

BEFORE THE INDIAN CLAIMS COMMISSION

THE SIOUX TRIBE OF INDIANS OF THE	)	
LOWER BRULE RESERVATION, SOUTH	)	
DAKOTA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Docket No. 116
	)	
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 the 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 motions by defendant for summary judgment and for leave to file amended 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 September 6, 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), sixteen amended exceptions to the GAO report, filed by plaintiff on May 15, 1970, are before the <sup>1/</sup> Commission.

Defendant filed an answer on November 4, 1971, to the amended exceptions, and on November 17, 1971, 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

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<sup>1/</sup> Seventeen exceptions were filed, but exception No. 8 was dismissed pursuant to the 1971 decision.

answer to plaintiff's amended exceptions and for partial summary judgment. Plaintiff filed a response to defendant's motion for leave to amend, and a separate response to defendant's motion for summary judgment, to which defendant filed replies.

Docket 116 is for the most part parallel to Dockets 119 and 118. The respective plaintiffs in the latter two dockets are Sioux tribes from the Standing Rock and Rosebud reservations, predominantly raising issues and relying on arguments similar to those raised by the Lower Brule Sioux in the instant case. Many of the issues raised in Docket 116 were therefore discussed and disposed of by the Commission in Dockets 119 and 118. Consequently many of the issues before us now will be decided by reference to our decision in Docket 119, 34 Ind. Cl. Comm. 230, referred to hereinafter as Standing Rock, or our decision in Docket 118, decided today, referred to hereinafter as Rosebud.

Defendant argues in its amended answer that, insofar as amended exceptions 2 through 6, and 13, 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 the defendant.<sup>2/</sup> 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 the aforesaid amended exceptions to be filed by plaintiff after a long delay.<sup>3/</sup>

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 prior to 1925, and that additional expenditures under section 17 of the 1889 act for

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<sup>2/</sup> Actually, defendant previously raised the defense of res judicata in its response filed on May 28, 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 act of April 21, 1906, 34 Stat. 124, and stated that such claims could have been asserted previously 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.

<sup>3/</sup> Defendant's amended answer dated October 23, 1973, is in reference to its answer filed November 4, 1971, to plaintiff's amended exceptions.

plaintiff's benefit were gratuitous. In the case of the Lower Brule, the treaty obligations had been met by 1903. (The subsequent expenditures for the Lower Brule reservation, covering the period from 1903 to 1925, totaled \$248,757.30.) 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 exceptions 2-5 insofar as they relate to funds or appropriation accounts established pursuant to section 17 of the 1889 act.

Exceptions 6, 7 and 13 apply only to expenditures made under the 1889 act. We therefore will dismiss exceptions 6, 7 and <sup>4/</sup>13.

Exception No. 1

Plaintiff's first exception is based upon the 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

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<sup>4/</sup> Although exception 7 was not specified in defendant's motion, the only funds involved in exception 7, "unclassified receipts" of \$3,833.97, were derived from the 1889 act.

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 plaintiff's funds were 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 <sup>5/</sup> therefore be ordered to report the pertinent facts requested.

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

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

facts necessary to ascertain the degree of "reverse spending." Plaintiff refers to five interest-bearing funds in the GAO report, pages 203-07, 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 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 of 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 disbursement from plaintiff's interest-bearing accounts in the instant docket.

#### Exceptions No. 6 and 7

These exceptions are no longer under consideration, as we have decided hereinabove that they will be dismissed.

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 earlier dismissed by the Commission. 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.

Exceptions No. 10 and 11

Plaintiff's tenth exception is based on defendant's expenditure of IMPL funds allegedly contrary to statutory limitations. Exception 11 deals with expenditures of IMPL funds for purchase, feed, and care of livestock, and questions whether they were of tribal benefit. These same funds are objected to in exception 12, below. We determined in our discussion of exception 12 that these expenditures were improperly charged by defendant against plaintiff's trust funds. Therefore, we need not determine plaintiff's tenth and eleventh exceptions.



Exception No. 12

Plaintiff's twelfth exception deals with the same portion of the accounting report concerning IMPL funds as do exceptions 10 and 11. Plaintiff alleges herein that twenty-three of the twenty-five disbursement classifications (GAO report, pp. 76-77) are not explained adequately and that funds totaling \$35,531.97 were expended not for the direct and exclusive benefit of the tribe, but for certain continuing obligations of the defendant. (The expenditures plaintiff concedes are allowable are \$25 for "per capita.")

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

We discussed this issue at length in Rosebud, at 134, and determined that defendant had made expenditures in a number of categories<sup>6/</sup> in accordance with its view of its obligations under the 1877 act. We concluded in Rosebud that it is improper for defendant to charge these expenditures against plaintiff's IMPL funds.

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 12, the following disbursements, which include all expenditures complained

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<sup>6/</sup> The categories are specified in a list in the 1934 GAO report submitted in the Court of Claims Sioux cases (see GAO report filed July 12, 1934, in C-531, pp. 946-48), as well as the category of education, discussed in Sioux II at p. 802.

of in this exception, were improperly charged against plaintiff's IMPL funds:

Agency buildings and repairs	\$ 369.50
Agricultural aid: <u>a/</u>	
a. Clearing, breaking and fencing land	41.10
b. Planting and harvesting crops	11.35
c. Seeds, fruit trees and fertilizer	470.75
Agricultural implements and equipment <u>a/</u>	21.07
Automobiles, vehicles, maintenance and repairs <u>b/</u>	3,808.01
Clothing	104.63
Education	10,782.99
Expenses of Indian delegations	351.00
Fuel and light	2,016.20
Funeral expenses <u>c/</u>	25.63
Hardware, glass, oils and paints	23.88
Household equipment and supplies <u>d/</u>	586.04
Livestock: <u>e/</u>	
a. Feed and care of	210.54
b. Purchase of	600.00
Maintaining law and order <u>f/</u>	2.50
Medical attention:	
a. Drugs	68.92
b. Hospital care	6.75
c. Hospital equipment and supplies	502.03
d. Pay and expenses of physicians	601.40
Mills and shops: <u>g/</u>	
a. Erection, repairs and supplies of blacksmith shops	3.65
b. Erection, repairs and supplies of saw mills	43.00
c. Erection, repairs and supplies of mills, shops, unspecified	13.76
Miscellaneous agency expenses <u>h/</u>	1,053.39
Pay and expenses of farmers	70.80
Pay and expenses of field matrons	174.62
Pay of clerks <u>h/</u>	7,179.50
Pay of laborers <u>i/</u>	786.53
Pay of mechanics <u>b/</u>	69.00
Pay of stockmen <u>i/</u>	10.25
Provisions	4,377.66
Transportation of Indian supplies	<u>1,150.52</u>
	\$35,311.97

a/ Listed in the 1934 GAO report as "Agricultural implements" and "Agricultural improvements."

b/ 1934 GAO report lists as "Operation and repair of automobiles."

- c/ 1934 GAO report lists as "Burial of Indians."
- d/ 1934 GAO report lists as "Furniture and equipment."
- e/ 1934 GAO report lists as "Livestock."
- f/ 1934 GAO report lists as "Indian police."
- g/ 1934 GAO report lists as "Building materials," "Saddles, harness and leather" or "Sawmills, gristmills, etc."
- h/ 1934 GAO report lists as "Agency buildings and repairs" or "Pay of" or "Subsistence of Agency employees."
- i/ 1934 GAO report lists as "Labor in lieu of rations."
- j/ 1934 GAO report lists as "Stock growers dues and assessments."

Exception No. 13

This exception is no longer under consideration, as we have decided hereinabove that it will be dismissed.

Exception No. 14

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 21, 1906, 34 Stat. 124. Section 3 of this act provided for the proceeds to be paid into the Treasury, with no provision for payment of interest.

The Commission has found that it is the duty of the defendant to make Indian trust funds productive, and is liable to plaintiff for its failure to do so. Standing Rock, supra, pp. 238-39.

Exception No. 15

Plaintiff's fifteenth exception complains that defendant charged the proceeds from the sale and disposition of plaintiff's land with fees and commissions of registers and receivers of defendant's land offices, and failed to show how much was deducted from the proceeds of the land for such fees and commissions. This exception is analogous to exception No. 18 of the accounting claim in Rosebud.

We decided in Rosebud that explanations in the aforesaid disbursement accounts could have been more revealing, but that they are adequate as a beginning to bring the issues into focus. We decided that these issues should be resolved under Rule 14 of the Rules of Procedure (25 C. F. R. § 503.14 (1968)), or at trial of the issues in this matter.

Accordingly, this exception will be denied, without prejudice to the plaintiff's rights to serve interrogatories upon the defendant or utilize other discovery devices under the Rules of Procedure. If such interrogatories are served upon the defendant, they should be specific and the Commission will expect the defendant to make a good faith search of its records or take whatever measures are indicated to furnish the answers. See Blackfeet, supra, pp. 94-95.

Exception No. 16

Plaintiff complains in its sixteenth exception of expenditures of tribal funds derived from sale of lands, and interest thereon, allegedly

contrary to law. Plaintiff states that the GAO report (pp. 132-33) shows that the sum of \$5,329,01, which includes principal and interest, was derived from the sale of tribal lands under the 1906 act, supra. Out of that sum, \$5,266.60 was disbursed from July 1, 1925, through June 10, 1951, leaving \$62.41 in the treasury. The expenditures, totaling \$5,266.60, are set forth by plaintiff in Statement No. 12, GAO report, page 131.

Plaintiff raises initially the claim we discussed earlier, as to Exception 12, 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 hereinabove, and determined that plaintiff was correct, at least as to the items listed in defendant's 1934 GAO report as expenditures made by defendant under Article 5.

In dealing specifically with exception 16, we conclude that the following disbursements, which include all expenditures complained of in this exception, were improperly charged by defendant against plaintiff's trust funds.

Agency buildings and repairs	\$ 46.50
Agricultural implements and equipment <u>a/</u>	6.50
Automobiles, vehicles, maintenance and repairs <u>b/</u>	62.24
Clothing	5.75
Education	2,421.80
Expenses of Indian delegations	864.80
Fuel and light	92.26
Funeral expenses <u>c/</u>	9.21
Hardware, glass, oils and paints	9.63
Household equipment and supplies <u>d/</u>	2.52

Maintaining law and order <u>e/</u>	3.10
Mills and shops: <u>f/</u>	
a. Erection, repairs, and supplies of blacksmith shops	1.03
Miscellaneous agency expenses	173.22
Pay of clerks <u>g/</u>	<u>1,568.04</u>
Total:	<u>\$5,266.60</u>

- a/ Listed in the 1934 GAO report as "Agricultural implements" and "Agricultural improvements."
- b/ 1934 GAO report lists as "Operator and repairs of automobiles"
- c/ 1934 GAO report lists as "Burial of Indians."
- d/ 1934 GAO report lists as "Furniture and equipment."
- e/ 1934 GAO report lists as "Indian police"
- f/ 1934 GAO report lists as "Building materials" and "Saddles, harness and leather."
- g/ 1934 GAO report lists as "Pay of agency employees."

Exception No. 17

The seventeenth exception is based on the asserted failure of defendant to furnish adequate information and for making expenditures in violation of law and the standards applicable to the trustee-fiduciary relationship. The plaintiff refers to the same trust funds as we discussed under exception 16, in the total amount of \$5,266.60. (GAO report, stmt. 12, p. 131.) Since we have determined that these expenditures were improperly charged by defendant against plaintiff's trust funds, exception 17 is moot.

Future Proceedings

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, Standing Rock, at 249-51, in which the same issues were raised, we ordered the parties to attend a conference before Commissioner Vance, at which they determined what further information should be supplied by defendant and in what form. Defendant will be expected to provide the same supplementary information in this docket as well.

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

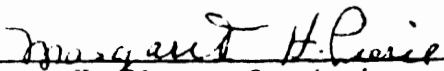
Plaintiff will have 60 days within which to respond to defendant's filing. The nature of those exceptions is such that when the data is submitted, and after plaintiff has made its amended exceptions thereto, if any, it is possible that they may be disposed of on motion without the necessity for further trial.

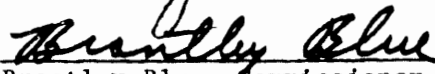
If defendant has not supplied the additional data called for within the prescribed period, the Commission will request plaintiff to submit a claim for damages based on existing evidence. If plaintiff, after receipt of defendant's additional data, has not

filed amended exceptions thereto within 60 days, we will entertain a motion for dismissal as to the relevant exceptions.

  
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John T. Vance, Commissioner

We concur:


  
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Margaret H. Pierce, Commissioner

  
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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