BEFORE THE INDIAN CLAIMS COMMISSION

THE SIOUX TRIBE OF INDIANS OF THE CROW CREEK RESERVATION, SOUTH DAKOTA,	)	
Plaintiff,	)	
v.	)	Docket No. 115
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 May 22, 1961. Of the subsequent history of the case to 1971, suffice it to say that pursuant to our decision reported at 26 Ind. Cl. Comm. 92 (1971), eleven amended exceptions to the GAO Report, filed by plaintiff on May 15, 1970, are before the Commission. 1/

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 answer to plaintiff's amended exceptions and for partial summary judgment.

1/ Twelve exceptions were filed, but exception No. 8 was dismissed pursuant to the 1971 decision.

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 115 is for the most part parallel to Docket 119. The plaintiff in Docket 119 is the Sioux tribes from the Standing Rock reservation. Plaintiff in Docket 119 predominately raised issues and relied on argument similar to those raised by the Crow Creek Sioux in the instant case. Many of the issues raised in Docket 115 were therefore discussed and disposed of by the Commission in Docket 119. 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 through 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 the defendant.[2/] 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 an amended answer by defendant to set forth affirmative defenses than in permitting the aforesaid amended exceptions to be filed by plaintiff after a long delay.[3/]

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 plaintiff's benefit were gratuitous. In the case of the Crow Creek

---

2/ On June 24, 1970, defendant raised the defense of res judicata in its further response to plaintiff's motion to file Amended Exceptions and Amendments to the petition. Defendant referred to claims in the amended petition for Fifth Amendment takings stating that they could have been the basis of a suit under the jurisdictional act of June 3, 1920, 41 Stat. 738. Such defense had not been raised in previous pleadings in this accounting, with respect to residual funds of plaintiff, held by defendant under the acts of March 2, 1895, 28 Stat. 876, 888, and May 27, 1902, 32 Stat. 267, although defendant had previously raised the defense in related Dockets 116, 118 and 119. The Commission rejected the defense, 26 Ind. Cl. Comm., supra.

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

Reservation, the treaty obligations had been met by 1914. (The subsequent expenditures for the Crow Creek reservation, covering the period from 1914 to 1925, totalled $307,322.18.) 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 exceptions 2-5 insofar as they relate to funds or appropriation accounts established pursuant to section 17 of the 1889 act.

Exceptions 6 and 12 apply only to expenditures made under the 1889 act. We therefore will dismiss exceptions 6 and 12 pursuant to defendant's motion.

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 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.[4/]

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

---

4/ 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.

four interest-bearing funds in the GAO report, pages 194 to 199, including interest on IMPL and interest on Crow Creek or Sioux funds, and requests that defendant be required to report the balances in the 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 disbursements from plaintiff's interest-bearing accounts in the instant docket.

Exception No. 6

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

Exception No. 7

Plaintiff's seventh exception pertains to defendant's failure to furnish dates on which three sums (totalling $3,929.03), carried as "Unclassified Receipts," were credited to Crow Creek accounts. The information was requested in order to determine damages, if any, as for reverse spending. On July 13, 1972, the defendant reported the dates requested.

The evidence shows that two of the items questioned by plaintiff, in sums of $3,833.97 and $84.41, in the total amount of $3,918.38, were expended from accounts established under the act of March 2, 1889, supra. (GAO report, pp. 93 Item (c) and 95 Item (c).) Defendant has no obligation to account for gratuitous expenditures and accounts arising from such funds. This portion of plaintiff's request for such data will be denied.

The Commission will allow plaintiff a period of 30 days in its order to enable plaintiff to file exception to the remaining item herein, in the amount of $10.65.

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, 22 Stat. 528, 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, Docket 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 asserted expenditure of IMPL funds contrary to statutory limitations. IMPL funds were authorized by the appropriation act of March 3, 1883, 22 Stat. 582, 590, directing that proceeds from "all pasturage and sales of timber, coal or other products of any Indian reservation be covered into the treasury for the benefit of the tribe." The Act of May 18, 1916, 39 Stat. 123, 159, required congressional appropriation for all IMPL expenditures except for "equalization of allotments, education of Indian children . . . . per capita and other payments. . . ."

The GAO report (page 74) lists disposition of available IMPL funds and interest belonging to plaintiff during the period from July 1,

1930, through June 30, 1951, pursuant to the act of March 3, 1883, supra, in the total amount of $3,326.65.

Plaintiff asserts that only one of the two categories of expenditure is included in the aforementioned exceptions to the statute's limitations as discussed above. This category refers to expenditures for education ($1,166.85). However, the broad language of the 1916 statute excepts not only expenditures of education, but those made for "other payments." The remaining category of expenditures herein, "Expenses of Indian delegations" ($2,159.80), could be considered "other payments." Neither party has addressed itself to the significance of the term "other payments." We will defer a decision on the issues raised by this exception until after we have considered the briefs of the parties. Standing Rock, supra, at 240.

Exception No. 11

In the eleventh exception the plaintiff alleges that certain tribal funds totaling $7,432.97, appropriated under the act of March 2, 1895, 28 Stat. 888, were expended contrary to law.

Plaintiff argues that expenditures for education in the amount of $2,074.00, were a part of the continuing obligation of the defendant under the terms of Article 5 of the 1877 act (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 from tribal trust funds were improper because such expenditures were for continuing

obligations of the defendant. Accordingly, the Commission concludes that the expenditures in the instant exception for education were improperly made from tribal funds.

The remaining expenditures to which plaintiff objects are those made for "per capita" payments in the total amount of $5,358.97. Plaintiff asserts that ordinarily expenditures made under this category are not challenged, but that the GAO report (pp. 122-23) shows annual dollar distributions during 1926 through 1948 that are so small that there is doubt that the funds were distributed per capita.

The plaintiff may wish to except to items proper on their face which it believes to be false, and the burden is then on plaintiff to go forward. We can therefore proceed to trial with respect to the propriety of the "per capita" payments in question. See Blackfeet and Gros Ventre Tribes v. United States, Dockets 279-C and 250-A, 32 Ind. Cl. Comm. 65, 85 and 111 (1973).

Exception No. 12

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

Future Proceedings

As we have indicated in the foregoing discussion, we may proceed to trial as to some or all of exceptions 10 and 11. 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, Standing Rock, at 249-51, 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.

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