support the claim made under the thirteenth exception, arguing as follows (response to motion for consideration, p. 12):

> If plaintiff wanted to assert a claim for the value of land or other property as opposed to receipt and expenditure of money, it should have done so by setting out a specific claim for the loss of such land or other property. Miami Tribe v. United States, 9 Ind. Cl. Comm. 580, 590-591 (1961). If all land or property claims are preserved merely by demanding a general accounting, the statute of limitations in the Indian Claims Commission Act, Section 12, Act of August 13, 1946, 60 Stat. 1052, 25 U.S.C. sec. 70k, is without meaning for any tribe which demanded a general accounting.

Miami, a case decided without citation of a single authority, is not the Commission's last word on accounting. Blackfeet, supra, 32 Ind. Cl. Comm. at 86-87. The relation of pleadings to the statute of limitations under modern Federal practice is given in Moore's Federal Practice, Par. 15.15[2], at 1021-1023, thus:

> Statutes of limitations are designed to ensure that parties are given formal and seasonable notice that a claim is being asserted against them . . . A party who is notified of litigation concerning a given transaction or occurrence is entitled to no more protection from statutes of limitations than one who is informed of the precise legal description of the rights sought

to be enforced. If the original pleading gives fair notice of the general fact situation out of which the claim arises, the defendant will not be deprived of any protection which the state statute of limitations was designed to afford him.

There is no doubt that the plaintiff at the commencement of this lawsuit gave the defendant fair notice of the claim it later particularized in Exception No. 13. We quote from pages 3 through 6 of the original petition, filed July 31, 1951:

Trust Properties of the Claimant Group

A. Reservation Lands and Properties.

9. By Act of May 1, 1888 (25 Stat. 113), the Congress set apart for the permanent use and occupation of the Claimant Group the lands embraced within the Fort Peck reservation. In respect to said lands and appurtenances thereon, the Respondent has exercised and is now exercising the powers of a guardian and of a trustee in possession.

* * * * *

C. Funds From Sale and Other Disposition of Reservation Lands.

11. Pursuant to an Act of May 30, 1908 (35 Stat. 558), and subsequent legislative acts, Respondent sold, granted rights of way through, and otherwise disposed of lands of the Claimant Group and took the proceeds of such sales to be held in trust, used and expended for the benefit of the Claimant Group. The Respondent managed the sale of these lands and administered the proceeds thereof as guardian of and trustee for the Claimant Group.

* * * * *

Breaches of Fiduciary Obligations

* * * * *

17. Upon information and belief the petitioner asserts that the Respondent, in breach of its fiduciary obligations to the Claimant Group, has

(a) mismanaged the said trust properties of the Claimant Group and has used parts of such properties for its own purpose, advantage, and benefit;

* * * * *

(d) failed to credit all said trust properties or other funds owing or due the Claimant Group to the account of the Claimant Group;

(e) improperly paid said trust properties of the Claimant Group to persons or organizations not entitled thereto;

(f) improperly used said trust properties of the Claimant Group for purposes which were not to the advantage or benefit of the Claimant Group, or the members thereof;

(g) failed to exercise due diligence in protecting the value of the said trust properties of the Claimant Group.

18. Wherefore, the Petitioner prays:

* * * * *

B. For a determination that Respondent shall pay to the Claimant Group such amount, including interest, as is revealed by such accounting to be due and unpaid;

C. For a determination that Respondent is liable to the Claimant Group in damages for any breach of its fiduciary obligations revealed by such an accounting.

D. For such other relief as the Commission may find appropriate and that judgment be entered in favor of the Petitioner.

The plaintiff's rights to present evidence in support of the foregoing allegations are neither restricted nor affected because its attorneys put the label "Accounting Petition" on the cover of the pleading.

A contention very similar to the defendant's instant one, that an Indian claim not initially pleaded with particularity may not be asserted in an accounting case after expiration of the statute of limitations, was made in Menominee Tribe v. United States, 102 Ct. Cl. 555 (1945). The court rejected the contention in the following language (at page 564):

> The defendant devotes a large part of its brief to a defense not raised in its answer and counterclaim, to wit, that it was not until after the statute of limitations had run that the plaintiff made claim that the 5 percent fund should have been reimbursed for expenses incurred under the Act of 1906.
>
> * * * * *
>
> . . . On December 1, 1938, thirteen petitions were filed. One of them was for loss of interest on the "Menominee Log Fund." This complained only of withdrawals from this fund for operations under the Act of 1908 and did not mention withdrawals under the Act of 1906. However, on the same date plaintiff filed a bill for a general accounting by defendant. Then, when the Comptroller General's report showed withdrawals from the 5 percent fund for operations under the 1906 Act, later supplemented by the 1908 Act, plaintiff filed a motion for leave to amend its petition for loss of interest on the Menominee Log Fund by consolidating with it its petition for a general accounting, insofar as withdrawals from this Menominee Log Fund were concerned. This motion was granted. It was properly granted because plaintiff had filed within time a petition giving it the right to recover the interest on any withdrawals from this fund that had not been repaid, to wit, the petition for a general accounting. In that suit it was not necessary for plaintiff to point to any specific wrongful act of the defendant; it was a petition by the "ward" for a general accounting by its "guardian."
>
> This defense is not well taken.

In Blackfeet, supra, 32 Ind. Cl. Comm. at 76-84, we held that the Government must account for Indian trust property other than money, where

a plaintiff has made a timely demand to that effect. In its original petition in this case, filed July 31, 1951, the plaintiff called for a property accounting. We can perceive no more reason for requiring the plaintiff to particularize breaches of trust in advance of rendition of the account in the case of property than in the case of money.

In Lower Sioux Indian Community v. United States, Docket 363, 22 Ind. Cl. Comm. 226 (1969), we held that general allegations of mismanagement of plaintiff's property, similar to those in the petition in the instant case, authorized the prosecution of claims for lands ceded under a treaty, an agreement, and a statute, first specified on the record 18 years later. In Yankton Sioux Tribe v. United States, 175 Ct. Cl. 564, 569 (1966), rev'g Docket 142, 10 Ind. Cl. Comm. 137 (1962), the Court of Claims reversed our refusal to hear a claim on the ground that it was not specified in the original petition and stated:

> . . . we take cognizance of the liberality in pleading before judicial tribunals in these modern times, as fully discussed by Commissioner Scott, and need but mention that the Commission is bound both by the rules it has adopted and the spirit of the Indian Claims Commission Act to this liberality in procedure.

The same court, in Confederated Salish and Kootenai Tribes v. United States, 189 Ct. Cl. 319, 324, 417 F. 2d 1340, 1342 (1969), stated:

> Finally, we cannot forget that this is a litigation brought by Indian Tribes to redress an alleged wrong by the Government which has long supervised their affairs. Though we do not lean over backward in such a case, we are somewhat more lenient in procedural matters than we might be in other classes of cases in which the relationships of the parties are not so special.

We conclude, therefore, that we were in error in our former opinion when we held that the plaintiff could not assert a claim in the instant case for extra compensation for its lands alienated under the 1908 act.

No amendment of the petition is necessary. The only purpose an amendment could serve would be to give details of the claim, and the thirteenth exception and its supporting statement have already done this. Modern practice recognizes alternative ways to define issues. The Supreme Court stated in Conley v. Gibson, 355 U. S. 41, 47-48 (1957):

> . . . all the Rules require is "a short and plain statement of the claim" that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests. . . . Such simplified "notice pleading" is made possible by the liberal opportunity for discovery and the other pretrial procedures established by the Rules to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues.

Amending the plaintiff's petition to conform to the exception would be an idle and anachronistic ceremony.

Another question remains. Is there some substantive principle--not a technicality of pleading, but a rule of law--which forbids a claim for just compensation from being asserted in the same case as a claim for equitable accounting?

As we pointed out in footnote 3 of our 1972 opinion (28 Ind. Cl. Comm. at 171), the fact that an act of Congress disposing of Indian property is based on an agreement with the Indians ordinarily signifies that an eminent domain taking did not occur.

In regard to surveyed sections numbered 16 or 36 on the Fort Peck Reservation, and lands granted in lieu thereof, an agreement dated September 14, 1907, provided for the $1.25 an acre price; but it made no mention of reserving land for agency and school use. A copy of the agreement forms Exhibit B in support of the defendant's motion for summary judgment in Docket 183, an earlier action between the present parties, 11/ and we take judicial notice of it here.

Thus it appears that the present plaintiff may have a legal claim under the Fifth Amendment in regard to part of the lands alienated in 1908 12/ and a purely equitable claim in regard to the other part.

11/ See 3 Ind. Cl. Comm. 78 (1954), aff'd, 132 Ct. Cl. 373 (1955). In its response to the present motion for rehearing, defendant for the first time attempts to raise the defense of res judicata, on the basis of this case, against plaintiff's claim for additional compensation for the Montana school sections and administrative sites. By examining the pleadings and decisions in Docket 183 we have determined that different lands were in issue and the defense is not well taken.

12/ We express no opinion on whether the claim based on the lands reserved for Federal school and administrative sites really is sustainable as a Fifth Amendment taking. While these sites are not mentioned in the 1907 agreement, it was stated in the House debate that the Indians had consented to the amendments in the 1908 act. 42 Cong. Rec. 7209 (May 29, 1908). There was substantial opposition in the House to the $1.25 per acre price. In answer it was stated (erroneously, but without contradicion) that the Fort Peck Reservation was an Executive Order Reservation, and the $1.25 price was "really nothing more nor less than a gift to the Indian." Id. 7211.

If liability should be established for the reserved sites, a difficult question of damages would remain. As stated in footnote 9, above, these lands were restored to tribal ownership in 1927. Presumably they had been used for purposes of benefit to the Indians continuously since 1908, during which period the Indians had the use of the $5,117.52 purchase price at $1.25 an acre, the principal of which was taken back by the Government when the lands were restored to the tribe, leaving any interest or profit from interim use of the money with the Indians.

Although not cited in footnote 3 of our previous opinion, Fort Berthold, supra (182 Ct. Cl. at 560-61), is the authority for the proposition that land acquired by the Government from an Indian tribe pursuant to agreement is not "taken" within the meaning of the Fifth Amendment. Cf. Lower Sioux Indian Community v. United States, Docket 363, 30 Ind. Cl. Comm. 463, 472 (1973).

It is now suggested that Fort Berthold by implication prohibits a Fifth Amendment claim from being asserted in the same proceeding where the Government is called to account as a trustee. The following passage at 182 Ct. Cl. 553 is quoted in support of this view:

> It is obvious that Congress cannot simultaneously (1) act as trustee for the benefit of the Indians, exercising its plenary powers over the Indians and their property, as it thinks is in their best interests, and (2) exercise its sovereign power of eminent domain, taking the Indians' property within the meaning of the Fifth Amendment to the Constitution. In any given situation in which Congress has acted with regard to Indian people, it must have acted either in one capacity or the other. Congress can own two hats, but it cannot wear them both at the same time.

The contention that the above passage stands in the way of asserting a Fifth Amendment claim in an accounting suit seems to rest on a belief that the Government cannot commit breach of trust when it exercises the power of eminent domain. Such could hardly have been the court's meaning, however. At 182 Ct. Cl. 555, the court referred to cases where a Fifth Amendment taking had been held to have occurred, and stated:

> . . . In each case, the Government, in dereliction of its fiduciary obligations, made no attempt to give the Indians any compensation. [Emphasis supplied.]

Similarly, the Supreme Court in United States v. Mille Lac Chippewas, supra, referred to two joint resolutions by which Congress exercised its power of eminent domain over Indian trust land as "violations of trust," 229 U. S. at 509.

When the Government puts on its sovereign hat and exercises the power of eminent domain to take land held by recognized Indian title, it lays aside its character as a fiduciary. This is the ultimate breach of trust.

We have looked in vain for authority that abuse of trust only, but not outright repudiation of the trust, may be claimed in an equitable accounting. The distinction between Fifth Amendment claims and equitable claims affects the quantum of proof and the measure of damage; but it does not affect the plaintiff's right to assert both in the same case. Fort Berthold, supra, 182 Ct. Cl. at 551-552. See also Klamath and Modoc Tribes v. United States, 193 Ct. Cl. 670, 686, 436 F. 2d 1008, 1015 (1971); Indian Claims Commission General Rules of Procedure, Rule 7(a)(2) (25 C.F.R. § 503.7(a)(2)). The ancient rule of equity is to the same effect. See McMullen Lumber Co. v. Strother, 136 Fed. 295, 305 (8th Cir. 1905):

> . . . Where the court of equity thus obtains jurisdiction over any material part of the subject-matter in controversy between the parties, it brings within the compass of its jurisdiction in the single proceeding the entire adjustment of all, to put an end to the litigation. Pomeroy's Equity, Vol. 1, pars. 181-242; 1 Cyc. of L. & P. 418.

To cite Fort Berthold for the proposition that claims for accounting and for just compensation cannot be joined, or even that a Fifth Amendment

taking must be specially pleaded, is a misreading of the case. Fort Berthold actually permitted such a joinder, and does not deal with the subject of pleading at all.

The Court of Claims case was an appeal from an interlocutory decision of this Commission determining taking dates of lands alienated from the Fort Berthold Reservation by a 1910 statute and ordering further proceedings to determine fair market value and the amounts of consideration previously paid. See Three Affiliated Tribes of the Fort Berthold Reservation v. United States, Docket 350-F, 16 Ind. Cl. Comm. 341 (1965). Three classes of lands were involved in the appeal: (1) school sections granted to the state in return for a flat $2.50 per acre price unilaterally determined by Congress, (2) land sold by the Government to homesteaders for the account of the Indians, and (3) three small tracts, one given away by the Government to the Bureau of Catholic Indian Missions and the other two seized by the Government for public use. The Commission, without considering the Fifth Amendment, held as follows in regard to all three classes of lands (except the mission site, which it held to be noncompensable):

> If the Indians are to prevail in this law suit, it is incumbent upon the petitioner in subsequent proceedings to prove that the moneys received from the sale and disposition of the subject lands under the several acts involved herein were so far below the fair market value at the time petitioner lost title thereto, that the United States was guilty either of fraudulent conduct or gross negligence amounting to a breach of its fiduciary obligations assumed under the 1910 Act and the subsequent acts involved herein. With this in mind it must be remembered that proof of a mere inadequacy between moneys paid and received for said lands and their then fair market values as of the date of takings is not enough to prove fraudulent conduct on the part of the United States. [16 Ind. Cl. Comm. at 391.]

On appeal, the Court of Claims rejected the Commission's requirement of anything more than mere inadequacy of consideration to support recovery where there was a Fifth Amendment taking. See 182 Ct. Cl. at 551. It held there were Fifth Amendment takings of the school sections and small tracts, but not of the lands sold to homesteaders. In the case of these lands, the court did not deny the plaintiff all right to recover, but affirmed the Commission's requirement for proof of more than mere inadequacy of consideration.

The court did not require the plaintiff in Fort Berthold to elect between proceeding with its Fifth Amendment claims, applicable to the school sections and small tracts, and its equitable claims, applicable to the lands sold to homesteaders; nor did it order a severance.

As to any suggestion that a Fifth Amendment taking must be specially pleaded, it is a sufficient answer that our General Rules of Procedure impose no such requirement, and neither does Fort Berthold.[13/]

We conclude that our holding under Exception 13 in the 1972 decision of this case was an aberration from sound principle. The plaintiff, without amendment of its pleadings, may proceed to give evidence as to the fair market value of the land alienated from its reservation under the 1908 act, and argue either or both equitable and Fifth Amendment claims

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13/ We have examined a copy of the petition in Fort Berthold that was before the Court of Claims in 1968 (Amended Severed Petition, filed June 4, 1959). It does not mention the Fifth Amendment. Instead, in language similar to the thirteenth exception and supporting statement in the instant case, it alleges that the alienations of all three classes of lands involved in the appeal were breaches of fiduciary obligation, and prays for just compensation.

for any difference between such value and the price actually paid. To the extent that our holding here is in conflict with Minnesota Chippewa Tribe v. United States, Dockets 19, et al., 29 Ind. Cl. Comm. 211 (1972), the latter case is overruled.

Plaintiff's motion for reconsideration of our ruling under Exception 13 is granted. Our order of June 14, 1972, 28 Ind. Cl. Comm. 202, will be vacated insofar as it applied to this exception, and a new order will be entered in accordance with the views just expressed.

Exception No. 14

A. Expenditure of 1888 Agreement Consideration

In the agreement ratified May 1, 1888, c. 213, 25 Stat. 113, the Government did not promise to "pay" to the Indians the consideration for a land cession, but to "advance and expend" it for certain stated objects. Among these were "providing employees" and "erection of . . . new agency . . . buildings." Taken out of context, such purposes appear to represent administrative expenses of the United States.

The plaintiff asked us, under Exception 14 and in its subsequent Motion for Determination of Issues of Law, to rule that the defendant breached its fiduciary obligations and contravened fair and honorable dealings whenever it used parts of the consideration for its own administrative purposes even though the use was purportedly authorized by the 1888 agreement. Plaintiff states "that it was patently and inherently unfair and dishonorable for defendant to use plaintiff's money for its own purposes. . ." See Plaintiff's Points and Authorities in Support of Its Motion for Reconsideration, at 31.

We do not view the 1888 agreement as authorizing the expenditure of parts of the consideration for administrative purposes of the United States. Moneys which might properly have been disbursed for "new agency . . . buildings" and "providing employees" must have been for the specific purposes stated in Article III and consistent with the overall purpose of the agreement. See Blackfeet, 32 Ind. Cl. Comm. at 130-131, cf. 108, 111. If defendant can establish that its payments for "new agency buildings" and "providing employees" were for the benefit of the Indians in accordance with the provisions of the 1888 agreement, then defendant fulfilled its obligations and is entitled to credit for such payments. We would not view any such payments to have been for administrative purposes of the United States.

If, however, payments were made for agency buildings or employees which were not for purposes stated in Article III, then all such payments would have been unauthorized by the agreement; they would probably have been for administrative purposes, but in any event the defendant would not receive credit for them.

It is in the above sense that our statements in the previous opinion in this case, that the plaintiff may not invoke the fair and honorable dealings clause as an exception to the accounting under the 1888 agreement, are to be taken. See 28 Ind. Cl. Comm. at 192. We did not rule on the question of whether the fair and honorable dealings clause can ever be applicable in accounting cases. Cf. Osage Nation v. United States, 119 Ct. Cl. 592, 669-671, cert. denied, 342 U.S. 896 (1951) (rev'g Docket 9, 1 Ind. Cl. Comm. 43 (1948)).

B. Supplemental Accounting for Disbursements

In exception 14 the plaintiff excepted to "all or part" of the defendant's expenditures shown in the GAO report under some 48 categories and requested "a further accounting with respect to the expenditures determined by the Commission to be improper."

We responded by ordering the defendant to supply a detailed breakdown and explanation of expenditures.

When we were again confronted with a plaintiff's request that we compel supplemental accounting for expenditures, in Blackfeet, we examined the question in greater depth. We held that when a plaintiff questions a particular item of expenditure its remedy is to except, that is, to ask the Commission to disallow the item, not to ask that the defendant be ordered to supplement the account. We expressly repudiated our 1972 decision in the instant case as a precedent for ordering restatements of disbursements. 32 Ind. Cl. Comm. at 147. We wrote (id. at 85):

> The burden is on the defendant to make a proper accounting . . . 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.

We added in a footnote:

> 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.

In view of our Blackfeet decision the Commission on its own motion is vacating that part of the 1972 order herein which requires the defendant to supplement its accounting for expenditures. Inasmuch as the defendant is exposed to substantial liability on its existing disbursement schedules (see 28 Ind. Cl. Comm. at 191-193), which it may be able to escape by providing fuller explanations, it will be allowed until August 26, 1974, to voluntarily file an amended account of expenditures.

The plaintiff will be allowed until September 23, 1974, to file specific exceptions (i.e., requests for disallowance) directed to items of expenditure, as shown on the amended account, or if none is filed, as shown in the existing GAO report. These exceptions should be at least as specific as those filed by the plaintiffs in Blackfeet in the 13 lists discussed between pages 107 and 128 of volume 32 of our reports.

CONCLUSION

We stated in Blackfeet (32 Ind. Cl. Comm. at 146-147):

> The most decisive action of which we are capable appears necessary to move our accounting cases on to adjudication . . .
>
> 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 time limits in the accompanying order. They will not be extended except for the gravest reasons, such as the death of an attorney. The trial date currently set in this case, July 15, 1974, is now unrealistic. We set a new date in the order, and to enable the parties

to keep it we are establishing a fixed schedule for all preliminary steps, which we will expect to be adhered to strictly.

John T. Vance, Commissioner

We Concur:

Richard W. Yarborough, Commissioner

Margaret H. Pierce, Commissioner

Brantley Blue, Commissioner

Yarborough, Commissioner, concurring:

I concur, since I am 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 I 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. I 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, I am now bound to follow the authority of Te-Moak, supra, in the instant case.

Richard W. Yarborough, Commissioner

Kuykendall, Chairman, dissenting in part:

In my view the majority is not correct in its rulings on two points, and I must, therefore, dissent in part. The matters on which I disagree involve the rulings concerning Exception 13 and the proper measure of damages for the defendant's failure to make IMPL funds and certain other accounts productive.

Under Exception 13 plaintiff seeks to recover just compensation on its claim that the United States was guilty of a taking under the Fifth Amendment when it acquired some 6,736.71 acres of plaintiff's reservation lands for the support of public schools in the State of Montana and for Federal agency and school use. This claim, which plaintiff seeks to prosecute as an exception to the defendant's accounting, raises serious questions concerning the pleadings in this case and the Commission's statute of limitations which expired five years after August 13, 1946. 25 U.S.C. § 70k. Contrary to the majority's holding, I have concluded that the plaintiff has not timely filed any Fifth Amendment taking claim, and the Commission has no jurisdiction to consider such a claim.

Defendant argues that claims for the value of land or other property should have been timely set forth in specific allegations relating to the loss of such land or other property. The majority has cited the case of Menominee Tribe v. United States, 102 Ct. Cl. 555 (1945) as being one which involved a contention very similar to that urged by defendant in this case. In Menominee the plaintiff had filed, in addition to some thirteen separate petitions, a bill for a general

accounting. When the accounting report was ultimately filed, it revealed certain withdrawals from a particular Menominee fund. The court permitted the plaintiff to amend its petition, even though the statute of limitations had run, because the timely filed general accounting petition gave plaintiff the right to recover its losses occasioned by any improper withdrawals from that fund. The Menominee case is not at all analogous to the claim which is now being asserted here under Exception 13. I am sure that defendant would readily concede that all improper or questioned transactions which have been revealed by the accountings in this case are properly raised by plaintiff's exceptions. The particulars of any such transactions were not known by the Indians when the petition herein was filed, and the purpose of the general accounting was to make claim for losses suffered by the improper administration of the Indians' accounts. But the "taking" of the 6,736.71 acres involved in Exception 13 was not revealed for the first time in the accountings. These lands were acquired under the provisions of sections 3 and 7 of the Act of May 30, 1908, 35 Stat. 558, 560, 561. The plaintiff did not require an accounting to learn of these circumstances. In fact the disposal of its lands under the 1908 act was the subject of the Fort Peck Indians' petition in the matter of Docket 183, 3 Ind. Cl. Comm. 78 (1954), aff'd 132 Ct. Cl. 373 (1955).

The majority has referred to the case of Lower Sioux Indian Community v. United States, Docket 363, 22 Ind. Cl. Comm. 226 (1969), as an instance in which the Commission, by allowing the filing of an amended petition, has permitted the prosecution of claims for lands ceded under a treaty,

an agreement, and a statute in a suit in which the original petition was based on general allegations of mismanagement of plaintiff's property. While the general allegations in Lower Sioux are characterized by the majority as similar to those in the petition in the instant case, an examination of the Lower Sioux petition reveals a significant difference.

In Lower Sioux, a decision in which I participated and which I fully support, the amendment was permitted because the original, timely filed petition contained allegations which satisfied the requirement that the land claims, which were being asserted by amendment, had been sufficiently presented in the original petition to permit their relation back under our Rule 13(c). The original petition in Lower Sioux contained allegations that:

SECOND CLAIM

> 14. Under and by virtue of various statutes, treaties and administrative acts, the defendant has been obligated to pay various sums in money and goods to the petitioners, has invested and held for investment various funds belonging to the petitioners, and has managed and disposed of property, both real and personal, belonging to the petitioners.
>
> 15. In the course of its management and control, the defendant at various times:
>
> * * * * *
>
> (2) Has sold, rented or otherwise alienated property, including lands, belonging to the petitioners in an improvident manner;
>
> * * * * *
>
> (4) Has taken unto itself lands and other property belonging to the petitioners. [Emphasis supplied.]

This language was adequate notice that the Lower Sioux's Second Claim might encompass claims for lands ceded under a treaty, an agreement, and a statute. Clearly it was a petition containing more than allegations

of mismanagement of property. And under the liberal interpretation of modern pleading, and in Indian cases in particular, we properly permitted the Lower Sioux amendment.

However, the petition in this case is restricted to claims based upon the fiduciary obligations of the United States and the management of the Indians' trust properties. Those portions of the petition which the majority has quoted merely emphasize the limitation of the claims in this case to those involving breaches of trust. There is no language giving notice that any claim would be presented for just compensation based on a taking of lands under the Fifth Amendment. Absent any language which presented or served notice of a timely claim for just compensation for a taking of property, the plaintiff's Fifth Amendment taking claim is barred by the Commission's statute of limitations. 25 U.S.C. § 70k. See Creek Nation v. United States, 194 Ct. Cl. 86 (1971), aff'g in part, rev'g in part Docket 280, 22 Ind. Cl. Comm. 10.

Two other cases are cited by the majority, but they are no authority for the ruling in this case. In Yankton Sioux Tribe v. United States, 175 Ct. Cl. 564, rev'g Docket 142, 10 Ind. Cl. Comm. 137 (1962), the Court of Claims found the Sioux's land claim to have been timely filed, since the area involved was in fact included within the description of the land claimed in the original petition. The case of Confederated Salish and Kootenai Tribes v. United States, 189 Ct. Cl. 319, 417 F.2d 1340 (1969), did not involve

an issue of the adequacy of a pleading or a statute of limitations. There the court returned the case to its trial commissioner to permit the Indians another opportunity to attempt to prove the existence and amount of loss they might have incurred. Noting that the Indians, having had their chance and failed to prove their loss, could have their case dismissed, the court elected as a procedural matter to give the Indians a "second chance". The court was motivated in part by a feeling that the Indians might have been misled by its incidental references, in an earlier decision, to a value which was not a proper measure of damages. The court did state, as the majority has quoted, that it was motivated also by a leniency in such procedural matters because plaintiffs were Indians.[1/] However, the court did caution that it does not "lean over backwards" in such cases.

In the instant case I believe the majority is leaning over backwards -- and in a matter which is not merely procedural but actually concerns a more substantial matter involving the statute of limitations contained in our jurisdictional act.

The majority also sets forth a second or alternative basis for allowing the prosecution of a Fifth Amendment taking claim in this case. Under this theory it would be immaterial that the original petition contained no allegations to support a relation back of a just compensation claim. As the majority views it, the alleged action of the

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1/ Judge Skelton dissented from this holding.

United States in taking property for public purposes is merely one form of a breach of trust, and therefore the claim is an appropriate one in an accounting case. I also disagree with this holding

The claim which plaintiff seeks to prosecute as an exception to defendant's accounting is not based on the United States' conduct as a trustee. Rather it is a claim arising from the actions of the United States as a sovereign. Plaintiff asserts that the circumstances in this case are substantially identical with those involved in the purchase by the United States of school lands in Three Affiliated Tribes of the Fort Berthold Reservation v. United States, 182 Ct. Cl. 543 (1968), aff'g in part, rev'g in part Docket 350-F, 16 Ind. Cl. Comm. 34 (1965). In that case the court found that Congress was not acting as a trustee for the Indians with regard to school lands. Rather the court stated it ". . . . was exercising its power of eminent domain in order to grant this land to the State of North Dakota". Fort Berthold, supra, 182 Ct. Cl. at 559. The so-called "purchase" of lands to which the Fort Berthold Indians held recognized title was a ". . . . taking under the Fifth Amendment, entitling the Indians to just compensation". Fort Berthold, supra, 182 Ct. Cl. at 567. In this case the Fort Peck Indians assert that under the holding of Fort Berthold they are "entitled to an accounting showing a credit to petitioner's funds of an amount representing just compensation for the purchased lands".

The use of words that the United States must "account" does not convert a claim based on a taking by the United States in its sovereign

capacity to a claim based on a breach of the United States' fiduciary duties as a trustee. Plaintiff's words requesting "an accounting showing a credit to petitioner's funds" are surplusage. The claim is solely one for just compensation. The right to just compensation does not arise through or by reason of any trust relationship and is not related to defendant's accounting in this case.

Likewise the plaintiff's Fifth Amendment taking claim cannot be converted to an accounting action merely by referring to the plaintiff's claim for just compensation as involving one based on a breach by the United States of its fiduciary duty. The majority would characterize the sovereign's exercise of its power of eminent domain as the ultimate repudiation of a trust and therefore a breach of its duties as a trustee. This analysis of plaintiff's claim under Exception 13 fails to distinguish between the two capacities in which Congress may act when it deals with Indian property. First it may act as trustee for the benefit of the Indians, exercising its plenary power over Indian affairs. Secondly, it can exercise its power of eminent domain and take the property, in which case it must pay just compensation. But the Congress cannot act simultaneously as both a trustee and as a sovereign. In Fort Berthold, supra, 182 Ct. Cl. at 553, the court stated:

> In any given situation in which Congress has acted with regard to Indian people, it must have acted either in one capacity or the other. Congress can own two hats, but it cannot wear them both at the same time. [Emphasis supplied.]

The majority believes that the United States can "commit breach of trust when it exercises the power of eminent domain". The support for this contention is the Court of Claims' statement in Fort Berthold that in certain cases where a Fifth Amendment taking had occurred the United States, in dereliction of its fiduciary obligations, made no attempt to give the Indians any compensation. Apparently the majority equates "dereliction" with "breach" to reach a conclusion which is clearly not intended by the court's statement and is contrary to the decision in the case. Dereliction of an obligation is an intentional abandonment of that obligation. A breach, however, is an infraction or violation of an obligation. What the court was saying is that the United States, when it acts as a sovereign in taking property for public purposes, has abandoned or put aside its role as a trustee. It has not, in such instances, acted as a trustee and cannot be held to have breached any trust obligation. The court, in Fort Berthold, did not say that the Government when exercising its eminent domain powers was in breach of its fiduciary obligations.

Another difficulty I have with the decision under Exception 13 lies in the majority's apparent conclusion that in the Fort Berthold case there was no allegation of a Fifth Amendment taking. As they view it the Fort Berthold pleading was similar to the instant case, excepting that there was a prayer in Fort Berthold for just compensation. My examination of the Amended Severed Petition, filed June 4, 1959, in Fort Berthold reveals allegations of a taking of property under the

Fifth Amendment and a claim for just compensation.[2/] The Fort Berthold just compensation claim was not pursued as an "exception" to an accounting by defendant.

Under its second or alternative theory the majority now holds that Fifth Amendment claims may be presented in all cases in which a general accounting claim is asserted. This is to be done without any regard to the petitions in each individual case. I believe the majority is in error in following such a course. I agree with our decision in Minnesota Chippewa Tribe v. United States, Dockets 19, et al., 29 Ind. Cl. Comm. 211 (1972). In any case wherein the petition is broad enough to include claims based on Fifth Amendment takings, the case should proceed. However, in any case in which a question exists concerning the

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2/ The Amended Severed Petition in Fort Berthold alleges in part:

11. The said Act of June 1, 1910, supra, and the taking of petitioner's land thereunder, the sale of said lands (affected in part by the Act of February 9, 1925, 43 Stat. 817), and the disposition of proceeds, therefrom, were imposed by defendant on petitioner without petitioner's consent and in violation of defendant's duties and obligations as guardian of petitioner and petitioner's property, or petitioner's rights therein. The said Act constituted a taking of petitioner's lands without petitioner's consent and without compensation, or compensation agreed to by petitioner, or without fair and equitable compensation to petitioner.

* * * * *

14. As a result of the matters set forth in paragraphs 8, 11 and 12 hereof, petitioner has been damages (a) through failing to secure just compensation, or compensation agreed to by petitioner, for the said lands; or (b) through failing to receive such additional payment for the said lands as will provide just and equitable compensation therefor; and (c) through loss of the use of the proceeds, or entire proceeds, or just compensation, or additional compensation, for the said lands; and (d) has been otherwise damaged. [Emphasis added.]

timely filing of Fifth Amendment taking claims, the plaintiff should not be permitted to proceed unless the petition is amended. A claim for a taking under the Fifth Amendment should not be permitted as "an exception" to an accounting action, and the majority's action in overruling Minnesota Chippewa is erroneous.

The other matter upon which I must indicate my differing views has already been set forth in the dissent of Commissioner Yarborough, in which I joined, in Te-Moak Bands of Western Shoshone Indians v. United States, Dockets 326-A, et al., 31 Ind. Cl. Comm. 427 (1973). We disagreed with the majority concerning the proper measure of damages for defendant's failure to make the Indians' IMPL funds productive and 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. That dissenting opinion states my views concerning the measure of damages in this case for the defendant's failure to make IMPL funds and certain other accounts productive.

Jerome K. Kuykendall, Chairman