BEFORE THE INDIAN CLAIMS COMMISSION

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| OTTAWA-CHIPPEWA TRIBE OF MICHIGAN, | ) | |
| Plaintiff, | ) | |
| v. | ) | Docket No. 364 |
| THE UNITED STATES OF AMERICA, | ) | |
| Defendant. | ) | |

Decided: January 27, 1975

Appearances:

Rodney J. Edwards, Attorney for Plaintiff.

Dean K. Dunsmore with whom was Assistant Attorney General Wallace H. Johnson, Attorneys for Defendant.

## OPINION OF THE COMMISSION

Blue, Commissioner, delivered the opinion of the Commission.

## INTRODUCTORY STATEMENT

The principal matter now before the Commission is the defendant's accounting under the Treaty of July 31, 1855, 11 Stat. 621. It is contained in a report of the General Accounting Office entitled "Re: Petitions of the Red Lake Band, et al., and Ottawa and Chippewa Indians of Michigan, Indian Claims Commission Nos. 18-E and 58," which was filed in this docket pursuant to the Commission's opinion and order of February 14, 1974, 33 Ind. Cl. Comm. 142. The plaintiff filed exceptions and a so-called "Motion for Summary Determination" on April 1, 1974.

The defendant has answered the exceptions, moved to strike the motion, and filed two additional motions of its own. The first of these is entitled "Motion to Dismiss and for Entry of Final Judgment," and is directed to the first, third, and fifth claims of plaintiff's petition. The second is entitled "Motion for Partial Summary Judgment," and is directed to the second and fourth claims of the petition. We treat them both as motions for summary judgment. The plaintiff has not responded, although the motions were filed in August 1974.

The historical background of the 1855 Treaty is this: The plaintiffs had ceded their last remaining tribal land to the defendant by a treaty dated March 28, 1836, 7 Stat. 491. Originally, the treaty provided for permanent reservations in Michigan; but by Senate amendment, the reservations were each limited to a 5-year term, after which the Indians were to be removed west.

The 1855 Treaty marked the Government's abandonment of the removal scheme. Article 1 partially restored the land ceded in 1836, this time in the form of individual allotments. Lake Superior Bands of Chippewa Indians v. United States, Dockets 18-E and 58, 22 Ind. Cl. Comm 372, 375 (1970).[1/]

Article 2 provided for expenditures of $538,400 for the Indians, in the manner and for the objects specified in the article's five subdivisions. The consideration for these payments was the release of the Government, contained in Article 3, from liability under prior

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1/ We determined in an earlier decision in this docket that the real party in interest is identical in Dockets 364 and 58. 30 Ind. Cl. Comm 288 (1973).

treaties. Bay Mills Indian Community v. United States, Dockets 18-E and 58, 26 Ind. Cl. Comm. 538, 545 (1971).

We deal first with the defendant's motions for judgment, since they are directed against the plaintiff's basic claims; and ruling on them here will greatly simplify the case.

I. DEFENDANT'S MOTIONS FOR JUDGMENT ON THE CLAIMS

First Claim. The first claim in the petition is for the value of land which members of the tribe were entitled to have allotted to them under the 1855 Treaty, but which was allegedly not so allotted.

Defendant contends that is an aggregate of individual claims rather than a tribal claim.

We believe the first claim must be dismissed, but for a different reason. Assuming, without deciding, that the tribe had a claim for the value of such of its ceded lands as ought to have been allotted but were not, that claim has already been paid. In Lake Superior Bands, supra, the Commission excluded only the 121,450.75 acres which were actually allotted under the 1855 Treaty from the area of land ceded in 1836 for which the plaintiff was awarded additional compensation. We asked no questions about whether some of the rest of the land should have been allotted; we awarded compensation for it all. The plaintiff's first claim here, if valid, merely overlaps part of the claim that was satisfied in Lake Superior Bands.

Final judgment in the prior litigation was entered on December 29, 1971. Bay Mills Indian Community v. United States,

Dockets 18-E and 58, 26 Ind. Cl. Comm. 562, amended 27 Ind. Cl. Comm. 94 (1972). It follows that the plaintiff's first claim in the instant docket is now barred.

Second Claim. The plaintiff's claim is for the unexpended balance or amounts improperly expended under the five clauses of Article 2 of the 1855 Treaty, and the last clause of Article 1, as added by Senate Amendment.

Defendant states that the GAO report shows it has fulfilled its obligations under the last clause of Article 1, as amended, and under clauses 4 and 5 of Article 2. Therefore, defendant contends, it is entitled to summary judgment. As authority for this proposition, it cites two decisions entitled Minnesota Chippewa Tribe v. United States, Docket 18-C, 32 Ind. Cl. Comm. 192, 193 (1973), and Docket 18-T, 28 Ind. Cl. Comm. 103, 105 (1972). What these cases hold is that after a trial at which the GAO report was put in evidence and not controverted, such report is prima facie proof of payments as therein set forth. The present case, of course, is only in the pretrial stage. Here, plaintiff has questioned the expenditures shown in the report under all three of the treaty clauses and has not yet had its day in court. Under these circumstances we can give the report only the weight of a pleading. Cf. Blackfeet and Gros Ventre Tribes v. United States, Docket 279-C, et al., 34 Ind. Cl. Comm. 122, 140-143 (1974) (on rehearing); see also Kiowa, Comanche and Apache Tribes v. United States, 143 Ct. Cl. 534, 543 (1958), aff'g Docket 32, 5 Ind. Cl. Comm. 297 (1957).

Defendant's motion for summary judgment against that part of the second claim relating to the last clause of Article 1, and Article 2, Clauses Fourth and Fifth, of the 1855 Treaty, will be denied. We have more to say, below, about the merits of plaintiff's objections to the accounting under these clauses, in our discussion of plaintiff's exceptions and motion for summary determination.

The second claim also demands interest on the unexpended balances of the accounts, and the amounts improperly expended under Articles 1 and 2 of the 1855 Treaty. Defendant requests summary judgment that it is not required to pay such interest. Defendant correctly states that there is no provision for a trust fund, or for interest, in the treaty except in Article 2, fourth clause. Under that clause, defendant claims it has already paid all the interest it was obliged to.

Plaintiff has excepted to the accounting under Article 2, Clause Fourth. At this stage of the proceedings, the exception is enough to prevent summary judgment as to that clause. We discuss the merits of the exception in a later part of this opinion.

Partial summary judgment for the defendant will be granted, ruling out interest on any deficiencies which may be discovered under any part of the 1855 Treaty except Article 2, clause Fourth. Cf. Te-Moak Bands v. United States, Docket 326-A, 33 Ind. Cl. Comm. 417 (1974) (on rehearing).

Third Claim. This claim is for "all of the trust funds on

deposit or deemed by this Commission to be held on deposit in the Treasury of the United States to the credit of the Ottawa-Chippewa Tribe of Michigan or its members. . .together with interest thereon."

Defendant states that insofar as the claim is asserted for funds to the credit of tribal members, it is beyond our jurisdiction. This is correct, and our final judgment will not extend to funds held in trust for individuals.

The GAO report (page 35) shows $2,003.00 to the plaintiff's credit in a treasury trust fund. The fund is shown as a tribal one, not as a fund held in trust for individual beneficiaries. The $2,003.00 figure is the undistributed balance, as of June 30, 1949, of the proceeds of a judgment rendered by the Court of Claims in 1907 for unlawful conversion of an earlier trust fund. See Ottawa and Chippewa Indians of Michigan v. United States, 42 Ct. Cl. 240. The last disbursement from the fund, in the amount of $58.32, was made in 1942. GAO report, page 82.

Defendant contends the third claim is beyond our jurisdiction even insofar as it demands funds held in trust for the tribe. As authority for this proposition, defendant cites Sac and Fox Tribe v. United States, Docket 95, 26 Ind. Cl. Comm. 513, 517 (1971), rev'd 202 Ct. Cl. 1088 (1973). Defendant ignores the fact that the Court of Claims reversed the Commission in the cited case and mandated us to render judgment for the amount held on deposit in the Treasury of the United States.

We believe our Sac and Fox decision would not be controlling here even if unreversed. We considered the trust involved in that case to be a continuing one, for the benefit of tribes still in existence. Upon adjudication of an accounting, the corpus of a continuing trust is ordinarily reawarded to the trustee for further administration. Princess Lida v. Thompson, 305 U.S. 456, 464 (1939). In contrast, we have here a passive, non-continuing trust, where the trustee's only duty, other than interim safekeeping and paying interest, is to pay the fund over to those entitled to it. No purpose can be served by further administration.

But for the present claim, plaintiff might never receive this apparently forgotten vestige of Ottawa-Chippewa tribal money. In any event, the fund is available; and we are of the opinion something ought to be done about it. We will reserve our ruling on defendant's motion until the close of the record. Meanwhile, this matter may be resolved between the parties.

An additional balance of $1,593.39, consisting of interest earned on the Court of Claims judgment fund between 1930 and 1949 is shown on page 32 of the GAO report as standing to plaintiff's credit. Interest should be brought down from 1949 to date of payment, and this money also distributed to plaintiff.

Moreover, additional interest may be due plaintiff. The Act of February 12, 1929, as amended, 25 U.S.C. § 161a, is cited as authority

for accrual of the interest shown in the report. We question whether the 1929 act properly applies to the Court of Claims judgment fund. The act provides for payment of interest, at the annual rate of 4 percent, prospectively only from its effective date, on all funds "upon which interest is not otherwise authorized by law." The trust fund which was converted to the use of the United States, and for whose restitution the Court of Claims gave judgment, was a 5 percent treaty fund. And the court's decision stated that interest would run on the judgment at 5 percent per annum from March 5, 1885. See 42 Ct. Cl. at 248. We suggest that the parties investigate and brief whether additional interest may not be due.

Ruling on the Government's motion for dismissal of the third claim will be reserved.

Fourth Claim. The plaintiff's fourth claim is for its proportionate share of annuities arising under the following treaties:

a. Treaty of Greeneville of August 3, 1795, 7 Stat. 49, as confirmed and reinstated by the Treaty of Spring Wells of September 8, 1815, 7 Stat. 131.

b. Treaty of Detroit of November 17, 1807, 7 Stat. 105.

c. Treaty of the Rapids of the Miami of Lake Erie of September 29, 1817, 7 Stat. 160.

d. Treaty of Chicago of August 29, 1821, 7 Stat. 218.

Article 3 of the 1855 Treaty released the United States from liability on account of former treaty stipulations. To avoid this bar to the fourth claim, the petition alleges that the release was procured by misrepresentation. In the alternative, it is alleged that if the annuities were not paid to members of the tribe because of administrative difficulty resulting from the latters' increase in numbers, then the 1855 Treaty did not fairly compensate for the former annuities' value.

Defendant would have us grant summary judgment in its favor on the fourth claim because plaintiff has not filed exceptions to six accounting reports covering the pre-1855 treaties. Defendant claims to have served these on the plaintiff, although it did not file them with the Commission in this docket.

We cannot grant summary judgment on the stated ground in this case. According to the defendant, the reports were served on February 17, 1961. The decision in which we first established the 90-day period for filing exceptions was not issued until August 29, 1963. See Sioux Tribe v. United States, Dockets 114-119, 12 Ind. Cl. Comm. 541. By that date plaintiff was without counsel, and unable to act.

Our order of February 14, 1974, entered after plaintiff finally got new lawyers, required the filing of exceptions only to the GAO report of March 21, 1952, which does not cover the early treaties

mentioned in the fourth claim. See Ottawa-Chippewa Tribe v. United States, Docket 364, 33 Ind. Cl. Comm. 142, 149 (1974).

We do not know whether plaintiff wishes to pursue its fourth claim. In any event, the time is not ripe to file exceptions. Plaintiff must first get over the hurdle of the release clause in the 1855 Treaty, a matter on which it has the burden of proof.

Defendant's motion for summary judgment will be denied as to the fourth claim. Plaintiff will be ordered to inform us at the pretrial conference whether or not it intends to proceed on this claim, and whether it desires a trial on the issue of fraud in procurement of the release clause or will submit the issue for immediate decision on the basis of documentary evidence.

Fifth Claim. This is a claim on behalf of the estate of the late Jacob Walker Cobmoosa for the reasonable value of his services in preparation and presentation of the aforesaid claims.[2/] The defendant

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2/ Mr. Cobmoosa filed a petition on behalf of the Ottawa-Chippewa Tribe of Michigan (Docket No. 4) in propria persona on April 29, 1947. This petition was dismissed by the Commission on March 25, 1949. Mr. Cobmoosa then retained Rosemary Scott as counsel, under a contract dated March 27, 1951. A new contract, dated August 2, 1951, between Miss Scott and Nora Chartrand Greenhalgh, stated to be his daughter, recites that Mr. Cobmoosa died on July 17, 1951. The March 27, 1951, contract states that Mr. Cobmoosa, who was evidently not a lawyer, derived his authority to retain counsel from a power of attorney dated December 27, 1918, executed by individual members of the Ottawa-Chippewa Tribe.

contends it is an individual as opposed to a tribal claim and thus not within our jurisdiction.

The defendant is right, and the fifth claim will be dismissed.

II. PLAINTIFF'S EXCEPTIONS.

The exceptions and defendant's response thereto raise several questions of law and procedure which should be disposed of before trial. As customary, in the absence of an appropriate motion from either party, the Commission will examine the exceptions upon its own motion. See, e.g., Gila River Pima-Maricopa Indian Community v. United States, Docket 236-N, 35 Ind. Cl. Comm. 209 (1974); Confederated Tribes of the Goshute Reservation v. United States, Docket 326-B, 33 Ind. Cl. Comm. 130 (1974). The exceptions are all directed to the accounting under the Treaty of July 31, 1855.

Exception 1 - Payment of Indians' debts, Article 1, last clause, as amended.

In ratifying the 1855 Treaty, on April 15, 1856, the Senate added a clause to Article 1 by which the United States promised to pay $40,000 on the Indians' just debts, over and above the other payments provided in the treaty. The creditors' claims were to be presented promptly and examined by the Secretary of the Interior, whose decision would be final. Any excess of the $40,000 over the total claims allowed by the Secretary was to be paid to the Indians or expended for their benefit. See 11 Stat. 626, 627.

The GAO report simply shows an item "Payment of debts $40,000" on page 96, and on page 106 schedules this item in the fiscal year 1857. No further details are given.

In Exception 1, plaintiff objects to the report's failure to show that the creditors' claims were timely filed, investigated by the Secretary of the Interior, and certified by him for payment. No exception is taken to the failure to break down the $40,000 item according to the individual claims paid.

The defendant denies that plaintiff is entitled to further information.

In the absence of indications to the contrary in the record or within judicial notice, we presume the Secretary performed all legally required preliminaries to payment of the $40,000 to creditors.[3/]

Exception 1 will be dismissed. This dismissal is without prejudice to plaintiff's right to seek more information about the payment of the debts, by discovery or otherwise, and to ask leave to file supplemental exceptions demanding disallowance of any part of the $40,000 which such information may show to have been spent illegally.

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3/ See Fort Peck Indians v. United States, Docket 184, 34 Ind. Cl. Comm. 24, 34, note 1 (1974); cf. Gila River Pima-Maricopa Indian Community, supra.

Exception 2 - $80,000 for educational purposes, Article 2 First clause.

The United States promised to spend the $80,000, under the direction of the President, in ten equal annual installments, consulting the Indians about the expenditures and the appointment of teachers and management of schools, and adopting their views insofar as just and reasonable.

The GAO report (p. 97) shows that $81,090.23 was expended under the 1855 Treaty for education. Disbursement Schedule No. 12 at pages 106-119 shows that this sum was expended in 15 unequal installments between fiscal years 1857 and 1871.

Plaintiff's Exception No. 2 reads as follows:

> ... Exception is taken to this accounting in that it fails to disclose the following:
>
> a) Equal annual payments of $8,000.00 each.
> b) Interest on investment of the annual payments.
> c) That the disbursements were made under direction of the President in accordance with the views and wishes of the Indians.

The defendant stands by the report.

(1) There can be no dispute that there was technical breach of the treaty in that the payments were unequal and spread over more than 10 years. The burden, however, is on plaintiff to show damages from the breach.

(2) We have already ruled, in disposing of defendant's motion for summary judgment, that no interest was payable under any clause of the treaty except the fourth clause of Article 2.

(3) In the absence of any indication to the contrary, we presume that the President did his duty, consulted the Indians, and adopted their views about the educational expenditures so far as they were just and reasonable.

The plaintiff will be ordered to file a pretrial statement stating whether it intends to pursue parts (a) and (c) of Exception 2, and if so, disclosing in general terms the evidence it intends to rely on.

Exception 3 - $75,000 for agricultural implements and other useful articles, Article 2 Second clause.

The plaintiff faults the accounting under this clause for failure to disclose whether the disbursements were for the Indians or Government agency purposes and for not showing interest on investment of annual payments.

The exception is not well taken. The heading of Statement No. 15, starting at page 96 of the GAO report, which lists the expenditures under the 1855 Treaty, begins, "Disbursements made by the United States for the benefit of the Ottawa and Chippewa Indians of Michigan..." In the absence of something in the body of the report casting doubt on the applicability of the heading to particular items listed under it, we accept it as meaning what it says.

Clause Second was incompatible with investment or interest.

Exception 3 will be dismissed, without prejudice to plaintiff's right to ask leave to file supplemental exceptions challenging particular items which it may contend were for Government rather than Indian use.

Exception 4 - $42,400 for blacksmith shops, Article 2 Third clause.

Plaintiff faults the accounting under this clause for failure to show how many shops there were, where they were located and whether they were operated for Indian or Government agency purposes.

The plaintiff can use discovery to find out how many and where the shops were. The report states they were for Indian benefit and shows expenditures in excess of the required amount.

Exception 4 will be dismissed.

Exception 5 - $306,000 plus interest for per capita distribution, Article 2 Fourth clause.

The clause in question reads as follows:

> "Fourth. The sum of three hundred and six thousand dollars in coin, as follows: -ten thousand dollars of the principal, and the interest on the whole of said last-mentioned sum remaining unpaid at the rate of five per cent. annually for ten years, to be distributed per capita in the usual manner for paying annuities. And the sum of two hundred and six thousand dollars remaining unpaid at the expiration of ten years, shall be then due and payable, and if the Indians then require the payment of said sum in coin the same shall be distributed per capita in the same manner as annuities are paid, and in not less than four equal annual installments."

Plaintiff excepts to the accounting under Article 2 Fourth clause in that it fails to disclose:

a) Amounts annually paid from principal.
b) Amounts annually paid from interest.
c) Amounts annually paid as the difference between coin and currency value.

Defendant answers that the report shows plaintiff received $112,766.29 more than it was entitled to under the fourth clause and

consequently has no need for further information. Defendant sets out the amounts due and paid during the first ten years after the effective date of the treaty as shown in the following table: 4/

TABLE OF ANNUITY PAYMENTS

| Fiscal Year | Balance At Start of Year | Annual Payment ($10,000) | Remaining Balance | Interest On Remaining Balance At 5% | Total Required Payment | Actual Payment Per GAO report pp. 106-112 |
|---|---|---|---|---|---|---|
| 1857 | $306,000 | $10,000 | $296,000 | $14,800 | $24,800 | $24,800 |
| 1858 | 296,000 | 10,000 | 286,000 | 14,300 | 24,300 | 24,300 |
| 1859 | 286,000 | 10,000 | 276,000 | 13,800 | 23,800 | 20,800 |
| 1860 | 276,000 | 10,000 | 266,000 | 13,300 | 23,300 | 23,300 |
| 1861 | 266,000 | 10,000 | 256,000 | 12,800 | 22,800 | 22,800 |
| 1862 | 256,000 | 10,000 | 246,000 | 12,300 | 22,300 | 22,300 |
| 1863 | 246,000 | 10,000 | 236,000 | 11,800 | 21,800 | 21,800 |
| 1864 | 236,000 | 10,000 | 226,000 | 11,300 | 21,300 | 21,300 |
| 1865 | 226,000 | 10,000 | 216,000 | 10,800 | 20,800 | 20,800 |
| 1866 | 216,000 | 10,000 | 206,000 | 10,300 | 20,300 | 20,300 |
| 10-year totals: | | $100,000 | | $125,500 | $225,500 | $222,500 |

4/ Article 6 made the treaty effective as soon as ratified by the President and Senate. The Senate ratified on April 15, 1856, with amendments. The Indians accepted the amendments at various dates during June and July of 1856. The President proclaimed the treaty on September 10, 1856. See 11 Stat. 621, 626-629. We consider the proclamation date as the effective date.

After 10 years, defendant states, the duty to pay interest stopped, and the Indians were then entitled to the unpaid principal balance of $206,000, but no more. To calculate the total sum plaintiff was entitled to, defendant would take the $225,500 aggregate of principal and interest for 10 years shown in the preceding table, plus the unpaid balance of $206,000, for a total of $431,500. Therefore:

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|---|---|
| Paid, per GAO report (page 96) | $ 544,266.29 |
| Due, as above | 431,500.00 |
| Overpayment, per defendant | $ 112,766.29 |

Defendant asserts that even if its duty to pay interest had continued beyond 10 years until final pay-out, the plaintiff would have been entitled to less money than the overpayment the report shows it received.

We believe the obligation to pay interest did continue until the entire $306,000 principal was paid in coin. The last sentence in Article 2, clause Fourth, is ambiguous.[5/] As the defendant would have us read it, it is also unfair to the Indians. But the Supreme Court stated, in Tulee v. Washington, 315 U.S. 681, 684-685 (1942):

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5/ First, the sentence states that the balance of $206,000 "at the expiration of ten years shall be then due and payable." But immediately afterwards, it continues that if the Indians require payment in coin (the medium of payment specified at the beginning of clause Fourth), the payment will be made in not less than four equal annual installments. It is silent as to what happens if the Indians do not demand payment. According to the GAO report, payment was actually made in six unequal installments.

The sentence has a ring of giving with one hand and taking away with the other similar to that which the late Commissioner Watkins denounced in another case as "savoring of double entendre." Sisseton and Wahpeton Bands v. United States, Dockets 142, 326, 16 Ind. Cl. Comm. 678, 684 (1966).

> . . . It is our responsibility to see that the terms of the treaty are carried out, so far as possible, in accordance with the meaning they were understood to have by the tribal representatives at the council, and in a spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent people.

See also, McClanahan v. Arizona State Tax Commission, 411 U. S. 164, 174 (1973).

We think the last sentence of clause Fourth had nothing to do with interest, that subject being covered earlier in the clause, but was concerned solely with the final distribution of the principal. We cannot believe that the Indians understood the last sentence to stop interest in addition to making them wait to get their money four and perhaps more years after it was due and payable.

The Government's contemporaneous interpretation of clause Fourth, like ours, was that interest continued to run until final pay-out. This is shown by the appropriation acts for the eleventh through sixteenth years of the treaty's life.

The appropriations for the eleventh and twelfth years were:

> For interest on two hundred and six thousand dollars, unpaid part of the principal sum of three hundred and six thousand dollars, for one year, at five per centum per annum. . .

See Acts of July 26, 1866, c. 266, 14 Stat. 255, 261; March 2, 1867, c. 173, 14 Stat. 492, 504.

The appropriations for the thirteenth, fourteenth, and fifteenth years each were for payment of one quarter of the $206,000 principal plus interest at five percent on the remaining balance. The sixteenth

appropriation was for the final payment on principal, but for no interest, since interest had always been appropriated in advance. See Acts of July 27, 1868, c. 248, 15 Stat. 198, 211; April 10, 1869, c. 16, 16 Stat. 13, 27-28; July 15, 1870, c. 296, 16 Stat. 335, 348; March 3, 1871, c. 120, 16 Stat. 544, 557.

The main flaw in the defendant's argument that there was an overpayment under clause Fourth, however, is its failure to note that the clause provides for payment in coin. The Government, after the Act of Februarv 25, 1862, c. 33, 12 Stat. 345, paid its obligations in paper currency, which depreciated rapidly. 6/

The GAO report appears to be expressed in paper currency after 1862. We note items for the premium on sale of coin on page 98 ($1,526.20), page 99 ($81,260.49), and page 102 ($6,341.89). This premium was the excess over face value of gold and silver pieces which

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6/ . . . The great inflation, the uncertain fortunes of the War, and the belief that even if victorious the United States neither would nor could pay its enormous debt at face value, but would repudiate or scale it, combined to depreciate the value of the notes; throughout 1864 they were worth on an average only about 45 cents on the dollar, and on one day, 11 July, when Early was threatening Washington, they dropped in panic to about 35 cents--or as currently expressed, the "premium on gold" was 285. [13 Encyclopedia Americana, Greenbacks 427 (1936)].

The above quotation is inserted for illustrative purposes only; the Commission will require proof of the value of paper currency as of any particular date in issue.

Paper currency became redeemable in coin on January 1, 1879, pursuant to the Act of January 14, 1875, c. 15, 18 Stat. 296.

was received when they were sold for paper money. The appearance of such an item in an account necessarily indicates that it is expressed in terms of paper dollars. Further evidence to this effect is supplied by the accounting for an appropriation of $36,753.47 by the Act of July 15, 1870, c. 296, 16 Stat. 335, 337, representing the difference between the coin and currency value of payments made in currency during 1863 and 1864, with 5 percent interest to June 30, 1870. This accounting appears in Statement No. 17 at page 102 and Disbursement Schedule No. 14 at page 121 of the GAO report. In all probability, the report is expressed throughout in terms of the money in actual circulation, that is, coin until 1862, and thereafter paper, until the resumption of specie payment in 1879 made currency and coin of equal value.

Exception 5, therefore, is well taken. One cannot tell from the GAO report whether or not the Government's obligations under Article 2, clause Fourth, were fulfilled. The Government owed $431,500, plus interest from 1866, in coin; and it paid $544,266.29 partly in paper. The exchange rates fluctuated, and we do not know them judicially. To be comprehensible, the account will have to be restated in terms of coin.

Defendant asserts it has no duty to supply further information, because, it says, the plaintiff's claim is for breach of contract and not for equitable accounting. This is alleged to be so "since the 1855 Treaty set up no trust funds but only provided for the manner and amounts of consideration to be paid." Defendant cites certain language

in Te-Moak Bands v. United States, Dockets 326-A, 22-G, 31 Ind. Cl. Comm. 427, 540-542 (1973), as its authority.

We wrote in Te-Moak that shortages in payments required by treaty are ordinarily regarded as breaches of contractual obligation rather than as breaches of trust. But this was stated in the context of rejecting a claim for interest under the Act of September 11, 1841, 31 U.S.C. § 547a, which applies only to trust funds.

The duty of the United States to make a fiduciary's accounting for its performance of treaty obligations does not depend on the existence of a trust fund. Rather, as the Supreme Court stated in Seminole Nation v. United States, 316 U.S. 286, 296-297 (1942):

> . . . In carrying out its treaty obligations with the Indian tribes, the Government is something more than a mere contracting party. Under a humane and self-imposed policy which has found expression in many acts of Congress and numerous decisions of this Court, it has charged itself with moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards.

Contracts, such as treaties, between the United States and the Indians may thus be scrutinized to determine whether the Government followed fiduciary standards in dealing with these dependent people. Pottawatomie Tribe v. United States, Dockets 15-B and 111, 3 Ind. Cl. Comm. 10, 47 (1954).

In the instant case relevant parts of the petition read as follows:

> 6. Second claim is hereby made for the unexpended balance of the following accounts or for the amounts improperly expended, with interest, under Articles 1 and 2 of the Treaty of 1855 as follows:
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> * * * * *
>
> WHEREFORE, the petitioner prays that the Commission find the amounts due under the foregoing claims and render judgment on behalf of the Ottawa-Chippewa Tribe of Michigan in said amounts with interest, costs, and attorney's fees and expenses, and such other and further relief as may be just and equitable.

The Commission had no difficulty recognizing this language as a demand for accounting; and apparently neither did defendant, since it served the GAO report on plaintiff on its own initiative long ago. Indeed, we cannot readily conceive of any remedy responsive to the petition except accounting. That the accounting be governed by the principles of equity is required by the fiduciary nature of the relationship between plaintiff and defendant. Cf. Fort Peck Indians, supra, 34 Ind. Cl. Comm. at 48,note 10 (1974); Blackfeet and Gros Ventre Tribes v. United States, Dockets 279-C and 250-A, 32 Ind. Cl. Comm. 65, 87 (1973).

The burden in equity is on the Government to make a proper accounting. Sioux Tribe v. United States, 105 Ct. Cl. 725, 802 (1946). An account in terms of paper currency of an obligation imposed in coin does not discharge the burden. Therefore, the Government must supply the new account in terms of coin under Article 2, Fourth clause.

III. DEFENDANT'S MOTION TO STRIKE PLAINTIFF'S MOTION FOR SUMMARY DETERMINATION.

The defendant's procedural motion must be disposed of before the plaintiff's motion can be reached.

The defendant contends we should strike the motion for summary determination because it does not state the grounds for the relief requested and is not accompanied by a memorandum of authorities, thus violating the Commission's General Rules of Procedure, 6(b)(1) and 22(a)(1). See 25 CFR §§ 503.6(b)(1), 503.22(a)(1).

We think the plaintiff does state the grounds for the relief it seeks. The motion states:

> . . . Plaintiff herein moves for summary determination that plaintiff is entitled to recover for the following as being improperly accounted for or disbursed in the payment of the consideration provided for by the Treaty of July 31, 1855, 2 Kappler 725, 11 Stat. 621, G.A.O. Report, pages 85 to 124. [Emphasis supplied]

It is true that the plaintiff did not accompany the motion by the required memorandum. The penalty for this default is the risk that the Commission may not understand why the moving party is entitled to the action requested.

Defendant states that the motion for summary determination is so vague that a meaningful reply is impossible. Except in regard to paragraph 6, discussed below, we cannot agree. The motion accompanied the exceptions, and reading them together we have no difficulty understanding either. We further note that the defendant has managed to answer much of the substance of the motion quite capably in its own subsequent filings. Accordingly, the motion to strike is denied.

IV. PLAINTIFF'S MOTION FOR SUMMARY DETERMINATION.

To some extent this motion goes beyond the exceptions and asks us to disallow items objected to for the first time in the motion itself.

We regard the parts of the motion where this occurs as additional exceptions. We cannot be overly finical as to the form and procedure for exceptions, since these matters are not covered in our rules, but are regulated only by case law. Blackfeet and Gros Ventre Tribes v. United States, Dockets 279-C and 250-A, 34 Ind. Cl. Comm. 122, 142 (1974) (on rehearing).

The motion contains nine numbered paragraphs, which we will discuss in order.

1. Use of annuity money for surveying.

Plaintiff asks summary judgment for the $3,000 which the GAO report states, at page 94, was disbursed in fiscal year 1859 for surveying, out of moneys appropriated in fulfillment of Article 2, Fourth, of the Treaty of July 31, 1855. Page 106 of the report shows that annuity payments to the Indians were correspondingly short that fiscal year. The Government has no real defense for this expenditure, but writes as follows at page 8 of the memorandum in support of its own motion for summary judgment:

> . . . Assuming only arguendo that this expenditure may have been improper, the payment of total annuities in the amount of $544,266.26, being $115,766.29 in excess of the amount to which plaintiff was entitled, more than compensated plaintiff for any breach of obligation which may have occurred.

The $3,000 item for surveying is quite evidently improper. The 1855 Treaty authorizes expenditures for a number of purposes and for per capita payment, but contains not a word about surveying. We will disallow the item, but not order summary judgment against the defendant

pending determination of whether there really was a compensating overpayment in terms of coin.

2. Grand River annuity paid in provisions instead of cash.

Plaintiff asks summary judgment for $2,000 issued to the Ottawas of Grand River in 1859 in the form of provisions instead of cash, under Article 2, Fifth, of the 1855 Treaty. See GAO report, page 94.

The cited treaty clause states that $35,000 shall be paid, to the Grand River Ottawas only, in 10 annual installments of $3,500 each, to be "distributed in the usual manner per capita."

There is nothing in the record to show what "the usual manner per capita" was. Assuming it was cash payment, and that the distribution in provisions was, therefore, in breach of the treaty, how was the plaintiff damaged? The Indian Claims Commission Act does not provide for mere vindication of right, absent actual damage. Gila River Pima-Maricopa Indian Community v. United States, Docket 236-G, 34 Ind. Cl. Comm. 290 (1974).

The plaintiff will be required to explain in a pretrial memorandum how it proposes to show damages from the distribution in goods instead of money; and if it does not do so satisfactorily, this part of the motion for summary determination will stand denied.

3. Unaccounted for interest on all installment payments.

We have already ruled, in Part I of this opinion, that interest is not payable under any clause of the 1855 Treaty except Article 2,

Fourth clause. Under Exception 5, we have ruled that the 1952 GAO report under the latter clause is inadequate. The determination of whether any interest is unaccounted for must await settlement of the coin account. Consequently, the matter of interest is not susceptible to summary determination, and the plaintiff's motion to that effect must be denied.

4. Unaccounted for difference between coin and currency value.

Only Article 2, Fourth, of the 1855 Treaty specified that payment should be in coin. Thus, the difference between coin and currency value is material only in the account under that clause. For reasons stated above, the matter cannot now be determined summarily.

Paragraph 4 of plaintiff's motion for summary determination will be denied.

5. Reverse spending.

Plaintiff asks for interest on disbursements made out of principal without first exhausting accrued interest.

The concept of reverse spending applies only to trust funds. It requires at least two funds, one interest-bearing and one either non-interest-bearing or bearing interest at a lower rate. With the possible exception of the $206,000 mentioned in Article 2, Fourth, after it had become due and payable at the expiration of ten years, there were no trust funds established under the 1855 Treaty. There is no indication in the report that interest on the $206,000 balance, if paid, was segregated into a separate non-interest-bearing account. The annual

disbursements after 1866 were so large, in terms of currency, that they would have exceeded any interest which might have been earned. Therefore, we do not see how reverse spending could have occurred. However, final determination of the question must await a coin account under the clause.

Treating paragraph 5 of the Motion for Summary Determination as an additional exception, we shall defer ruling upon it until the close of the record.

6. "Such sums that were not disbursed in accordance with the direction of the treaty provisions."

It is unreasonable to ask the Commission to examine accounts on the basis of such a vague objection and unfair to call upon the defendant to respond to it. Paragraph 6 of the Motion for Summary Determination will be denied.

7. $2,769.27 unaccounted for balances in fiscal officers' accounts.

8. $26,753.15 carried to surplus.

These objections refer to items (k) and (l) in Statement No. 16 at page 101 of the GAO report. Statement No. 16 is an accounting for the disposition of moneys appearing in the appropriation account, "Fulfilling Treaties with Ottawas and Chippewas of Michigan." The United Staes has not claimed credit against the Indians for items (k) and (l). The only items in Statement 16 which the Government claims were for Indian benefit are (h), "Disbursements made for the benefit of the Ottawa and Chippewa Indians of Michigan as set out on disbursement

schedule No. 12, pages 106 to 119," and the last entry, "Balance to their credit on the books of the Treasury as of June 30, 1949."

Paragraphs 7 and 8 will be denied. Blackfeet, supra, 32 Ind. Cl. Comm. at 108-109.

9. Interest at the rate of 5 percent per annum until paid on all sums not paid in accordance with treaty provisions.

". . . It is well established that the United States is not liable for interest in the absence of a contractual or statutory requirement to pay interest. See Pawnee Indian Tribe of Oklahoma v. United States, 157 Ct. Cl. 134, 301 F.2d 667 (1962), cert. denied, 370 U.S. 918; United States v. Alcea Band of Tillamooks, 341 U.S. 48 (1951)." United States v. Delaware Tribe, 192 Ct. Cl. 385, 392, 427 F.2d 1218, 1222 (1970).

There is no law authorizing us to award interest on shortages in treaty payments. Where the treaty itself or some other law provided for interest and the interest was not paid to the Indians, we award damages for the Government's breach of duty, in an amount approximating the lost interest; but we cannot award interest as such. Cf. Te-Moak Bands v. United States, Docket 326-A, 33 Ind. Cl. Comm. 417, 424-425 (1974) (on rehearing).

Paragraph 9 of the plaintiff's Motion for Summary Determination will be denied.

V. DEFENDANT'S PROPOSED EXHIBITS 1 AND 7 THROUGH 237.

On December 9, 1974, after the foregoing opinion had been almost

completed, the defendant submitted 231 documents accompanied by a motion for leave to file the same. The 10 days allowed the plaintiff for responding to the motion have expired without response. See 25 CFR §503.22(a). Accordingly, we have admitted the documents. We have not attempted to fully evaluate them; but we have examined them to determine whether any would require substantive change in our opinion. We conclude that they would not. They do, however, make it unnecessary for us to order a coin account under Exception 5.

The documents are designated defendant's Exhibits 1 and 7 through 237. No exhibits numbered 2 through 6 have been submitted.

Exhibit 1 consists of excerpts from the GAO report of March 21, 1952, which was before us when we prepared the opinion. Exhibit 7 is a copy of the treaty of July 31, 1855. Exhibits 8 through 23 are excerpts from appropriation acts relating to the Ottawa and Chippewa Indians of Michigan. All this material was subject to our judicial notice while preparing the opinion; and its presentation in the form of exhibits necessarily presents no occasion to reconsider our draft decision.

Exhibits 24 through 49, and 184, are historical background material having no direct bearing on the questions considered in the foregoing opinion.

A number of the exhibits respond to exceptions we are dismissing. Exhibits 50 through 100, and 183, relate to blacksmith shops. The corresponding dismissed exception is No. 4. Exhibits 133 through 181 relate to payment of creditors' claims. The corresponding dismissed

exception is No. 1. Exhibit 182 relates to expenditures for agricultural implements, etc. The corresponding dismissed exception is No. 3. The proposed exhibits may make unnecessary the use of discovery, which we suggested to the plaintiff as an alternative to the dismissed exceptions.

Exhibits 185 through 237 are said by defendant to be "typical sample vouchers." These are submitted, apparently, in anticipation of a demand from plaintiff, and have no bearing on the questions covered in the foregoing opinion.

Exhibits 101 through 132 relate to the payment in currency of annuities due in coin. They confirm our inference that the GAO report shifts from coin to currency in 1862.

Exhibit No. 124 is an account showing (1) the amount of each yearly appropriation under the Fourth clause of Article 2 of the 1855 treaty, (2) the premiums on coin for fiscal years 1864-1872, and (3) the total amount disbursed each year, consisting of the face amount due in coin plus the premium. This is essentially the "coin account" we called for in the discussion on page 406, above. Accordingly, it will not be necessary to order the Government to make up such an account.

The premium on coin for fiscal year 1863 (payable in late 1862) still appears to be unaccounted for. 7/ This matter will be among the

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7/ The Act of July 15, 1870, c. 296, 16 Stat. 335, 337-338 (Def. Ex. 22), appropriated funds to pay the difference between coin and currency value ". . . of payments made in currency during the years eighteen hundred and sixty-three and eighteen hundred and sixty-four, at the dates of the treasury warrants. . ." The payments referred to were, apparently, made in the latter halves of 1863 and 1864, from appropriations for the fiscal years 1864 and 1865. See notes 10 and 25 to Def. Ex. 124.

topics for pretrial discussion.

The pretrial conference previously scheduled for January 14, 1975, has been postponed, to afford the parties adequate time to study this opinion. A new pretrial date is set in the accompanying order. The order also sets out special preparations for the conference which will be required of the parties.

Brantley Blue

Brantley Blue, Commissioner

We concur:

Jerome K. Kuykendall

Jerome K. Kuykendall, Chairman

John T. Vance

John T. Vance, Commissioner

Margaret H. Pierce

Margaret H. Pierce, Commissioner

Yarborough, Commissioner, dissenting in part,

I dissent from the reservation of a ruling on the defendant's motion for summary judgment against the plaintiff's third claim; the motion should be granted. Now is a good time for the Commission to restate the obvious principle that it has no jurisdiction to order the paying over of an existing trust fund balance. Indeed, contrary to what the majority seems to think, such a judgment would not result in a paying over, but a new appropriation in the stated amount, doubling the trust fund. See, the opinion at 34 Ind. Cl. Comm. 189 (1974).

Richard W. Yarborough, Commissioner