BEFORE THE INDIAN CLAIMS COMMISSION

THE SIOUX TRIBE OF INDIANS OF THE ROSEBUD RESERVATION, SOUTH DAKOTA, Plaintiff,	)	
v.	)	Docket No. 118
THE UNITED STATES OF AMERICA, Defendant.	)	

Decided: November 22, 1974

Appearances:

Marvin J. Sonosky, Attorney for the Plaintiff.

Richard L. Beal, with whom was Assistant Attorney General Wallace H. Johnson, Attorneys for Defendant.

OPINION OF THE COMMISSION

Vance, Commissioner, delivered the opinion of the Commission.

This accounting case is before the Commission on a motion by plaintiff for an order fixing a time certain for defendant to furnish certain data, and for rulings on issues of law, and a motion by defendant for summary judgment and for leave to amend answers to the amended exceptions.

Plaintiff filed its accounting petition in 1951, asking for an accounting from July 1, 1925, of funds held by defendant pursuant to various acts of Congress. An accounting for the period up through June 30, 1925, had been adjudicated by the Court of Claims. Sioux Tribe

v. United States, 105 Ct. Cl. 658, 64 F. Supp. 303, remanded, 329 U. S. 684 (1946), judgment reentered, 112 Ct. Cl. 39 (1948), cert. denied, 337 U. S. 908 (1949); Sioux Tribe v. United States, 105 Ct. Cl. 725, 64 F. Supp. 312, remanded, 329 U. S. 685 (1946), judgment reentered, 112 Ct. Cl. 50 (1948), cert. denied, 337 U. S. 908 (1949). (The case reported at 105 Ct. Cl. 658 concerns an accounting of the price stipulated in the agreement of 1889, 25 Stat. 888, and will be referred to hereinafter as Sioux I. The case reported at 105 Ct. Cl. 725 concerns a general accounting, and will be referred to hereinafter as Sioux II.)

In response to plaintiff's petition, defendant filed a General Accounting Office Report, certified on March 11, 1960. Of the subsequent history of the case, suffice it to say that pursuant to our decision reported at 26 Ind. Cl. Comm. 92 (1971), nineteen amended exceptions to the GAO Report, filed by plaintiff on May 8, 1970, are before us.

Defendant filed an answer on October 29, 1971, to the amended exceptions, and plaintiff filed a reply to defendant's answer, and a motion for an order fixing time for defendant to furnish data, and for rulings on issues of law. On October 23, 1973, defendant filed motions requesting leave to file an amended answer to plaintiff's amended exceptions and for partial summary judgment.

Plaintiff on November 1, 1973, filed a response to defendant's motion for leave to amend, to which defendant filed a reply on November 13, 1973. Plaintiff filed a response to defendant's motion for summary judgment on December 3, 1973, to which defendant filed a reply on December 11, 1973.

Docket 118 is for the most part parallel to Docket 119. The respective plaintiffs in the two dockets are Sioux tribes from the Rosebud and Standing Rock reservations in the Dakotas, represented by the same counsel, predominantly raising similar issues and relying on similar arguments. Many of the issues raised in Docket 118 were therefore raised in Docket 119, and were discussed and disposed of by the Commission. Consequently many of the issues before us now will be decided by reference to our decision in Docket 119, 34 Ind. Cl. Comm. 230 (1974), referred to hereinafter as Standing Rock.

Defendant argues in its amended answer that, insofar as amended exceptions 2 to 6 and 12 may relate to funds appropriated or expended under section 17 of the Act of 1889, 25 Stat. 894, plaintiff is barred by res judicata and collateral estoppel from asserting that the money involved tribal funds. Defendant states that the Court of Claims determined in the Sioux cases, supra, that funds appropriated and expended under the Act of 1889 on behalf of plaintiff were in excess of any amount due under any obligation existing by treaty or legislation, and that the expenditures that were made after such fulfillment of the obligations under the Act of 1889 were gratuitous. Thus, defendant asserts that it is under no duty to make an accounting of additional funds disbursed since 1925 pursuant to the Act of 1889.

Plaintiff's response to defendant's motion argues that since defendant did not assert the aforementioned defenses for twenty-two years after the complaint was filed in May 1951, such defenses were waived by

defendant.[1/] Defendant's reply states that plaintiff's amended exceptions were filed in May 1970, almost six years after they were due according to the Commission's order of April 2, 1964. Defendant argues, and we concur, that the interests of justice are no less served in permitting amendment by defendant to set forth affirmative defenses than in permitting amended exceptions to be filed by plaintiff after a long delay.[2/]

In considering the substance of defendant's argument in its amended answer, we refer to Standing Rock, supra, at 233-34 where we dealt with this question. We concluded therein that the Court of Claims determined that defendant had met its treaty obligations by 1915, and that additional expenditures under section 17 of the 1889 act for plaintiff's benefit were gratuitous. (These expenditures, covering a period from 1915 to 1925, totalled $1,250,295.18.) Expenditures after 1925 only resulted in additional gratuities. Defendant has no obligation to account for such gratuitous expenditures.

However, amended exceptions 2-5 are concerned with other funds in addition to those expended under section 17 of the 1889 act, specifically, Indian Money, Proceeds of Labor (IMPL) funds. We therefore can only deny

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1/ Actually, defendant previously raised the defense of res judicata in its response filed on May 21, 1970, to plaintiff's motion to file amended exceptions to the petition. At that time defendant referred to claims made in the amended petition for Fifth Amendment takings under the acts of April 23, 1904, 33 Stat. 254 and March 2, 1907, 34 Stat. 1230, and stated that such claims could have previously been asserted under the jurisdictional act of June 3, 1920, 41 Stat. 738, which defendant alleged was broad enough to have allowed claims for such takings. The Commission rejected this defense, 26 Ind. Cl. Comm., supra.

2/ Defendant's amended answer dated October 23, 1973, is in reference to its answer filed October 29, 1971, to plaintiff's amended exceptions.

exceptions 2-5 insofar as they relate to funds or appropriation accounts established pursuant to section 17 of the 1889 act.

Exception 6 also involves in part certain expenditures made under the 1889 act. The exception will be denied in part, therefore, as discussed below. Exception 12 is concerned wholly with funds established pursuant to section 17 of the 1889 act, and will be dismissed, as discussed below.

Exception No. 1

Plaintiff's first exception is based upon the asserted failure of defendant to account beyond June 30, 1951. An up-to-date accounting is required only if it is determined that defendant was guilty of pre-1946 wrongdoings which have continued. Standing Rock, supra, at 234-35. The motion of plaintiff with respect to this exception is therefore denied without prejudice.

Exception No. 2

Plaintiff's second exception is from defendant's failure to cover funds into interest-bearing accounts without undue delay, and for failure to report the facts from which it can be determined whether receipts were covered into interest-bearing accounts without delay.

On reviewing the accounting report, we conclude that the report does not disclose how long the money was held outside the treasury. The record is thus inadequate to determine whether there was an undue delay in covering funds into the interest bearing accounts. Plaintiff is entitled to this information. Id., at 235. Defendant will therefore be

ordered to report the pertinent facts requested.[3/]

Exception No. 3

Plaintiff's third exception is from defendant's failure to indicate the dates and amounts of warrants and certificates of deposit covering receipts credited into the principal fund, and from defendant's failure to show the amounts of interest credited to the interest fund, and thus for failure to compute interest correctly.

Our review of Part IV of the accounting report leads us to conclude that the information requested is not contained therein. Plaintiff is entitled to this information. Defendant will be ordered to report the facts requested.

Exception No. 4

Plaintiff's fourth exception is based on defendant's alleged "reverse spending," that is, spending interest-bearing funds when non-interest-bearing funds were available, and for failure to report facts necessary to ascertain the degree of "reverse spending." Plaintiff refers to fifteen interest-bearing funds in the GAO report, pages 286 to 300, including interest on IMPL and "proceeds of lands" funds, and requests that defendant be required to report the balances in the interest-bearing and non-interest bearing accounts on the various dates of withdrawal.

The ramifications of this exception are fully discussed in Standing Rock. We concluded that data in the GAO Report is adequate to allow

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3/ As we concluded above, the order to defendant to report additional facts as to exceptions 2-5 does not extend to funds expended under section 17 of the 1889 act, supra.

plaintiff to calculate losses from reverse spending. Id., at 236-37. Therefore plaintiff's request that defendant be ordered to furnish additional data as to this exception will be denied.

Exception No. 5

Plaintiff's fifth exception is based on defendant's alleged premature withdrawal from interest-bearing funds, causing the tribe to lose interest, and for failure to report dates of withdrawal and of disbursement, such dates being necessary to ascertain the amount of interest due plaintiff.

Defendant's accounting report does not contain the information plaintiff requests, and plaintiff is entitled to this data. Id., at 237. Accordingly, the Commission will order defendant to furnish the information concerning the dates of withdrawal and subsequent disbursements from plaintiff's interest-bearing accounts in the instant docket.

Exception No. 6

Plaintiff's sixth exception is for "transferring tribal funds to defendant's own account." Plaintiff argues in its statement supporting the exception that when "tribal funds are transferred to the the United States by surplus warrant, it means that the United States is taking tribal funds for its own account." The exception concerns the Act of February 12, 1929, 45 Stat. 1164. This act authorized money in excess of $500 held in a tribal trust account to carry interest at five per cent.

Plaintiff specifies a list of funds from the GAO report which were transferred by defendant to its own account by surplus warrant. Twelve of the transfers, in the total amount of $485,758.67, involve money available under appropriations made by defendant under the Act of 1889, supra. These funds involve gratuitous expenditures by defendant, as discussed previously herein, and thus concern the transfer of funds from other than trust fund accounts. Accordingly, this portion of exception 6 will be denied.

Plaintiff complains of eight transfers in addition to the foregoing. These eight involve funds totalling $8,623.58, designated as surplus by defendant.

One transfer, of $238.50, was the balance of the payment to plaintiffs for "Lands Allotted to Lower Brules" pursuant to the agreement of March 10, 1898, ratified by the Act of March 3, 1899, 30 Stat. 1362. This sum should have remained to the credit of plaintiff.

Four of these transfers are of sums of less than $5.00, in a total of $6.52. They were all transfers of balances of plaintiff's trust funds after disbursements had been made. These sums should have remained to the credit of plaintiff.

The remaining three transfers are of funds derived from sale of school lands under the Act of March 2, 1907, 34 Stat. 1230, and the

Act of May 30, 1910, 36 Stat. 448. Defendant advanced sums to the plaintiff based on the expected acreage of the lands sold. The advance was to be reimbursed on receipt of proceeds of the sale.

In both cases, however, the acreage sold was less than anticipated by a small amount, so that the sums received did not equal the amount advanced. Defendant accordingly transferred back to its own account by surplus warrant the difference between the amount advanced and the receipts from the actual sales.

In each case, defendant subsequently discovered that its determination of the acreage sold was in error, and that the amounts actually sold were slightly more than had appeared. However, the records do not indicate that defendant rectified this error by crediting plaintiff for the small amount of acreage sold in addition to that previously calculated.

Specifically, plaintiff states, and the record confirms (GAO Report, Statement No. 26, pp. 192-93), that under the 1907 act, _supra_, defendant advanced $165,000 to plaintiff. The Department of Interior reported that 63,527.45 acres of school land were disposed of at $2.50 per acre, for a total of $158,818.62. Defendant then transferred $6,181.38 of the tribe's funds to its own account to reimburse itself for the unreimbursed portion of the $165,000 which had been advanced.

Subsequently, according to the GAO Report in Docket 74 (Vol. 3, pp. 1660-63), defendant discovered that 64,585.97 acres were actually disposed of, which would indicate plaintiff should have received $161,464.93, and that only $3,535.07 should have been transferred to defendant's account. The $2,646.31 difference between the $6,181.38 which was transferred and the $3,535.07 which properly should have been transferred to defendant's account should be credited to plaintiff.

Under the 1910 act, supra, through a similar chain of events, the Government reimbursed itself $1,399.48 in principal and $797.70 in interest.[4/] When correction was subsequently made for the amount of acreage actually sold, according to the GAO Report in Docket 74 (Vol. 3, pp. 1715-16), it turned out that only $799.92 in principal should have been returned to defendant's account. The $599.56 difference should be credited to plaintiff.

Exception No. 7

Plaintiff's seventh exception pertains to defendant's failure to furnish certain dates on which specified items were credited to various accounts. The information was requested in order to determine damages,

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4/ There is nothing to indicate why defendant failed to reimburse itself with interest as to the reimbursement under the 1907 act.

if any, as for reverse spending. On July 13, 1972, the defendant reported the dates requested. The plaintiff should now file an exception, if it has any, to the recently submitted data. The Commission will grant a period of 30 days in its order to enable the plaintiff to make such exception to the material in question submitted by defendant.

Exception No. 8

The eighth exception asserted by plaintiff is based on the asserted failure of defendant to account for IMPL funds prior to July 1, 1925. This exception is no longer under consideration, having been dismissed by the Commission in a previous action. 26 Ind. Cl. Comm. 92, 95-96 (1971).

Exception No. 9

Plaintiff's ninth exception concerns interest on Indian Money, Proceeds of Labor (IMPL) funds. Defendant paid no interest on IMPL funds until an interest account was established pursuant to the Act of June 13, 1930, 46 Stat. 584. The IMPL fund was created by Congress by the appropriation act of March 3, 1883, c. 141, 22 Stat. 582, 590. The Commission has determined in Standing Rock, supra, at 239, that pursuant to our decision in Te-Moak Bands of Western Shoshone Indians v. United States, Dockets 326-A, et al., 31 Ind. Cl. Comm. 427 (1973), defendant has a duty to make Indian trust funds productive, and is liable to plaintiff for its failure to do so during the period prior to July 1, 1930, the effective date of the 1930 act.

Exception No. 10

Plaintiff's tenth exception is based on defendant's expenditure of IMPL funds allegedly contrary to statutory limitations. These same expenditures are objected to in exception 11, below. We determined in our discussion as to exception 11 that these expenditures were improperly charged by defendant against plaintiff's trust funds. Therefore, we need not determine plaintiff's tenth exception.

Exception No. 11

Plaintiff's eleventh exception deals with IMPL funds authorized under the Act of March 3, 1883, 23 Stat. 582, 590, directing that proceeds from Indian reservations be covered into the Treasury for the benefit of Indian tribes. Plaintiff alleges herein that nine of the ten disbursement classifications of IMPL funds (GAO Report, p. 86) are not explained adequately and that funds totalling $18,794.79, were expended not for the direct and exclusive benefit of the tribe, but for certain continuing obligations of the defendant. (Plaintiff concedes that expenditure of $1.77 in the disbursement classification "per capita cash payments" is allowable.)

In support of its allegation, plaintiff argues that these expenditures are part of defendant's continuing obligations under Article 5 of the Act of 1877, 19 Stat. 254. Plaintiff cites Sioux I and Sioux II in support of its claim.

In Standing Rock, at 241, we observed that the Court of Claims in Sioux II had determined that expenditures for education and for provisions from tribal trust funds were improper because such expenditures were for

continuing obligations of the defendant. We conclude therefore that expenditures by defendant in this docket, in the amount of $12,718.45 for education, and $1,180.05 for provisions, were improperly charged against tribal funds.* The continuing obligations of the defendant specified in Sioux II flowed from article 5 of the Act of 1877, which provided that:

> In consideration of the foregoing cession of territory and rights, . . . the United States does agree to provide all necessary aid to assist the said Indians in the work of civilization; to furnish to them schools and instruction in mechanical and agricultural arts, as provided for by the treaty of 1868. Also to provide the said Indians with subsistence . . . until the Indians are able to support themselves.

Sioux II, in addition to ruling on expenditures for provisions and education, dealt with expenditures for the pay of farmers, and determined that such expenditures were also a continuing obligation of defendant under the 1877 Act. Sioux II, at 797-800.

The language that plaintiff relies on from article 5 of the 1877 act is the obligation of defendant "to provide all necessary aid to assist the said Indians in the work of civilization." In its aforementioned rulings in Sioux II, the court did not rely on that phrase, but rather cited the specific language following it, referring to obligations to provide "subsistence," "assistance in agricultural arts," and "schools."

However, the court did state that since defendant obligated itself in the 1877 act to provide aid and assistance, "the burden is on

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* We recognize that the question of expenditures for education may be reopened in Dockets 118, 117, 116, and 115, as it is in Docket 119 by order entered today in response to defendant's motion therein for rehearing.

defendant to show what portion, if any, of such expenses has not been assumed by it and should be charged to the Indians." Sioux II, at 802.

Defendant in this case has not responded to plaintiff's argument on this point beyond making a general denial. Thus we are left to determine for ourselves what expenditures were made in pursuance of the article 5 obligation to provide aid and assistance to plaintiff in the work of civilization. We note that the court in Sioux II observed, with reference to article 5, that

> . . . These were not empty words which meant no more than that the Government would fulfill its specific and limited obligations under the treaty in consideration of the valuable cessions being extracted from the Indians. What the government subsequently did indicates that it did not understand the promise to be so limited. . . .

To ascertain what the Government subsequently did we have turned to its accounting report for the Sioux cases. GAO Report, filed July 12, 1934, in C-531. Contained therein is a statement by defendant of the disbursements made by it under article 5, including a list covering three pages of disbursements for "support and civilization." Id., Vol. 2, pp. 946-48. (See Sioux I, supra, at 707, for a synopsis of defendant's list.) We conclude that expenditures in all of these categories were made by defendant in accordance with its view of its obligations under the 1877 act.

The only remaining question is whether the obligation under the 1877 act for some reason ceased. In this regard, the court in Sioux II stated, at 779, that there was

> . . . no proof to show that the obligation of the Government which it assumed in the act of 1877 to furnish subsistence had been fulfilled and discharged when Congress passed the acts of 1895, 1902, 1906, 1907, 1908, and 1910, pursuant to which the trust funds which took the place of reservation lands were derived and out of which the questioned disbursements for subsistence were made, or that such obligation had been discharged. . . .

Similarly in this case, there is no proof offered or urged by defendant to show that the obligation to furnish aid and assistance to plaintiff pursuant to the 1877 act had been discharged.

We therefore conclude that all expenditures for the purposes shown in the aforementioned list were improperly charged by defendant against Indian trust funds. In dealing specifically with exception 11, the following disbursements from the aforementioned list were improperly charged against plaintiff's IMPL funds:

Expenses of Indian delegations	$4,628.71
Indian dwellings	6.00
Livestock: Feed and care of	13.86
Maintaining law and order a/	37.25
Miscellaneous agency expenses b/	182.70
Pay and expenses of field matrons	22.60
Transportation of Indian supplies	5.17
	$4,896.29

a/ Listed in the 1934 GAO report as "Indian Police."
b/ Listed in the 1934 GAO report as "Agency buildings and repairs," etc.

We conclude therefore that for the reasons stated above all expenditures complained of in this exception must be disallowed.

Exception No. 12

Exception 12 is simply "for illegal expenditure of the Tribe's funds." Specifically, plaintiff takes exception to expenditures under section 17 of the 1889 act, as follows: miscellaneous agency expenses ($63.54); expenditure for the Yankton Tribe ($136.76); expenditure jointly with the Yankton Tribe ($312.20); education ($83,769.42); and, pay of attorneys ($3,404.00). Exceptions to expenditures made under the 1889 act merit no further consideration herein, for reasons discussed at the beginning of this opinion. This exception will be dismissed.

Exception No. 13

Plaintiff's thirteenth exception is based upon defendant's failure to account for lands reserved for and lands patented to religious organizations pursuant to the acts of April 23, 1904, 33 Stat. 254, March 2, 1907, 34 Stat. 1230, and May 30, 1910, 36 Stat. 448. Plaintiff asserts that in the accounting to 1925 before the Court of Claims in Sioux II, defendant reported dates, land descriptions and acreages of land reserved and patented under the aforementioned acts, and that the accounting in this case should contain corresponding information.

Such information was pertinent in Sioux II, but plaintiff has not shown the relevance of such information in this case. See Standing Rock, supra, at 242. The Commission concludes that plaintiff's exception herein is without merit.

Exception No. 14

Plaintiff's fourteenth exception complains of defendant's failure

to account for lands disposed of after 1925 under the Acts of April 23, 1904, March 2, 1907 and May 30, 1910, supra. Plaintiff is entitled to such information. Standing Rock, supra, at 243. The defendant is ordered to furnish information showing acreage and prices of lands disposed of after June 30, 1925, under the aforesaid acts, and the amount of acreage, if any, remaining unsold. See Blackfeet, supra, p. 76 et seq.

Exception No. 15

This exception is based on defendant's failure to pay interest on the proceeds from disposition of plaintiff's land under the Act of April 23, 1904, 33 Stat. 254. Section 3 of this act provided for the proceeds to be paid into the Treasury, with no provision for payment of interest.

Plaintiff's statement in support of this exception states that the Act of June 21, 1906, 34 Stat. 325, 327, provided that shares of proceeds due "minor Indians" pursuant to the 1904 agreement carry interest at 3%. This fund was established, and identified as the "Interest on Rosebud Sioux 3% Minors Fund." GAO Report, pp. 139-49.

Plaintiff complains that no interest was paid on the proceeds of plaintiff's land, other than those proceeds transferred to the minors fund, until after the act of February 12, 1929, 45 Stat. 1164, as amended by the act of June 13, 1930, 46 Stat. 583, which provided for payment of interest at 4 per cent on funds in excess of $500.00. Further, plaintiff complains that there was no information supplied to show when such fund was established.

As to the last point, the GAO report shows that the "Interest on Proceeds of Rosebud Reservation" fund was established pursuant to the 1929 and 1930 acts, supra, and that a total sum of $15,050.00 was derived through sums deposited therein through issuance of warrants, beginning February 26, 1930, and ending February 23, 1951. GAO report, pp. 147, 151, 289-90.

The duty of defendant to make Indian trust funds productive has been established. Standing Rock, supra, at 239. Thus, defendant is liable to plaintiff for its failure to make the 1904 Act proceeds productive prior to establishment of the four per cent fund.

Plaintiff also claims that the three per cent rate of interest on the minors fund and the four per cent rate on the 1904 act proceeds were unfair when compared to prevailing market rates. We may proceed to trial as to this issue. Id., at 243.

Exception No. 16

This exception also is based on the asserted failure of defendant to pay a fair rate of interest, in this instance under the acts of March 2, 1907, supra, and May 30, 1910, supra. The acts provided for a three per cent rate of interest. We may proceed to trial as to this exception. Id.

Exception No. 17

Plaintiff's seventeenth exception is based on defendant's asserted failure to pay interest on the proceeds from the sale of tribal land and buildings sold under the act of February 14, 1920, 41 Stat. 415, and for failure of defendant to furnish facts concerning dates of sales, the amounts received at each sale and the date the purchase money was paid to an officer of the United States.

The sum of $2,577.97 was received from the sales of land and buildings and this sum was credited to the tribe by four warrants issued between May 24, 1926, and February 17, 1927. Thereafter, $2,575.45 was disbursed in fiscal year 1929 for per capita cash payments to the Indians of plaintiff tribe. The sum of $2.52 was carried to the surplus fund of the defendant. (See exception 6, above.)

We have determined that defendant has a duty to make Indian trust funds productive. (See exception 9, above.) Defendant therefore had a duty to make the funds productive which were received from the proceeds of the sales of tribal land.

Defendant should furnish information, showing the dates the purchase money for the tribal lands was received, for the purpose of computation of damages.

Exception No. 18

Plaintiff's exception 18 asserts that defendant improperly deducted sums from the proceeds of the sale of plaintiff's land for fees and commissions of registers and receivers of defendant's land offices, and

that defendant failed to show how much was deducted from the proceeds of the lands for these fees and commissions. Plaintiff stated that section 5 of the 1907 act, supra, and section 7 of the 1910 act, supra, provided for such charges, and that such charges are "illegal and immoral" due to defendant's fiduciary relationship to its beneficiary in selling its land. See GAO Report, pp. 145, 167 and 177.

The 1934 GAO Report contains entries referring to "two percent commissions for the land offices at Gregory and Pierre, South Dakota." 1934 GAO Report, supra, Vol. 3, pp. 1622 (item (1)), 1667, 1710.

The 1907 act provided, among other things, as follows:

> Sec. 3 * * * In addition to the price to be paid for the land, the entryman shall pay the same fees and commissions at the time of commutation of final entry as now provided by law, where the price of the land is one dollar and twenty-five cents per acre. . . .
>
> Sec. 5 That from the proceeds arising from the sale and disposition of the lands aforesaid, exclusive of the customary fees and commissions, there shall be deposited in the Treasury of the United States, to the credit of the Indians. . . (Emphasis added.)

The 1910 act contains similar provisions. The 1904 act, supra, says nothing about deductions of fees and commissions.

Since the aforesaid acts either made no provisions for deduction of fees and commissions or provided that the entryman must pay such charges, it appears that the above disbursements by defendant were made on behalf of the entryman from a part of the total sum paid for the land by him, which sum included such fees and commissions. Explanations in the aforesaid disbursement accounts could have been more revealing, but

they are adequate as a beginning to bring the issues into focus. These issues can likely be resolved without further order of the Commission through use of discovery procedures under Rule 14 of our Rules of Practice (25 C.F.R. § 503.14 (1968)) or at the trial of the issues in this matter. See Blackfeet, supra, at 85, 111. If interrogatories are served upon defendant they should be specific. In turn, the Commission will expect defendant to make a good faith search of its records or take other appropriate measures to furnish the answers. Id., at 94-95.

Exception No. 19

Plaintiff complains in its nineteenth exception of expenditure of tribal funds derived from sale of lands, and interest thereon, allegedly contrary to law. Plaintiff states that the GAO Report shows that of the sum of $244,604.21, which includes principal and interest, derived from the sale of tribal lands under the acts of 1904, 1907, 1910 and 1920, supra, the sum of $191,453.66 was disbursed from July 1, 1925, through June 10, 1951, leaving $53,150.55 in the treasury. The items comprising the total of $191,453.66 are set forth by plaintiff in the exception as a composite of Statements No. 15 and 21. GAO Report, pp. 150 and 185.

Plaintiff raises initially the claim we discussed earlier, as to Exception 11, that the disbursements were legal obligations of defendant under article 5 of the 1877 act, supra, and were improperly made from the tribe's trust funds. We discussed that argument above, and determined that plaintiff was correct, at least to the items listed in defendant's 1934 GAO Report as expenditures made by defendant under article 5.

In dealing specifically with exception 19, therefore, we conclude that the following disbursements, which are identical or analogous to

items listed in defendant's 1934 GAO Report, were for continuing obligations of defendant under the 1877 act, and were improperly charged against plaintiff's IMPL funds:

Item	Amount
Agency buildings and repairs	$ 66.70
Agricultural aid	
Planting and harvesting crops	244.10
Automobiles, vehicles, maintenance and repairs	5,532.41
Cash relief payments a/	2,483.97
Clothing	80.06
Expenses of Indian delegations	6,467.77
Fuel and light	297.06
Household equipment and supplies b/	5.27
Indian dwellings	951.50
Livestock	
Feed and care of	350.65
Purchase of	9,463.90
Maintaining law and order c/	312.92
Medical attention	
Drugs	279.81
Fuel and light	11.35
Hospital care	218.21
Hospital equipment and supplies	1,954.65
Miscellaneous agency expenses d/	2,070.42
Pay of attorneys	480.74
Pay of laborers e/	1,441.46
Provisions	179.39
Transportation of Indian supplies	6,932.48
TOTAL	$40,776.32

a/ Listed in the 1934 GAO report as "Relief of destitute Indians."

b/ Listed in the 1934 GAO report as "Furniture and equipment."

c/ The 1934 GAO report lists item as "Indian police."

d/ The 1934 GAO report lists analogous items such as "Pay of Miscellaneous agency employees" and "Subsistence of agency employees."

e/ "Labor in lieu of rations" or "Pay of farmers," listed in the 1934 report, are analogous.

Although expenditures for education are not included in the GAO list, we determined, as discussed concerning exception 11 above, that expenditures for education were an obligation of defendant under the 1877 act. Therefore we conclude that expenditures totalling $11,562.48 for education were also improperly charged against plaintiff's IMPL funds.

The 1960 report also includes "Per capita cash payments" (two entries, $84,336.50 and $55,715.62, for a total of $140,052.12) and "Purchase of land" ($14.24). Plaintiff interposes no objection to these items. In part A of the exception plaintiff refers to "Per capita cash payments" as expenditures which are clearly not the obligation of the defendant under article 5 of the 1877 act, and to the "Purchase of land" as a possible addition to such nonobligatory expenditures.

Exception No. 20

This exception is concerned with disbursements of the $191,453.66 discussed above in exception 19, and complains of defendant's alleged failure to furnish adequate information, and of defendant's expenditures allegedly in violation of law and the standards applicable to a trustee-fiduciary relationship.

However, these disbursements have been disposed of, except as to two categories, pursuant to exception 19. The two categories of disbursements remaining for our consideration are per capita cash payments and purchase of land, in the respective amounts of $140,052.12 and $14.24.

Plaintiff makes five distinct arguments in exception 20. The first argument questions whether the expenditures were of tribal benefit. This argument is applicable as to the disbursement for purchase of land. We may proceed to trial as to this issue.

Plaintiff's second argument concerns delivery of food, clothing or supplies, and is not pertinent to the items remaining under consideration.

Plaintiff's third argument is that the records do not indicate whether items were distributed to Indians in payment for labor performed by the Indians. Such information can be obtained by plaintiff from defendant pursuant to our Rules of Practice. Standing Rock, supra. at 249.

Plaintiff's fourth argument is that there is no indication in the GAO Report of the existence of any cash arising from sale of goods, or refunds, spoilage, etc. This argument is inapplicable to the items remaining under consideration too.

Finally, plaintiff argues that defendant must include in its accounting report data concerning property purchased by defendant with plaintiff's trust money. Defendant is required to furnish an accounting

as to purchases properly made of land or buildings. However, since plaintiff is challenging the propriety of these purchases, an order now for defendant to furnish an accounting would be premature. We will defer ordering an accounting for purchases of land or buildings pending our determination as to the propriety of defendant's expenditures therefor.

Future Proceedings

As we have indicated in the foregoing discussion, we may proceed to trial as to some or all of exceptions 15, 16, and 20. In the interest of moving this case along, we will schedule a trial as to these exceptions.

As to exceptions 2, 3, and 5, it appears to the Commission, on the basis of our examination of the GAO Report, that relatively small sums are involved. It is clear, nonetheless, that these exceptions cannot be resolved without further accounting.

In Docket 119, in which the same issues were raised, the parties attended a conference before Commissioner Vance, at which they determined that further information should be supplied by defendant. The defendant will be expected to provide the same supplementary information in this docket as well.

As to exceptions 14 and 17, in which we have determined that defendant is required to furnish additional information, defendant will be ordered to furnish said information within 60 days.

Plaintiff will have 60 days within which to respond to defendant's filing. The nature of those exceptions is such that when the data is submitted, and after plaintiff has made its amended exceptions thereto,

if any, it is possible that they may be disposed of on motion without the necessity for further trial.

If defendant has not supplied the additional data called for within the prescribed period, the Commission will request plaintiff to submit a claim for damages based on existing evidence. If plaintiff, after receipt of defendant's additional data, has not filed amended exceptions thereto within 60 days, we will entertain a motion for dismissal as to the relevant exceptions.

John T. Vance, Commissioner

We concur:

Margaret H. Pierce, Commissioner

Brantley Blue, Commissioner

Kuykendall, Chairman, and Yarborough, Commissioner, concurring:

We concur as to exception 9 since we are now bound by the authority of Te-Moak Bands of Western Shoshone Indians v. United States, Dockets 326-A, et al., 31 Ind. Cl. Comm. 427 (1973), in which we dissented from the views of the majority of the Commission concerning the proper measure of damages for defendant's failure to make the plaintiffs' IMPL funds productive. We stated that the proper measure of such damages is simple interest on the unproductive balances which were in, or should have been in, these accounts. Since the majority decided otherwise, we now are bound to follow the authority of Te-Moak, supra, in the instant case.

Jerome K. Kuykendall, Chairman

Richard W. Yarborough, Commissioner