

BEFORE THE INDIAN CLAIMS COMMISSION

NORTHERN PAIUTE NATION, et al.,)	
)	
Plaintiffs,)	
)	
v.)	Docket No. 87-A
)	
UNITED STATES OF AMERICA,)	
)	
Defendant.)	

Decided: August 14, 1974

Appearances:

I. S. Weissbrodt, Attorney for Plaintiffs. Abe W. Weissbrodt and Ruth W. Duhl were on the Brief.

Marvin E. Schneck, with whom was Assistant Attorney General Kent Frizzell, Attorneys for Defendant.

OPINION ON PLAINTIFF'S MOTION FOR A COMPLETE AND PROPER ACCOUNTING

Blue, Commissioner, delivered the opinion of the Commission.

Now before the Commission is plaintiffs' motion for a complete and proper accounting, filed on December 3, 1970, and defendant's opposition thereto, filed on February 23, 1971. Plaintiffs enumerate several areas in which they allege that defendant's accounting report is deficient, incorporating their exceptions to the accounting into their motion. We shall discuss these alleged deficiencies below.

Defendant opposes the motion on two procedural grounds. The first of these grounds is that plaintiffs' motion is superfluous and duplicative of its exceptions, and that there is no provision for a motion of this type in our procedure. We find that the motion is adequately

stated. We have granted similar motions in the past where circumstances warranted it. E.g., Mescalero Apache Tribe v. United States, Docket 22-G, 23 Ind. Cl. Comm. 181 (1970).

Defendant's second ground of opposition is that the motion was premature since defendant had not then filed its response to plaintiffs' exceptions. Defendant's responses were filed on August 4, 1971, which effectively moots its second ground. Accordingly we will proceed to decide plaintiffs' motion.

We have recently delivered two accounting opinions which we intend to be determinative of certain accounting issues raised in this and other cases currently before the Commission. These cases are Te-Moak Bands of Western Shoshone Indians v. United States, Dockets 326-A and 22-G, 31 Ind. Cl. Comm. 427 (1973),^{*} and Blackfeet and Gros Ventre Tribes v. United States, Dockets 279-C and 250-A, 32 Ind. Cl. Comm. 65 (1973).

Plaintiffs have divided their exceptions into two categories, "general" and "special." They state that the exceptions are made

. . . in order to furnish a guide to defendant in preparation of a more complete and informative accounting as requested herein. As to most such improprieties the inadequacies of defendant's report make it impossible for petitioners to specify the amount of their claims, although it appears that they have suffered damage in substantial amounts through defendant's failure to credit moneys to petitioners' accounts and defendant's improper disbursements from petitioners' accounts.

^{*}/ Plaintiffs herein have adopted the briefing and argument of the Te-Moak Bands on the duty of defendant to make funds held in trust for Indian tribes productive of income. 31 Ind. Cl. Comm. 427, 429 n. 1.

Plaintiffs then list under their "general exception" seven areas, concerning which, they allege, essential facts necessary to a proper accounting are undisclosed. Plaintiffs claim that the lack of these facts renders the accounting before us "altogether incomplete and inadequate."

In support of its general exception plaintiffs cite an earlier Te-Moak opinion, 23 Ind. Cl. Comm. 79 (1970), and Mescalero Apache Tribe v. United States, Docket 22-G, 23 Ind. Cl. Comm. 181 (1970). In those cases we held that the burden on the defendant is to provide an accounting in such detail, using all available data, that the plaintiff may readily ascertain whether its funds have been properly managed. Mescalero, supra, at 185. We have not retreated from that position. See, e.g., Blackfeet, supra; Fort Peck Indians v. United States, Docket 184, 28 Ind. Cl. Comm. 171 (1972), 34 Ind. Cl. Comm. 24 (1974).

In Blackfeet we also tried to confront the realities of the Indian accounting problem. We suggested that delay in accounting cases tends to work against the interests of the plaintiffs. Id. at 147. We urged the use of discovery as an alternative to supplemental accounting, when applicable. We also suggested that plaintiffs consider whether issues which require the preparation of a supplemental accounting are really worth urging. We have ordered supplemental accounting only where the submitted accounting report is not adequate to bring the issues into focus, id. at 85, and where discovery is inappropriate.

We have taken no action on plaintiffs' general exceptions. The action we have taken under the special exceptions, infra, will cure

the defects alleged under the general heading. We will proceed with the special exceptions.

Exception No. 1. The defendant's report is incomplete and inadequate since it does not account beyond June 30, 1951.

In Blackfeet, supra, at 75-76, we held that we have no jurisdiction to order defendant to simply extend its general accounting. Our jurisdiction to order a post-1946 accounting depends upon finding a course of wrongful action which was ongoing at the August 13, 1946, cutoff date. Plaintiffs' request for a post-1946 accounting will be denied without prejudice to plaintiffs' rights to make a further request for an accounting beyond August 13, 1946, upon showing a specific wrongdoing which occurred before that date and can reasonably be expected to have continued thereafter. Confederated Tribes of the Goshute Reservation v. United States, Docket 326-B, 33 Ind. Cl. Comm. 130, 132 (1974).

Exception No. 2. The defendant's report is incomplete and inadequate in that it does not account for petitioners' funds which came into defendant's possession and control prior to November 4, 1892.

Plaintiffs allege that the Annual Reports of the Commissioner of Indian Affairs for the years 1870-1892 show that a total of \$11,085.00 was received from the sale of fish, furs and robes sold for plaintiffs by defendant's agents. Plaintiffs request an accounting for these and any other moneys received on plaintiffs' behalf.

Defendant denies that it received this sum on behalf of plaintiffs for those years. It states that no sums received during those years were tribal funds or funds subject to a fiduciary relationship. Alternatively it denies that, if it did receive the funds, it misappropriated or improperly disbursed such funds. It is uncertain whether defendant is stating that

its accountants were unable to find a record or receipts of such funds, or if it is stating that it received the funds but they are not subject to this accounting. Discovery procedures are available to plaintiffs as to this question. See Blackfeet, supra, at 95.

In any event, defendant has responded to plaintiffs. The burden is on defendant to make a proper accounting. Sioux Tribe v. United States, 105 Ct. Cl. 725, 802 (1946). Defendant feels it has sustained this burden, and this issue is ready for trial. We will not order a supplemental accounting as to this exception.

Exception Nos. 3-5. [These exceptions concern defendant's allegedly improper failure to credit interest on certain accounts during the period prior to the implementation of the Act of February 2, 1929, 45 Stat. 1164 (as amended by the Act of June 13, 1930, 46 Stat. 584). In each exception plaintiffs complain that the accounting report does not contain information sufficient to permit calculation of damages.]

Plaintiff's third exception concerns \$42,000 appropriated by Congress by the Act of May 27, 1902, 32 Stat. 245, 260, to be paid, \$300 per capita, to Indian allottees. The allottees received their payments in 1907-09. Plaintiffs complain that the money did not earn interest between the dates of appropriation and payment.

Exception 4 deals with proceeds of sales of Pyramid Lake reservation lands. According to the Act of June 7, 1924, 43 Stat. 596, the proceeds were to be deposited in the Treasury subject to appropriation by Congress for plaintiffs. Between June 30, 1926, and November 30, 1929, \$23,201.20 was deposited. No interest on these funds was paid, plaintiffs allege, prior to January 28, 1930.

Plaintiffs' fifth exception complains of defendant's failure to credit interest on plaintiffs' "Indian Moneys, Proceeds of Labor" (IMPL) funds prior to June 30, 1930. Plaintiffs argue that the accounting report shows IMPL fund deposits commencing November 4, 1892.

Defendant's response to plaintiffs' exceptions denies as to each of exceptions 3-5 any obligation or duty to credit interest on the funds in question. Defendant asserts it has no duty to supplement its report.

The issue to be decided as to each exception is whether the funds in question were trust funds upon which defendant had a duty to pay interest. Further accounting data is unnecessary for resolution of these issues. Therefore the motion for further accounting will be denied as to exceptions 3-5. If defendant is adjudged to be liable as to any of these exceptions, we may then determine whether the existing record is adequate to determine damages, or whether a supplemental accounting is required for that purpose.

Exception No. 6 does not contain a request for supplemental accounting, and need not be considered herein.

Exception No. 7. Petitioners except to defendant's report on the ground that it does not disclose (a) the length of the time during which petitioners' moneys withdrawn by defendant from interest-bearing funds in the Treasury of the United States, were retained by defendant in non-interest-bearing status, and (b) sufficient information to permit calculation of the amount of interest lost to petitioners while the moneys were held by defendant in non-interest-bearing status.

Plaintiffs herein allege that they may have lost interest on certain of their accounts because defendant withdrew funds from certain interest-bearing accounts and held them for an unreasonably long period before they were disbursed. Plaintiffs request that we order that the accounting provided to them be made specific enough that they may determine whether such delays in fact occurred, and, if so, the amount of interest lost to them by such delay.

In Blackfeet, supra, at 88, we held that "[u]nless 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." Plaintiffs are entitled to such information in the instant case. We will meet with the attorneys and accountants for the parties to determine the form of the additional information which is to be supplied.

Exception No. 8. Defendant's report does not show the length of time which elapsed before petitioners' interest-bearing moneys were covered into the Treasury of the United States after they had been received by defendant. Petitioners except to any delay of more than 30 days in covering interest-bearing moneys into the Treasury. To the extent that further information supplied by defendant shows delay beyond 30 days, the accounting should contain information sufficient to permit calculation of loss of interest to petitioners occasioned by such delays.

The practice of the United States is not to pay interest on interest-bearing funds until they are "covered" into the main United

States Treasury. In Blackfeet, supra, at 88-89, we followed Menominee Tribe v. United States, 107 Ct. Cl. 23, 33 (1946), where the Court of Claims held that the Government had a fiduciary duty to "cover" money into the Treasury within 30 days after its agents receive such moneys, and that the duty to pay interest commences on the date the funds are "covered" or 30 days after receipt, whichever is earlier.

Plaintiffs allege that the accounting report provides inadequate information to determine whether funds were held out of the Treasury improperly. (See GAO Report, Part V). We agree. Plaintiffs are entitled to such information.

We will meet with the attorneys and accountants for the parties to determine the form of the additional information to be supplied.

Exception No. 9. Petitioners except to defendant's report on the ground (a) that defendant disbursed moneys from petitioners' interest-bearing funds when other funds of petitioners which carried no interest or a lower rate of interest were or should have been equally available if defendant had properly discharged its fiduciary responsibilities, and (b) that the report does not contain information sufficient to permit calculation of the amount of interest lost to petitioners which was caused by said practice.

Another Menominee case, Menominee Tribe v. United States, 101 Ct. 10, 21 (1944), held that wherever possible the Government, where withdrawing money from Indian accounts in its role of a fiduciary, must withdraw funds from non-interest-bearing accounts

or the account bearing the lowest rate of interest. If the Government instead spends interest-bearing funds or funds bearing a higher rate of interest (reverse spending), it is under a duty to pay to the plaintiffs the interest thereby lost by them.

Plaintiffs are entitled to sufficient information to enable them to calculate whether any such practice occurred and the amount of interest, if any, which was lost. However, we think that the accounting provided herein is sufficient to calculate the losses, if any, from reverse spending. See Blackfeet, supra, at 90.

Exception No. 10. Petitioners except to the deposit of the amounts aggregating \$9,432.13 in petitioners' funds "Indian Moneys, Proceeds of Labor," which moneys should have been deposited in one of petitioners' funds representing proceeds of lands. Petitioners further except to the failure of defendant's report to disclose the details of the sales of their lands which produced the said sums, and to the failure to include sufficient information to permit calculation of the amount of interest lost to petitioners by reason of said improper deposits.

Plaintiffs state that certain funds derived from rights of way and sales of lands were deposited in incorrect accounts, and that essential information concerning the transactions is lacking. Defendant responds that all such funds were properly deposited and that all necessary records are available to plaintiffs.

We find that the receipts listed in the accounting report are inadequate to determine the nature of the pertinent transactions.

Plaintiffs are entitled to receive from defendant a supplemental accounting with the details of sales information requested. Blackfeet, supra, at 92-93. Defendant will be ordered to supply such an accounting.

Exception Nos. 11, 12, 14-16. [These exceptions allege that certain expenditures made by defendant from plaintiffs' tribal funds were improper or otherwise unjustifiable, or that the report does not contain sufficient information for plaintiffs to determine the propriety of the action or the amount of loss suffered thereby.]

The issue that is raised here is, when must the defendant supplement its accounts as to disbursements? This issue was discussed in Blackfeet, supra, at 84, et seq. In that case, as in the case before us, the plaintiffs argued that they were unable to determine the propriety of certain expenditures. We held that since the burden is on the defendant to make a proper accounting, the plaintiffs need only except to such questionable expenditures. Then it becomes incumbent upon the defendant to satisfy the Commission of the legality of the challenged items. Id. at 85, citing Sioux Tribe v. United States, supra, 105 Ct. Cl. at 802, Southern Ute Tribe v. United States, Docket 114, et al., 17 Ind. Cl. Comm. 46, 60 (1966). A motion to compel a new accounting will be granted only in an extreme case where the accounting reports are so lacking that the issues may not be brought into focus sufficiently for a trial. Blackfeet, supra, at 85.

In this case, as to these exceptions, the Government's report contains annual disbursement schedules, and states the purposes of the expenditures, at least in general terms. This is not an extreme case. Plaintiffs' motion will be denied, and we will proceed to trial on these exceptions.

Exception No. 13. Petitioners except to defendant's report in that it does not furnish adequate information as to the sales of petitioners' lands pursuant to the Act of June 7, 1924 (43 Stat. 596).

The accounting report shows the deposit of moneys, totalling \$30,150.21, received in payment for certain lands of plaintiffs, but no information pertaining to the sales. Plaintiffs are entitled to information showing the acreage sold, the price per acre and the basis therefor, and the dates of payment by the purchasers. Defendant will be ordered to provide a supplemental account containing such information. Id., at 76 et seq.

Exception No. 17. Petitioners except to defendant's report on the ground that it does not disclose whether receipts deposited in petitioners' funds "Indian Moneys, Proceeds of Labor," represent gross receipts or net receipts after deduction by defendant of administrative fees for services performed by it, and that it does not show the amounts of such administrative fees attributable each year to services performed by it for petitioners. Petitioners further except to the failure of said report to include sufficient information for them to calculate the loss of interest to them from any improper deduction of administrative fees.

Plaintiffs complain in this exception that the accounting report does not show whether deposits totalling \$123,637.29 represent gross receipts, or net receipts after deduction of administrative fees. Plaintiffs request this information.

Defendant, however, denies any improper deductions of administrative fees. This exception is thus in a posture similar to exception 2. It is uncertain from defendant's response whether defendant is denying that there were deductions for administrative fees, or is denying that such deductions were improper. Discovery procedures are available to plaintiffs as to this question.

In any event, the burden is on defendant to make a proper accounting. Defendant has made its response to plaintiffs' exception. This issue is ready for trial. We will not order a supplemental accounting as to this exception.

Future Proceedings

This case may be moved along. Defendant will be required to prepare a supplemental accounting as to exceptions 7, 8, 10 and 13. The parties will meet with Commissioner Blue within twenty days to determine the form of the supplemental accounting as to exceptions 7 and 8. Following that meeting, we will fix a time certain for defendant to prepare the required supplemental accounting. Plaintiffs will be given thirty days after receipt thereof to file amended exceptions thereto. The nature of these exceptions is such that when the data is submitted, and after plaintiffs have made their amended exceptions thereto, if any, it is possible that they may be disposed of on motion without the necessity for further trial.

We have determined hereinabove that we can proceed to trial as to the remaining exceptions, save exception No. 1. In the interests of moving this case along, we will schedule a trial as to these exceptions within ninety days.

We concur:

Brantley Blue
Brantley Blue, Commissioner

Jerome K. Kuykendall
Jerome K. Kuykendall, Chairman

John T. Vance
John T. Vance, Commissioner

Richard W. Yarborough
Richard W. Yarborough, Commissioner

Margaret H. Pierce
Margaret H. Pierce, Commissioner