BEFORE THE INDIAN CLAIMS COMMISSION

THE THREE AFFILIATED TRIBES OF THE FORT BERTHOLD RESERVATION, to wit, the Arikara, the Gros Ventre, and Mandan Tribes of Indians, an Indian Reorganization Act Corporation, in its own behalf and on behalf of the ARIKARA, MANDAN AND GROS VENTRE TRIBES OF INDIANS, Plaintiff,	)	
v.	)	Docket No. 350-G
THE UNITED STATES OF AMERICA, Defendant.	)	

Decided: May 29, 1975

Appearances:

Charles A. Hobbs, Attorney for Plaintiff; Wilkinson, Cragun & Barker, and Frances L. Horn and H. Michael Semler were on the briefs.

William F. Smith and James M. Upton, with whom was Assistant Attorney General Wallace H. Johnson, Attorneys for the Defendant.

OPINION OF THE COMMISSION

Yarborough, Commissioner, delivered the opinion of the Commission.

Introductory Statement

The Three Affiliated Tribes of the Fort Berthold Reservation, plaintiff herein, filed an original petition August 11, 1951, including seven specific claims, and a demand for a general accounting. We designated this petition as Docket 350. By order of March 4, 1955, we sustained defendant's plea of res judicata as to one of the original claims and denied the plea as to all others. 3 Ind. Cl. Comm. 444. By order of January 14, 1958, we sustained defendant's motion to sever the

remaining claims into separate dockets, ordering plaintiff to file severed petitions in connection with each claim. We designated the severed general accounting petition, filed March 14, 1958, as our Docket 350-G.

Defendant answered the petition in Docket 350-G on May 29, 1958. It filed a General Services Administration accounting report on June 14, 1966. The 1966 GSA report pertained to all of plaintiff's accounting affairs except those in Docket 350-F, and is referred to hereinafter as the 1966 report.

Defendant previously submitted a separate General Accounting Office report in Docket 350-F, as part of its amended answer of June 21, 1961, in that docket. The 1961 report was in response to our unreported order, issued in Dockets 350-F and 350-G on April 14, 1960, ordering defendant to render a separate accounting pertaining to the Act of June 1, 1910, 36 Stat. 455, and related statutes, and is referred to hereinafter as the 1961 report.

On April 9, 1970, plaintiff filed in Docket 350-G a total of 34 exceptions to the respective 1961 and 1966 reports. Defendant filed its response to plaintiff's exceptions on August 3, 1970. With our leave, plaintiff filed, on May 4, 1973, four supplemental exceptions, numbered 35 through 38, and coupled these with motions for a supplemental accounting and for partial summary judgment. On June 26, 1973, defendant filed motions to strike the first three supplemental exceptions; to dismiss the last

supplemental exception, and to dismiss plaintiff's request for a supplemental accounting. At the same time defendant filed responses to plaintiff's motions for supplemental accounting and for partial summary judgment. The case is now before us on the parties' motions and responses.

In the ensuing opinion, we deny defendant's motion to strike, grant defendant's motion to dismiss supplemental exception 38; grant in part plaintiff's request for supplemental accounting; and grant in part plaintiff's motion for partial summary judgment. We also issue certain show cause orders to the parties.

I. Defendant's Motion to Strike

Defendant contends that supplemental exceptions 35 through 37, dealing with the Act of June 1, 1910, supra, pertain to Docket 350-F, in which we have rendered a final award, 28 Ind. Cl. Comm. 264, 352 (1972), and that therefore the doctrine of res judicata applies. Plaintiff responds that defendant is estopped from claiming res judicata because defendant did not object to exceptions 13 through 16 which were included in Docket 350-G, and which also deal with certain aspects of the 1910 act.

Plaintiff's complaint in exception 35 is that defendant failed to account for forfeiture of entrymen's payments under section 9 of the 1910 act. Exception 36 involves accounting for an authorization under section 6 of the 1910 act to expend 20 percent of the net proceeds from the sales of certain town lots. Exception 37 involves accounting for allegedly wrongful remissions of the purchase price of certain Fort Berthold lands sold under the 1910 act. The remissions were made under the authority of the Act of February 9, 1925, 43 Stat. 817.

Res judicata bars the same cause of action between the same parties from being tried a second time. See United States v. Creek Nation, 192 Ct. Cl. 425, 427 F.2d 743 (1971), aff'g in part, rev'g in part, Docket 167, 18 Ind. Cl. Comm. 343 (1967), and 21 Ind. Cl. Comm. 278 (1970); and Creek Nation v. United States, 168 Ct. Cl. 483 (1964), rev'g Docket 167, 12 Ind. Cl. Comm. 54 (1963).

We observe first that we are dealing with claims originally stated in a single petition, filed in Docket 350. Dockets 350-F and 350-G were severed at defendant's request, and because severance served an administrative purpose. The issue in Docket 350-F was whether the price at which defendant sold certain of plaintiff's lands, authorized to be sold under the 1910 act, was so far below the fair market value as to constitute gross negligence, fraudulent conduct, or an abuse of the defendant's fiduciary relationships. 28 Ind. Cl. Comm. 264, 266. The issue did not involve any of the accounting aspects pleaded by plaintiff in the supplemental exceptions in Docket 350-G.

Nor were any factual determinations made in Docket 350-F that affect this case, other than those pertaining to exception 13, an exception not involved in defendant's motion to strike. No exceptions were ever filed in Docket 350-F, and neither party made any proposed findings therein relating to the exceptions that are filed in the instant case.

Furthermore, we note that plaintiff's petition in Docket 350-G included, in allegation 8, a request for an accounting for all funds or property of plaintiff under the 1910 act. Although the 1966 report included certain data pertaining to the 1910 act, the 1961 report of Docket 350-F was far more

inclusive in that regard. Yet Docket 350-F was not an accounting claim. Although the 1961 accounting report was not formally introduced into the record in Docket 350-G, the parties have, in fact, incorporated it by reference. Defendant in effect conceded as much in making no objection to plaintiff's exceptions 13 through 16, which all dealt with the 1961 accounting report. In any case, plaintiff is entitled to have the information in the 1961 accounting report entered in the record in Docket 350-G. We will therefore enter orders denying defendant's motion to strike amended exceptions 35 through 37, and making the 1961 accounting report in Docket 350-F a part of the record in Docket 350-G.

II. Defendant's Motion to Dismiss

In supplemental exception 38, plaintiff alleges that defendant engaged in unfair and dishonorable dealings with plaintiff in connection with the Garrison Dam Reservoir Project in North Dakota, a project that flooded much of plaintiff's Fort Berthold Reservation some time after 1952.

Defendant, in its motion, contends that we have no jurisdiction over the exception because it involved a claim arising after the August 13, 1946, jurisdictional limit specified in our act, 25 U.S.C. §70a. Defendant also urges that the exception, filed May 4, 1973, is a late filed claim, filed after August 13, 1951, the last date for filing claims before this Commission under our act.

We will quote plaintiff's exception 38 and its supporting statement in their entirety:

38. The defendant, in a practice of unfair and dishonorable dealings, determined to flood a major portion of the trust property for the benefit of the general public by construction of the Garrison Reservoir Dam, despite the fact that other lands located in the valley of the Missouri River were equally, if not more, logical sites for the said dam. The determination to so flood plaintiff's land was made on or before December 28, 1945, when the act of that date, 59 Stat. 632, 654, appropriating funds for flood control for the Mississippi River and tributaries withheld funds:

> ". . . for the actual construction of the Garrison Reservoir Dam, North Dakota, itself . . . until suitable land found by the Secretary of the Interior to be equal in quality and sufficient in area to compensate the Three Affiliated Tribes shall be offered to the said tribes in exchange for the land on the Fort Berthold Reservation which shall be inundated by the construction of the Garrison Dam."

The wrong arising from the defendant's choice of Indian lands held by it in trust instead of lands owned by others give rise to continuing damages and resulted in the plaintiff's loss of its lands without benefit of the promised lieu lands2/and with minimum benefit from the funds substituted for that promise of lieu lands.

Supporting Statement: The evidence will show that there was nothing unique about the site chosen for the Garrison Dam; it was chosen to prevent the flooding of the property of other landowners who were more vocal and could wield more political pressure than was expected of the Fort Berthold Indians. For precisely this reason the defendant trustee should have protected the Fort Berthold Indians from being the victim of this taking. By the Act of May 2, 1946, 60 Stat. 160, 163, 167, the defendant amended its promise not to begin construction of the Garrison Dam until suitable land should be offered to the tribes in exchange for the land to be flooded, by providing that after January 1, 1947, construction could proceed whether or not selection and offer of

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2/ The right to obtain lieu lands was, of course, a vested right for deprivation of which plaintiff is entitled to just compensation. Choate v. Trapp, 224 U.S. 665 (1912). [Footnote as in the original]

lieu lands by the Secretary of War and approval by the Secretary of the Interior should be consummated. Having failed to offer lieu lands acceptable to the tribes, the defendant by Act of July 31, 1947, 61 Stat. 686, 690, appropriated funds for acquisition of the Fort Berthold lands within the taking line of the Garrison Reservoir including all elements of value above or below the surface and including all improvements, severance damages, and reestablishment and relocation costs, the amount to be made available only if the contract between the United States and the tribes shall be negotiated and approved by a majority of the adult members of the tribes, and enacted into law by Congress, providing for the conveyance of the land. The act reserved the right of the tribes to institute suit in the United States Court of Claims for additional damages, if any, which they might sustain by reason of the taking. Negotiations for the contract were carried on with the knowledge that construction of the dam was proceeding. By the Act of October 29, 1949, 63 Stat. 1026, the defendant set out the terms and conditions for vesting title to certain lands of the Three Affiliated Tribes of the Fort Berthold Reservation in the United States. The statute covered payment for individual lands as well as tribal lands and was subject to approval by a majority of the adult members of the Indians of the Fort Berthold Reservation. At the time this offer was made to the Indians, the construction of the dam had progressed to the point where it was expected that impoundment of the waters would begin about October 1, 1952.3/ It is obvious, therefore, that the plaintiff's acceptance of the conditions of the Act of October 29, 1949, was given under duress. In the subsequent relocation of plaintiff's members to portions of the reservation not within the taking area, as noted in plaintiff's Exception No. 8, hereinbefore filed, defendant performed its duties so carelessly as to waste the tribal monies used for the purpose. This entire course of conduct arose from the wrongful action of the defendant in volunteering its beneficiary's land to satisfy the needs of the general public.

3/ Act of October 29, 1949, 63 Stat. 1026, 1028, § 11. [Footnote as in the original]

We have carefully examined the foregoing exception and supporting statement and concluded that the allegations are insufficient to show that a cause of action based on a lack of fair and honorable dealings had accrued to plaintiff prior to our jurisdictional cut-off date, August 13, 1946. In reaching this conclusion we have taken plaintiff's allegations of fact as true. However, we disagree with the conclusions of plaintiff based on those allegations.

Plaintiff's contention that the defendant's decision to flood plaintiff's trust lands prior to our jurisdictional cut-off date was a practice of unfair and dishonorable dealings is untenable. The factors cited by plaintiff as the alleged basis of this conclusion, that other lands located in the valley were equally, if not more, suitable for flooding, and that political considerations influenced the decision, are not borne out by the legislative acts and circumstances cited by plaintiff. These factors actually identified by plaintiff were not dealings between the parties to this suit, but were considerations employed by defendant preliminary to an exercise of its power of eminent domain under its declared policy relating to a national flood control program. See Flood Control Act of June 22, 1936, 49 Stat. 1570.

The Act of June 28, 1938, 52 Stat. 1215, 1218, in implementing the 1936 act cited above, contained an authorization of $9,000,000 for the initiation of a comprehensive flood control plan for the Missouri Basin, with the reservoir sites to be selected and approved by the Army Corps of Engineers. The actual decision to flood plaintiff's lands was apparently made pursuant to this act by the Chief of the Army Corps of Engineers some

time prior to the 1945 act referred to in plaintiff's exception. His choice of plaintiff's lands evinced defendant's intention to take the same lands for a declared public use. That choice was a proposed condemnation, not a taking, and in itself neither damaged plaintiff nor was an unfair and dishonorable dealing. We do not have jurisdiction over challenges to proposed condemnations, and we do not think that plaintiff has argued that we do. That being the case, the remaining question is the necessity or expediency of the condemnation of the particular property. However, this is a political question which is not subject to judicial review. See United States ex rel. Tennessee Valley Authority v. Welch, 327 U.S. 546 (1946), and cases cited therein.

Nor did the 1945 and 1946 acts of Congress mentioned by plaintiff, damage plaintiff, or create obligations on the part of the defendant which were breached before August 13, 1946. The first act, the Act of December 28, 1945, 59 Stat. 632, authorized additional funds for flood control for the Mississippi River and its tributaries, and contained the first legislative reference that a dam was to be constructed on plaintiff's reservation. This reference is implied in the acts' provision imposing upon defendant a unilateral restraint from using appropriated funds to construct such a project until suitable lieu lands were offered to plaintiff in exchange for lands to be inundated.

The second act, the Act of May 2, 1946, 60 Stat. 160, reiterated in section 6 the restraint against construction contained in the 1945 act, but put a time limit within which the selection and offer of lieu lands had to be consummated, after which actual construction was authorized to begin. The act, in this connection, was couched in mandatory terms that

required the Secretary of War and the Secretary of the Interior to make the selection and offer of lieu lands before the statutory date, and consequently, before construction could begin. The act did not provide, as plaintiff alleged, that construction would proceed after January 1, 1947, regardless of whether selection and offer had been made.

These acts did not affect plaintiff's title or possession of its lands. In fact, as of August 13, 1946, not only had plaintiff not been damaged, cf. Gila River Pima-Maricopa Indian Community v. United States, Docket 236-G, 34 Ind. Cl. Comm. 290, 293 (1974), but, as the 1945 and 1946 acts suggest, Congress could still have acted to see that the dam was not built.

We see nothing in either the 1945 act or the 1946 act which could be construed as unfair and dishonorable conduct on the part of defendant. The language of both acts, if anything, shows that defendant was not oblivious to the rights of its wards, and sought to protect them.

We have also examined the legislative acts passed subsequent to our jurisdictional cut-off date, and the alleged circumstances surrounding each, which are part of the entire course of conduct which plaintiff alleges gave rise to a cause of action under our fair and honorable dealings clause.

The Act of July 31, 1947, 61 Stat. 686, was the War Department civil appropriations act for the fiscal year ending June 30, 1948. One of its provisions, at page 690, allocated $5,105,625 out of the flood control funds for acquisition of plaintiff's lands and rights within the taking lines of the Garrison Reservoir. The amount allocated was to be deposited to plaintiff's credit and its availability to plaintiff was made subject to conditions subsequent.

The first condition subsequent was that a contract providing for the conveyance of plaintiff's lands and rights within the taking lines be negotiated and approved by a majority of the adult members of the tribe, and enacted into law by Congress. The second, and only other condition subsequent, required that the contract be submitted to Congress no later than June 1, 1948, and reserved to plaintiff the right to sue defendant in the Court of Claims under Section 24 of our act (now 28 U.S.C. 1505) for any additional damage not compensated for by the allocation.

The last act cited by plaintiff, the Act of October 29, 1949, 63 Stat. 1026, a joint resolution, indicated that the conditions subsequent mentioned in the 1947 act were not met, and, as plaintiff states, set out the terms of conditions for vesting title to plaintiff's lands in the United States. The land involved totaled 154,911.61 acres within the reservation, and included not only tribal lands but the interests of all individual allottees and heirs of allottees within the "Taking Area" of the reservoir.

The funds provided for in the 1949 act covered not only the values of the tribal and allotted lands and improvements, but also values above and below the surface, the costs of relocating and reestablishing the members of the tribe who resided within the taking area, and the costs of relocating and reestablishing Indian cemeteries, tribal monuments, and shrines within the same area.

Sections 3 and 4 of the act established a board of appraisal to determine the fair value of the land and improvements, and provided that the tribe and the allottees had the right to reject the appraisal covering their

particular interests. Upon rejection, Section 5 directed the Department of the Army to institute proceedings in the United States District Court for the purpose of determining just compensation.

The act also permitted the Indian owners to remove from the "Taking Area" their improvements, timber, sand, and gravel, without any deduction therefor in any appraisal. The act indicated that plaintiff and the individual allottees had to clear their holdings no later than October 1, 1952. The act also provided for an additional $7,500,000 to cover items not compensated for out of the $5,105,625 fund, and "all other rights, claims, demands and judgments of said tribes, individual allottees or heirs thereof, of any nature whatsoever existing on the date of enactment of this Act, whether of tangible or intangible nature and whether or not cognizable in law or equity in connection with the taking of said land and the construction of said Garrison Dam project."

Section 13 provided that the two appropriated funds should bear interest at the rate of 4% annually from the date of acceptance of the provisions of the act to the date of disbursement. The Indians were given rights on an equal basis with all others to the electric power anticipated from the project.

The 1947 and 1949 acts are of no assistance to plaintiff in establishing a cause of action that arose prior to our jurisdictional cut-off date. Even if these acts, or alleged facts surrounding them, amounted to unfair and dishonorable dealings, plaintiff's cause of action would not have accrued until after our jurisdictional cut-off date.

In addition to the foregoing, Congress in all of the acts cited by plaintiff was exercising its plenary authority over plaintiff's lands as

well as its sovereign power of eminent domain. In the exercise of its plenary authority over its Indian ward, it was free, as guardian, to exert its guardianship in any manner it deemed appropriate, and to adjust its action to new and changing conditions, so long as no property value was diminished or no fundamental right was violated. United States v. Rowell, 243 U.S. 464, 468 (1916), and cases therein cited. We are unable to identify any diminution of value or violation of a fundamental or vested right by defendant, prior to August 13, 1946, and therefore no cause of action accrued. Cf. Gila River Pima-Maricopa Indian Community, supra.

Plaintiff's footnote to the exception suggests an additional basis for its claim, i.e., that it had a vested right to obtain lieu lands, which it was deprived of by defendant. Choate v. Trapp, supra, which plaintiff cites in support of its proposition, concerned rights conferred on individual Indians under an agreement negotiated between Indian tribes and the United States. The Court concluded that these rights vested when the agreements were executed. The 1945 and 1946 acts in the instant case were appropriation acts. Neither contained an agreement with plaintiff; neither vested any rights in plaintiff. Thus the Choate decision is not in point.

If any right could be argued to have vested in plaintiff pursuant to these two acts, it was only the right to have an offer of lieu lands made to it by January 1, 1947. However, plaintiff's allegations do not

maintain that plaintiff was deprived of such a right prior to our August 13, 1946, jurisdictional cut-off date.

Since we conclude that supplemental exception 38 is not a valid claim under our act we do not reach defendant's alternative grounds for its motion, that the exception is a late filed claim.

We therefore grant defendant's motion to dismiss supplemental exception 38.

III. Plaintiff's Motion for Supplemental Accounting

Plaintiff requests supplemental accounting in three general categories. The first category calls for an up-to-date supplemental accounting; the second requests accounting information for plaintiff's property other than money; and the third requests additional accounting with respect to plaintiff's funds.

A. Post 1946 Supplemental Accounting

Plaintiff's motion for an up-to-date accounting reflects exception 1, which complains of the 1951 cutoff date observed in the accounting reports. We have considered a claimant's right to an identical request for a post-1946 accounting in several recent cases before this Commission. We decided that our jurisdiction to order such an accounting depends upon a showing that a course of wrongful action by defendant existed prior to August 13, 1946, and continued thereafter. E.g., Fort Peck Indians v. United States,

Docket 184, 28 Ind. Cl. Comm. 171 (1972); Blackfeet and Gros Ventre Tribe of Indians v. United States, Dockets 279-C and 250-A, 32 Ind. Cl. Comm. 65 (1973); and Sioux Tribe of Indians v. United States, Docket 119, 34 Ind. Cl. Comm. 230 (1974). Therefore, if it is determined that the defendant was guilty of pre-1946 wrongdoings, which have continued, the United States will be ordered to supplement its accounting with respect to those matters and accounts. In the interim, and in the absence of such a determination, the motion will be denied without prejudice.

B. Accounting for Property other than Money

Plaintiff has requested accounting information involving its property other than money, specifically that pertaining to leases, rights of way, surface or mineral interests, tribal administrative plants, reserves, unallotted tracts, homesteaded lands, demonstration farms, delivery of goods purchased, services purchased, and goods diverted, damaged, spoiled, or misdelivered.

In Blackfeet, supra, at 76, et seq., we held that the defendant's duty to account for property other than money is determined by the nature of its trust responsibility for the property involved. We stated generally that the defendant has no duty to make Indian property productive, but that where it has undertaken to do so, it must account. We held further that it must account where it has allowed third parties to use trust assets, or has used them itself.

Undertakings with respect to property other than money that require an accounting generally arise because of a statutory authorization, mandate, or program; or because of a treaty or an agreement; or simply because defendant administratively undertook, by virtue of its authority as guardian or trustee, or through its agents, a course of action that affected the property, and, consequently, the interest of its Indian ward. This last includes extralegal arrangements, if any.

We must turn to the pleadings on file to determine whether a particular undertaking has occurred. Where none is indicated, we will not order an accounting. Where an undertaking is indicated, and the GSA reports on file are inadequate, we will order defendant to render additional accounting. This additional accounting should be in the form of a detailed comprehensive statement, disclosing, in accounting terms usual to the type of undertaking involved, the nature, scope, and authority of the undertaking, the parties involved in all transactions, the terms and conditions of all obligations, and related accounting facts, fully supported by documentation. Where competitive bidding was involved, defendant should furnish a brief description of the bidding procedure employed. The information given must be sufficient to allow a determination whether the undertaking was reasonable, and properly executed and managed in the best interests of plaintiff.

We will now review plaintiff's request for supplemental accounting for property other than money according to the foregoing criteria.

1. Leasing Lands for Grazing and Mining: Plaintiff's first request is for a statement showing whether any of plaintiff's lands available for grazing and mining were leased, the dates of any such leases, the lessees, the acreages and periods involved, and the income derived from such leases.

In exceptions 24, 32 and 33 plaintiff complains that defendant's accounting fails to show whether leases for mining and grazing on reservation lands were executed and approved under various acts and does not account for income, if any, from such leases.

Defendant's 1966 GSA report, pages 99-100, in note (a) to Statement 24, shows income derived from bids on grazing lands, grazing fees, coal and wood royalties, lease rentals, "supervision of and mining coal," and from tribal permits for coal. The information, however, does not suffice as an accounting of defendant's undertakings. Defendant must account for its management of the lands involved. Such an accounting should meet the criteria outlined hereinabove and should specifically reveal pertinent dates, names of lessees, or permittees, and acreages involved, all collection data, charges against income, the net due plaintiff for each lease, and the disposition thereof.

We therefore grant plaintiff's motion as to all leasing undertakings reflected in the accounting report, and will order defendant to produce a supplemental statement to include the information referred to above.

2. Rights of Way over Lands: Plaintiff next requests us to order defendant to furnish supplemental accounting information regarding rights of way for various purposes through plaintiff's lands.

Plaintiff alleges in exception 12 the inadequacy of the accounting report in connection with authority granted defendant under the Act of February 15, 1887, 24 Stat. 402, for right-of-way extensions to a railroad company through the Fort Berthold Indian Reservation, and for fixing compensation to the Indians. In exceptions 25, 26 and 27, plaintiff complains that the accounting report fails to account for compensation due under other acts of Congress authorizing defendant to grant rights-of-way over tribal lands for various other purposes. Defendant's response to these four exceptions, in its answer filed August 3, 1970, states that the accounting records do not indicate any funds received, or any compensation paid for such rights-of-way.

Defendant's answer is contradicted by the 1966 GSA report, page 99, in note (a) to Statement 24, which shows $8,012.35 income derived from rights-of-way. There is also an entry in note (a) of Statement 24 showing income of $2,526.48 from damages to the reservation by railroads. Such income was possibly derived from payments made under clauses in right-of-way agreements or pursuant to statute, or under other arrangements defendant

made with the railroads in connection with their use of plaintiff's property. The report contains no detail in this regard and the accounting is inadequate because of this.

We therefore grant plaintiff's motion for supplemental accounting, and will order defendant to produce a comprehensive statement for all rights-of-way granted over plaintiff's lands, meeting the criteria mentioned above, explaining with regard to each right-of-way its purpose, dates, parties, terms, conditions, compensation fixed therefor, gross income, charges against income, and disposition of such income.

3. Interests in Surplus Lands; Tribal Administrative Plants, Reserves, or Unallotted Tracts; Homesteading Lands Acquired from Indian Tribes; and Lands Conveyed to Railroads: Plaintiff's third request is for supplemental accounting statements relating to defendant's handling of plaintiff's property in connection with funds received or payable under certain statutes. We take it that this request is directed to exceptions 23, 28, 30 and 31. In each exception plaintiff alleges that the accounting does not account under a particular act. The various acts are of general effect, applicable to "any Indian reservation" or tribe, providing for payments to Indians in the event of certain actions by defendant.

For example, two of the acts relate, respectively, to surface or mineral interests in Indian "surplus lands" sold or leased by defendant, 39 Stat. 944 (1917), and lands acquired from Indian tribes for homesteading, 25 Stat. 179 (1900).

In instances such as these, involving statutes of general effect applicable to all Indians, in order for us to require defendant to make a supplemental accounting, plaintiff must make a showing that defendant entered into an undertaking specifically as to plaintiff's property. (To do so, plaintiff may either point out information in the accounting report, submit evidence of its own, or use discovery procedures to obtain evidence from defendant.) Plaintiff has made no such showing. Nor do defendant's accounting reports show undertakings under any of the acts cited. Plaintiff's motion will be denied.

4-5. Oil and Gas Leases, and Mining Leases. These requests are for supplemental accounting statements relating to oil and gas leases, and mining leases, respectively. In our discussion at B.1, above, we determined that defendant should produce information concerning those leasing undertakings which are reflected in note (a) to statement 24 of the 1966 report. Beyond that, however, the burden is on plaintiff to show that defendant entered into specific oil and gas or mining undertakings before further accounting is appropriate.

6. Coal Deposits Reserved from Allotments: Plaintiff requests a supplemental accounting statement giving an account of defendant's handling of plaintiff's coal deposits reserved from allotment.

In exception 14 plaintiff complains that the 1961 GAO report fails to indicate what funds, if any, were due and owing plaintiff under the Act of August 3, 1914, 38 Stat. 681, which made coal deposits reserved under the Act of June 1, 1910, 36 Stat. 455, subject to disposal by the defendant according to the Coal Land Laws in force at the time of such disposal.

Defendant's answer alleges that the accounting records do not separately indicate that any monies became due plaintiff because of disposal of reserved coal lands,[1/] but it does not address itself to coal deposits reserved from allotment. The 1966 GSA report, at page 99 in note (a) to Statement 24, shows IMPL royalty income on "coal and wood." These references tend to show undertakings by defendant regarding coal deposits. Neither report furnishes an adequate accounting as to these undertakings.

We therefore grant plaintiff's motion in this instance, and will order defendant to produce an accounting statement as specified hereinabove that sufficiently explains defendant's handling of its undertaking with regard to plaintiff's coal deposits reserved from allotment.

7. Classification of Mineral Lands: Plaintiff requests a supplemental accounting statement showing the value of minerals lost, if any, from plaintiff's lands as a result of the sale, pursuant to the Act of June 1, 1910, supra, of mineral lands improperly classified by defendant as non-mineral lands.

In exception 15 plaintiff complains that the 1961 accounting fails to account for funds lost as the result of the improper classification and subsequent sale of mineral lands. Defendant responded in its answer of August 3, 1970, that the accounting records do not reflect that any such monies were due plaintiff, that the matter is not an accounting matter, and therefore that if there is a cause of action, plaintiff should have alleged it in another suit.

1/ Defendant's answer seems to be contradicted by a statement on p. 12 of the 1961 report referring to proceeds derived from disposal of lands bearing "coal or other minerals."

Plaintiff is entitled to a report showing the classification by defendant of lands as mineral and non-mineral pursuant to the 1910 act. However, plaintiff is not entitled to have defendant point out which lands, if any, were improperly classified under that act, nor how much plaintiff may have been damaged thereby. See Blackfeet, supra, at 68, 85. Neither the 1961 report nor the 1966 report show defendant's classification of plaintiff's lands pursuant to the 1910 act. We grant plaintiff's motion as to defendant's classification of plaintiff's lands, but deny it as to the question of value.

8. Assets: Plaintiff requests a supplemental statement accounting for assets purchased with plaintiff's funds, such as the demonstration farm mentioned in the 1961 report at page 14, the statement to include a showing of the value of the assets, the account from which they were purchased, their ultimate disposition, the proceeds derived therefrom, if any, and the disposition of such proceeds. In exception 16 plaintiff states that while the 1961 GAO report, at page 16, et seq., accounts for certain funds expended for such a farm, the report fails to reflect the fact that this farm, with its cattle, tribal sheep, and better than average equipment, was liquidated. Plaintiff argues that defendant should also account for the stock and equipment purchased with tribal funds for said farm.

In Blackfeet we set forth accounting guidelines which are applicable to plaintiff's motion. We said in Blackfeet, supra, at 81, that the government has an obligation to account for buildings erected from Indian

trust funds, and we specified the proper form of the accounting therefor. We will apply the same criteria herein.

We also set forth in Blackfeet, supra, at 83, the accounting criteria as to movable property, noting that they are not as demanding as in the case of real property. The accounting reports herein appear to supply sufficient information to satisfy these criteria.

Therefore plaintiff's motion to require further accounting will be granted as to real property and denied as to personal property. The denial is without prejudice to further motions to require accounting for specific chattels of unusually great value and long useful life that the record may show to have been acquired by the Government with tribal funds.[2/]

9-11. Proof of Actual Delivery of Goods Purchased for Plaintiff; Proof of Actual Benefit of Services Purchased for Plaintiff; and, Value of Goods Damaged, Spoiled, or Misdelivered: The ninth and tenth requests ask for supplemental accounting showing that goods purchased for plaintiff by defendant over the years were actually delivered, and that services rendered to plaintiff by defendant over the years were actually performed for the benefit of plaintiff. These issues are raised in exception 21. Defendant's accounting is inadequate in this regard and defendant must produce such vouchers, reports and other proof as may be available. Te-Moak

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2/ Blackfeet sets forth, supra at 98-103, distinct criteria for accounting for enterprises. However, plaintiff does not allege, and it is not self-evident to us, that a demonstration farm is an enterprise. We therefore will not require defendant to account for the demonstration farm as an enterprise.

Bands of Western Shoshone Indians v. United States, Docket 326-A, 23 Ind. Cl. Comm. 70, 81-82 (1970); and Blackfeet, supra, 87.

The requirement for an accounting for actual delivery of goods can be satisfied by furnishing an adequate description and explanation of the system used for purchasing and delivering goods to plaintiff over the years involved. The description and explanation should include, by way of illustration, measures taken by defendant to safeguard or warrant delivery, supported by samples of vouchers, agent's reports, or such other documents that show how delivery was accomplished.

An adequate accounting for services rendered for the benefit of plaintiff would include reference to back-up or source records such as payroll accounts relating to services; records that reflect authorization of such services issued either at the beginning or end of each fiscal year of expenditure; and finally, records that show job descriptions covering the duties of those engaged in rendering such services.

Further, if plaintiff so desires, defendant should make available for plaintiff's inspection the original records concerning goods and services.

Plaintiff's eleventh request asks for an evidentiary statement showing (a) the value of all goods intended for plaintiff which were diverted, damaged, spoiled, and the value of all goods intended for plaintiff which were sold or delivered to government employees or individual Indians, and (b) the amount, date and basis for all reimbursement therefor. The issue is raised in exception 22.

To the extent that there are records reflecting the information desired by plaintiff in (a), the defendant should make them available for plaintiff's inspection. Cf. Te-Moak, supra, at 82. As to part (b) of plaintiff's request, it would seem that no order is necessary, since the requested information would be in the nature of an offset, and therefore would be to defendant's advantage to report.

We will therefore order defendant to account for delivery of goods and services, and for the value of goods damaged, spoiled or misdelivered, as described herein.

C. Accounting for Funds

Plaintiff has requested supplemental accounting information as to deposits and receipts of plaintiff's funds.

1. Proportional share of annuities paid under the Treaty of Fort Laramie of September 17, 1851, 11 Stat. 749: Plaintiff requests a statement showing whether plaintiff received its fair share of the annuities paid under the Treaty of Fort Laramie of September 17, 1851, 11 Stat. 749. Defendant responds that the report reflects an adequate and sufficient record of the annuities in question.

In exception 2 plaintiff complains that the accounting gives insufficient information upon which to base a determination of whether the Fort Berthold tribes received their fair share of the annuities in question.

Defendant, in its answer to this exception, states that the 1966 report shows that $19,048.76 was spent directly for plaintiff, and that

$201,913.41 was spent for plaintiff's benefit jointly with other Indians of the Upper Missouri Agency. (Defendant includes, improperly, costs of insurance and transportation to arrive at its totals.) Defendant alleges that the treaty did not specify the amount of money each tribe was to receive.

The 1966 report, Part II, Section A, pages 6 through 22, states that more than $800,000 was distributed in annuity goods under the Fort Laramie treaty, and that of this total, $17,606.63 was disbursed to plaintiff directly, and $160,964.94 to plaintiff jointly with other Indians of the Upper Missouri Agency. The report, at page 9, explains the method of distribution and that under such method much of the goods were distributed to "the Indians of the 'Upper Missouri Agency'" with no designation as to the particular tribe or band to which the goods were distributed.

The report has no breakdown explaining in what proportions annuity goods were divided for distribution among the tribal parties to the treaty. The report does not include population figures or percentages for the several tribes, nor does defendant make any allegations in this regard elsewhere in its pleadings.

The Treaty of Fort Laramie was a multilateral agreement between the defendant and several Indian tribes including plaintiff. The defendant agreed to pay the Indian parties to the treaty an annuity of $50,000 for 15 years. Article 7 of the treaty mandated that the defendant spend the annuity on provisions, merchandise, domestic animals, and agricultural implements. It further mandated that the purchases "be distributed in proportion to the population of the aforesaid Indian nations."

We determined in Blackfeet, supra, at 85-86, that insofar as disbursements are concerned, after plaintiff has made his exception, defendant must then satisfy the Commission as to the legality of the challenged expenditure. We stated that a new accounting will lie only in an extreme case, i.e., when the accounting is not adequate to bring the issues into focus.

We are satisfied that the accounting report sets forth the available information concerning which plaintiff has inquired in its petition. Plaintiff's second exception and defendant's answer thereto have clearly placed at issue whether defendant properly or adequately fulfilled its mandate under the treaty. The accounting herein focuses the issue sufficiently for us to proceed to a trial on the merits. We will therefore deny plaintiff's motion for supplemental accounting in this instance.

2. Proceeds from the Fort Berthold Reservation: Plaintiff requests "a statement showing that all proceeds from the Fort Berthold Reservation have been placed to the credit of the plaintiff." In its supporting memorandum, plaintiff refers to the Act of June 10, 1920, 41 Stat. 1063, as the basis of its request. This same act is the basis of exception 34, which complains that the accounting does not account under said act.

Defendant responds that the accounting records do not indicate that any funds were received pursuant to the aforementioned 1920 act.

The cited act is the Federal Power Commission Act, a statute of general effect. The act requires, inter alia, that defendant credit Indians with funds derived by virtue of the operation of that act. Since there are no such funds reported in either of the GSA reports on file, and since plaintiff has made no showing in that regard, we deny plaintiff's request.

3. Nature of Transactions: Plaintiff requests a statement showing the nature and dates of all transactions which produced funds, including "Indian Moneys, Proceeds of Labor" funds, which were received for plaintiff or deposited in plaintiff's accounts.

In plaintiff's supporting memorandum (p. 38), plaintiff argues that certain acts (specified in exceptions 14 through 16 and 28 through 31) authorized disposition of various lands, resources and assets of plaintiff. Plaintiff states that the reports fail to state which lands, resources and assets, were thus disposed of, and what funds were consequently due and owing plaintiff. (This request of plaintiff overlaps certain of plaintiff's requests for supplemental accountings for property other than money which have been dealt with hereinabove.)

Plaintiff's request in regard to transactions producing IMPL funds is well taken. Defendant has supplied a listing of IMPL funds derived from various sources, without supporting explanations. (1966 GSA report, Statement 24, p. 98.) There is nothing to show the nature, dates, or any other detail of the transactions which produced such funds. This is not a meaningful accounting, such as defendant is required to give. Blackfeet, supra at 92. Defendant will be ordered to present a supplemental accounting down to August 13, 1946, as specified in Blackfeet, of those transactions which produced IMPL funds. 3/

3/ The supplemental accounting ordered herein will be in addition to those also pertaining to note (a), Statement 24, ordered above in Part III, B.

4. History of and Explanation of Treasury Department Procedures in Relation to Plaintiff's Funds: Plaintiff requests an additional accounting "statement showing a full and complete history of the certificates of deposit and receipt covering warrants relating to plaintiff's funds, together with the amounts thereof, and an explanation of Treasury Department procedure, and how interest thereon was computed at all relevant times."

We are unable to find anything in plaintiff's supporting memorandum which refers to this portion of plaintiff's motion. Defendant's memorandum in response to plaintiff's motion follows plaintiff's supporting memorandum, and consequently does not address itself to this portion of plaintiff's motion.

It would appear that plaintiff is seeking information which will show whether defendant covered funds into interest bearing accounts without undue delay, an issue raised in exception 19. This question is mentioned again in the portion of plaintiff's motion dealing with interest on funds discussed below. We conclude therefore that plaintiff is entitled to information adequate to show whether there was undue delay in covering funds into interest bearing accounts.

If plaintiff wishes to question defendant's computation of interest, its remedy is to except. We conclude that to the extent that this request of plaintiff for more information goes beyond the question of undue delay in covering funds into interest bearing accounts, we can find no need or basis for supplemental accounting, and that the request will therefore be denied. Cf. Blackfeet, supra, at 85.

5. Explanation of Proceeds Credited to Plaintiff: Finally, plaintiff requests a statement showing whether funds credited plaintiff represent the entire proceeds derived from the transactions producing such funds, or the net proceeds remaining after deduction of administrative or other charges or expenses.

This aspect of plaintiff's motion is directed towards the possibility that administrative or other charges or expenses may have been deducted from the proceeds of transactions which produced revenues belonging to plaintiff, and that such deductions were not shown or explained in the accounting reports.

Neither plaintiff's supporting memorandum nor defendant's response thereto addresses itself to this question. There is nothing in either report to show whether administrative or other charges or expenses may have been deducted from transactions producing funds for plaintiff's credit. Plaintiff is entitled to know whether any such deductions were made, and, if so, to an accounting showing the particulars of such deductions. (Presumably, the supplemental accounting we have required above, as to plaintiff's property other than money, will reveal most of the information sought here.) This portion of plaintiff's motion will be granted.

D. Accounting for Interest on Funds

Plaintiff requests additional accounting information regarding interest bearing funds so that it may determine whether it lost any interest it was entitled to. Exceptions 7, 9, 19, and 20 raise these issues. Plaintiff's request has three aspects:

1. Moneys Transferred in and out of Special Deposits: Plaintiff's first request concerning interest on funds is for an additional accounting "for all moneys transferred in and out of special deposits."

The term "special deposits" we take to refer to accounts, operated by defendant in the course of managing plaintiff's resources, which are established to accommodate cash bid funds belonging to private persons who bid competitively on the right to exploit tribal resources, or to accommodate funds paid in advance by successful bidders pending capture of such resources. We do not find an exception in which plaintiff lays specific claim to a loss of interest on such funds. Such funds are not the property of plaintiff until such time as bids are accepted and the funds become transferable to plaintiff's accounts. Plaintiff therefore is not entitled to the information sought. Plaintiff is entitled, however, to a determination whether any of such funds that eventually became interest bearing trust funds belonging to plaintiff were improperly withheld outside the Treasury/ The responsibility of defendant for information leading to such a determination is covered in the next phase of plaintiff's motion, and there is no need to grant plaintiff's access to it separately here.

2. Funds Held Outside the Treasury. Plaintiff requests a statement showing the dates of all receipts and appropriations of trust funds, and a statement showing the dates of all withdrawals and expenditures of trust funds. These requests concern whether defendant improperly withheld funds outside the Treasury, causing plaintiff to lose interest it was otherwise entitled to. The reports do not show the information requested. Without

that information, it will be impossible to determine whether defendant fulfilled its fiduciary obligation. Blackfeet, supra, at 88-89. Accordingly, we conclude that plaintiff is entitled to the requested information and we grant the motion.

In Sioux Tribe v. United States, Docket 119, 34 Ind. Cl. Comm. 230, 235 (1974), we dealt with the same issue. We suggested therein, Id. at 250, that plaintiff consider whether further accounting was worth the effort and time involved. In light of the same consideration, the parties should discuss what further information should be supplied by defendant and in what form.

3. Reverse Spending: Plaintiff's final request is for a statement showing the running balances in plaintiff's accounts so that it may be possible to determine whether any interest on interest-bearing funds was lost by reason of defendant's having expended such interest-bearing funds when non-interest-bearing funds were available.

We believe the reports on file are adequate for such a determination. See Blackfeet, supra, at 90. Plaintiff's motion is denied in this regard.

IV. Plaintiff's Motion for Partial Summary Judgment

Plaintiff's motion for partial summary judgment requests determinations as to defendant's liability in four different respects, as follows: for all amounts shown on the face of defendant's reports to have been improperly expended; for all interest which was lost; for all amounts dissipated because of poor judgment or poor supervision; and, for all amounts attributed to

satisfaction of treaty obligations which were in fact paid for by Indian labor.

We note from the onset that plaintiff's motion requests the Commission to render a partial summary judgment as to liability only, leaving the question of quantum open, presumably until trial on the merits or until such time as additional accounting may reflect exactly the amounts to be awarded.

A. Amount Improperly Expended on Face of the Reports

Plaintiff contends that on the face of the reports $328,708.97, exclusive of interest, was improperly spent or diverted by defendant out of plaintiff's funds.

Defendant responds that there are questions of fact involved that can only be decided after a trial; and that the claims are so vague and lacking in specificity that defendant cannot identify the particular items on which summary judgment is sought. Defendant, in support of the latter argument, points out that plaintiff does not show where the items totaling $328,708.97 are found in the accounting reports or what items make up this total.

In regard to the first point of defendant's response, defendant has not pointed out any specific material questions of fact on the face of the record. Plaintiff, for purposes of its motion, has accepted defendant's pleadings at face value, and does not dispute the expenditures as reported, but only disputes the legality thereof.

With regard to defendant's point that the motion is vague and lacks specificity, we must agree. The proper procedure is for plaintiff to challenge specified expenditures listed in defendant's report, indicating

the amounts of each and the exceptions wherein it challenges the expenditures.

Plaintiff's motion does not comply with this. It merely asks for partial summary judgment for all amounts shown on the face of defendant's reports to have been improperly expended or diverted for agency, administrative, or other purposes which were obligations of defendant, or which were otherwise improper, and gives a total of $328,708.97 without identifying the challenged disbursements making up this large amount.

Plaintiff does refer, in its supporting memorandum (p. 56), to two specific sums, objected to in exceptions 4 and 36, and alludes to the disbursements in exception 37. (The amounts involved in these exceptions total $8,454.90). As to the first of these three exceptions, the requirement of notice has been met, and we may rule on plaintiff's motion. As to supplemental exceptions 36 and 37, defendant has not yet had an opportunity to answer on the merits, and the motion is premature. As to all other expenditures plaintiff may have meant to challenge by its motion, plaintiff has not met the required standard of notice. Defendant is entitled to notice as to what it must defend itself against.

Nonetheless, we do not wish to prolong or delay this case unnecessarily. We have therefore reviewed plaintiff's exceptions alleging improper expenditures to determine which ones can be disposed of. In those instances where plaintiff may be entitled to a summary judgment, we will order defendant to respond to the motion, thus assuring defendant an opportunity to defend itself. In instances where it appears that plaintiff is not entitled to maintain its exception, we will order plaintiff to show cause why its exception should not be dismissed.

1. The Sum of $2,692.60 Challenged in Exception 4: Plaintiff alleges in exception 4 that defendant wrongly made a disbursement out of its funds for the benefit of Indians other than plaintiff. Plaintiff cites the 1966 GSA report, page 51, which shows on its face that defendant made a disbursement to the Fort Belknap Indians in the sum of $2,692.60 out of plaintiff's funds realized under the Agreement of December 14, 1886, 26 Stat. 1032. Defendant, in its memorandum of June 26, 1973, admits that it improperly disbursed the aforesaid sum to the Fort Belknap Indians. We conclude that these expenditures were improperly made from plaintiff's funds, and that plaintiff is entitled to recover this amount from defendant.

2. Sum of $4,828.95 Challenged in Exception 5: Plaintiff alleges in exception 5 that the 1966 report, page 49 et seq., reveals that defendant wrongfully diverted at least $4,828.95 of plaintiff's funds, due under the 1886 agreement, supra, from the purposes stipulated in that agreement. In plaintiff's memorandum in support of its motion for partial summary judgment, plaintiff points out that Article VII of the same agreement provided, inter alia, that a maximum of $12,000 was to be expended to remove agency buildings and property in needed repairs, and in the erection of new buildings. Plaintiff then alleges that the defendant wrongly spent $4,828.95 more than the $12,000 provided for the purpose.

Defendant contends that the term "agency" as used in the agreement is ambiguous and that a trial is necessary to determine whether the excess was spent for the benefit of the Indians.

We direct both parties' attention to our decision in Dockets 350-A, E, and H, 21 Ind. Cl. Comm. 92, 94-95 (1968), where by stipulation plaintiff waived all claim for refund or credit for certain expenditures in the instant

docket. The amount claimed by plaintiff in exception 5 was included in the stipulation. We will therefore deny plaintiff's motion and order the plaintiff to show cause why exception 5 should not be dismissed.

3. The Sum of $278,432.72 Challenged in Exception 10: In exception 10, plaintiff alleges that defendant wrongfully diverted trust funds belonging to plaintiff to pay for goods and services which defendant was obligated to supply, and that defendant admittedly was unable to account for $600 of plaintiff's funds. In its memorandum supporting its exceptions plaintiff specifies in five lists a total of $278,432.72 which it alleges were improperly disbursed. Our review of these lists indicates that certain of the expenditures listed may be subject to summary judgment while others may not be subject to challenge at all.

The second and third lists concern disbursements made after our jurisdictional cut-off date of August 13, 1946. We will therefore deny plaintiff's motion as to these lists and order plaintiff to show cause why these aspects of exceptions 10 should not be dismissed.

The fourth list concerns disbursements of IMPL funds. The disbursements listed therein under the item "agency buildings and repairs" may also be disposed of before trial. In a stipulation for compromise in Dockets 350-A, E and H, supra, at 95, plaintiff waived all right to recover in the instant docket an item spent by the defendant in connection with agency buildings in the sum of $4,698.90. This sum is the same as the agency buildings and repairs item in the fourth list. We will therefore deny plaintiff's motion as to this item, and will order plaintiff to show cause why this aspect of its 10th exception should not be dismissed.

We will now consider the remaining disbursements challenged in exception 10. As we have indicated above, plaintiff's motion for partial summary judgment did not make reference to exception 10, and plaintiff therefore did not meet standards of notice such as would allow a ruling as to that exception. (That plaintiff's response to defendant's reply to plaintiff's motion makes specific reference to exception 10 does not cure this defect.)

Subsequent to plaintiff's response, defendant filed on March 27, 1974, a motion for leave to file six exhibits in opposition to plaintiff's motion for summary judgment, stating it did so as a consequence of our intervening decision in Blackfeet, supra. Defendant's brief in support of its motion indicates that these exhibits were filed with respect to exception 10. (This reference to exception 10 by defendant presumably was owing to plaintiff's aforementioned response to defendant's reply, where specific mention is made of that exception for the first time.)

By order of April 10, 1974, we granted leave to defendant to file its exhibits. The first exhibit is the 1966 report. The other five exhibits include copies of documents and vouchers underlying several disbursements reported in categories of expenditure challenged in the memorandum supporting exception 10. The categories are miscellaneous agency expenses, miscellaneous building materials, and miscellaneous employees.

The aforementioned categories of expenditure were disallowed in Blackfeet. Defendant contends that these exhibits show that certain disbursements for plaintiff herein, which were reported in the aforementioned categories, were proper. Defendant states that these exhibits are representative, and requests additional time to search for further evidence.

Defendant is clearly now on notice that plaintiff's request for partial summary judgment includes exception 10. Defendant will be ordered to respond in full to plaintiff's motion in this respect. Defendant's response should indicate the alleged legal basis for all challenged disbursements which it believes were proper, even though previously reported in a category of expenditure which is improper.

4. The Sum of $5,083.55 Challenged in Exception 36: In exception 36 plaintiff quotes a provision of section 6 of the Act of June 1, 1910, 36 Stat. 455, that provided that "not more than" 20 percent of the proceeds of certain town lot sales be expended for specified purposes such as construction of school houses. Plaintiff states that the total proceeds were $91,319, and that 20 percent of that sum is $18,263.80. Plaintiff states that the 1961 report (at p. 19) accounts for $13,180.25 of that $18,263.80, and complains that defendant failed to account for the remaining $5,083.55.

Then, in its supporting statement for its motion for partial summary judgment, plaintiff includes that $5,083.55 in its discussion of "illegal disbursements shown on the face of the report," although it only states therein that defendant "failed to account" for the sum.

Plaintiff's position appears to assume that defendant was required to spend exactly 20 percent of the proceeds so derived. Plaintiff's position is not supported by the plain terms of the act. The act authorized the Secretary to spend not more than 20 percent of the net proceeds on improvements. The Secretary could legitimately spend less than 20 per cent. Furthermore, defendant's failure to spend the full 20 per cent presumably means that plaintiff remained credited with it. We will therefore order plaintiff to show cause why its 36th exception should not be dismissed.

5. The sum of $1,678.75 challenged in Exception 37: The amount challenged in exception 37 represents certain remissions out of plaintiff's funds pursuant to the Act of February 9, 1925, supra. In addition, plaintiff requests interest at 3 percent, inasmuch as the remissions were made from plaintiff's 3 percent fund established by the Act of June 1, 1910, supra. The remissions are shown in the 1961 accounting report pp. 15 and 19.

Plaintiff contends that the 1925 act amounted to a breach of defendant's obligation under the 1910 act, and related acts, wherein defendant undertook, inter alia, to sell townsites within the Fort Berthold Reservation, with the net proceeds to be credited to the Indians. The 1925 act authorized the Secretary of the Interior to certify to the Treasury the difference between the amounts paid by purchasers of lots in Sanish townsite and the price fixed as a result of the reappraisal of the Secretary, dated August 11, 1922.

Remissions of payments already made, based on reappraisal, are not in the interest of the Indians, and the Government is liable for the amounts lost thereby. See Fort Peck Indians v. United States, 132 Ct. Cl. 373, 376 (1955), aff'g Docket 183, 3 Ind. Cl. Comm. 78 (1954). It therefore appears that plaintiff's exception 35 has merit.

As we noted above, however, defendant has not yet had an opportunity to answer to the merits of this supplemental exception, and plaintiff's motion for summary judgment is therefore premature. Accordingly, we will order defendant to file a timely response to this exception. 4/

4/ Plaintiff's exception also requests that the Commission order defendant to supply information concerning all the sales involving reappraisals to determine plaintiff's total loss owing to reappraisals. However, there is nothing in the 1925 act or the 1961 report to suggest that the information shown in the report doesn't reveal the total amount of plaintiff's loss pursuant to the 1925 act by reason of the reappraisals, i.e., $1,678.75.

B. Interest

Plaintiff asks for summary judgment for all interest which should have been earned on trust funds held by defendant. In its supporting memorandum plaintiff challenges defendant's failure to pay interest on plaintiff's annuities, judgment funds, IMPL funds, and on earned interest and other earned income, and defendant's use of interest-bearing funds when non-interest bearing funds or lower interest-bearing funds were available.

Defendant's response makes three points. First, it denies generally that it owes plaintiff interest on plaintiff's trust funds. Second, it asserts that plaintiff has not identified the funds involved. Finally, it argues that controverted factual issues remain unresolved as to each fund mentioned.

The parties adopted herein the briefs and arguments in Te-Moak Tribe v. United States, Dockets 326 and 22-H, 31 Ind. Cl. Comm. 427 (1973), concerning defendant's obligations to make Indian trust funds productive. We decided in Te-Moak that the United States had a duty to make all its Indian trust funds productive. We therefore reject defendant's first argument.

As to defendant's second point, we think that plaintiff identified the types of interest funds sufficiently in its memorandum in support of its motion to allow us to make a decision. Although plaintiff has not specified the amount of interest owed on trust funds held by defendant, this matter may be deferred to further proceedings. See Te-Moak, supra.

As to defendant's third point, plaintiff's motion is based on information in defendant's accounting report, and no controverted issues of fact are apparent. We may therefore proceed to consider the specifics of plaintiff's request.

1. Failure to Pay Interest on Annuities: In its brief plaintiff refers to exception 3, which alleges that defendant failed to credit interest on unexpended funds appropriated and held in the Treasury under the provisions of the Agreement of December 14, 1886, 26 Stat. 989, 1032, and under the Act of February 20, 1920, 41 Stat. 1032.

The 1886 agreement involved a cession of tribal lands to defendant in return for defendant's expending $80,000 annually for a period of ten years in purchasing and providing certain enumerated goods and services for the benefit of the Indians. Article VII of the agreement contained a proviso that if during any year less than the annual installment was required to carry out the benefits, any such "excess" amounts were to be placed to the Indians' credit in the Treasury and expended in continuing benefits after the ten annual installments had been made. The agreement contained no provision for interest on, or for investment of, annuity funds. The disbursement schedule (1966 report, p. 53, et seq.) shows that after the annual installments had expired, "excess" amounts were expended.

The issue to be determined is whether unexpended portions of the annuities are trust funds on which defendant was required to pay interest. The same question was raised in Blackfeet, supra, where we determined with regard to similar treaty provisions that unexpended balances are trust funds which should have been invested in United States bonds bearing not less than 5 percent interest.

We therefore grant plaintiff's motion for partial summary judgment as to interest on the unexpended balances of annuity funds. The question of quantum will be reserved for future proceedings.

2. Failure to Pay Interest on Judgment Funds: In its brief plaintiff refers to exception 6, which alleges that insufficient interest was paid to it on an award by the Court of Claims. 71 Ct. Cl. 308 (1930). Congress appropriated $2,169,168.58 in satisfaction of the court's judgment by the Act of February 6, 1931, 46 Stat. 1076. By the Act of March 2, 1931, 46 Stat. 1481, Congress directed that the appropriation on deposit in the Treasury, less expenses of litigation, be paid in pro rata shares to all members of plaintiff tribes.

The 1966 report shows that defendant credited plaintiff with $14,160.00 in interest in fiscal year 1931. (1966 report, p.71.) Interest was due pursuant to the Act of February 12, 1929, 45 Stat. 1164, as amended by the Act of June 13, 1930, 46 Stat. 584. Defendant denies that plaintiff was due more interest.

Our review of the record shows that a warrant was issued on the same day as the appropriation, February 6, 1931. However, interest was calculated from April 16, 1931. There is nothing in the 1929 act to indicate that interest should not have started running on February 6.

We will therefore grant plaintiff's motion for partial summary judgment as to interest on judgment funds. The issue of quantum will be deferred to further proceedings.

3. Failure to Pay Interest on IMPL Funds: Plaintiff asserts in its brief (and in exception 9) that defendant held its Indian Moneys, Proceeds of Labor (IMPL) Funds, deposited with defendant under the Act of March 3, 1883, 22 Stat. 582, without paying 5 percent thereon as required by law.

Plaintiff states that the accounting report shows that no interest was paid on IMPL funds from August 18, 1888 (the date of the first warrant, 1966 report, p. 129), through June 13, 1930. Thereafter, plaintiff was paid 4% on IMPL funds, pursuant to the Act of February 12, 1929, supra. There is no dispute concerning how much interest was paid.

In Te-Moak, supra, we concluded that defendant was required by the Act of September 11, 1841, 5 Stat. 465, to invest IMPL funds as trust funds, and that damages for failure to do so were to be measured at the rate of 5 percent per annum. We therefore grant plaintiff's motion as to interest on IMPL funds. The matter of quantum will be deferred to further proceedings.

4. Failure to Pay Interest on Interest and Other Income: Plaintiff asserts in its brief (and in exception 17) that defendant improperly failed to credit it with interest on funds representing interest credited to plaintiff. Plaintiff contends that defendant was obliged to make such income productive under the 1841 act, supra. Defendant responds that plaintiff is entitled to simple interest only.

Interest income produced from invested funds or interest bearing funds was required to be reinvested under the 1841 act. Te-Moak, supra, 529. We therefore grant plaintiff's motion for partial summary judgment as to defendant's failure to invest interest earned on, or other income from, plaintiff's funds. Computation of damages is deferred to further proceedings.

5. Use of Interest-Bearing Funds when Non-interest-Bearing Funds or Lower Interest-Bearing Funds Were Available: Plaintiff asks for partial

summary judgment for interest lost by defendant's practice of expending interest bearing funds when non-interest bearing funds or lower interest-bearing funds were available. This practice is known as reverse spending, and is subject of exception 7.

In Menominee Tribe v. United States, 101 Ct. Cl. 10, 21 (1944), the Court of Claims held that defendant, in withdrawing money from tribal funds in its role as fiduciary, must draw such funds from non-interest-bearing funds or from funds bearing the lowest rate of interest. If defendant fails to follow this procedure, it is liable to the Indians for interest lost thereby.

However, what constitutes reverse spending will be effected by our determination above that IMPL funds should have been invested at 5 percent. See Blackfeet, supra, at 90. At this point, without evidence of actual reverse spending (see p. 24, hereinabove), it would be premature to grant plaintiff's motion. We will therefore deny plaintiff's motion, without prejudice.

C. Amounts Dissipated Because of Poor Judgment or Supervision

Plaintiff's motion for partial summary judgment requests that we hold defendant liable as a matter of law for all amounts dissipated because of poor judgment or poor supervision on the part of agents for the defendant, including all trust funds for which defendant is unable to account. This issue is raised in exception 8. In support of this proposition, plaintiff in its memorandum refers to funds appropriated under the Act of October 29, 1949, supra. Expenditures pursuant to this act are outside the jurisdiction of the Commission. See our discussion above concerning plaintiff's 38th exception. Plaintiff's motion in this regard will be denied, and plaintiff will be ordered to show cause why exception 8 should not be dismissed.

D. Treaty Funds Paid for by Indian Labor

The last aspect of plaintiff's motion for partial summary judgment asserts that defendant is liable for all amounts due plaintiff under treaty obligations which were paid for by Indian labor under the Act of March 3, 1875, 18 Stat. 449. In exception 11 plaintiff alleges that the 1966 report attributes to satisfaction of treaty obligations funds for goods which were paid for by Indian labor.

Plaintiff cites Rogue River Tribe v. United States, 105 Ct. Cl. 495, 64 F. Supp. 339 (1946), in support of its position. In Rogue River the court ruled that where payments were promised by treaty, a further requirement for Indian labor to earn such payments was unjustified. The court ruled plaintiff could recover for any such payments.

However, our review of the accounting fails to show any payments made by defendant after 1875 pursuant to duly ratified treaties entered into prior to that date.

Plaintiff entered into two treaties with defendant prior to 1875, the Treaty of Fort Laramie of 1851, 11 Stat. 749, and the 1866 Treaty at Fort Berthold, 2 Kappler 1052. Defendant made no payments to plaintiff pursuant to the Treaty of Fort Laramie after 1869. (1966 report, p. 22.) The Treaty of 1866, on the other hand, was never ratified, so that any disbursements made pursuant to it were not obligations of defendant. See Docket 350-B, 25 Ind. Cl. Comm. 179 (1971). We will

therefore deny plaintiff's motion as to treaty funds paid for by Indian labor, and will order plaintiff to show cause why exception 11 should not be dismissed.

V. Remaining Exceptions

We have dealt herein with all except three of plaintiff's 38 exceptions, as can be seen from the table of exceptions attached to this opinion. In order to dispose of all possible questions of law and procedure before trial, we will examine the three remaining exceptions and defendant's responses thereto. See, e.g., Gila River Pima-Maricopa Indian Community v. United States, Docket 236-N, 35 Ind. Cl. Comm. 209 (1974); Confederated Tribes of Goshute Reservation v. United States, Docket 326-B, 33 Ind. Cl. Comm. 130 (1974).

A. Exception 13. Plaintiff alleges in this exception that the 1961 report fails to correct an error made by the Court of Claims in determining offsets in its decision, Fort Berthold Indians v. United States, 71 Ct. Cl. 308 (1930). Defendant's response states that plaintiff's claim in Docket 350-F includes this issue. Defendant is correct. Our decision in 1972 in Docket 350-F disposed of this issue. 28 Ind. Cl. Comm. 264. Plaintiff will be ordered to show cause why exception 13 should not be dismissed.

B. Exception 18. Plaintiff complains in exception 18 that defendant paid interest at only 4% per annum on funds held in the treasury pursuant to the Act of July 1, 1946, 60 Stat. 348, 359; the Act of October 29, 1949, 63 Stat. 1026, 1028; and on IMPL funds; and only 3% per annum on funds held pursuant to the Act of June 1, 1910, 36 Stat. 455, although it paid 5% per annum on other trust funds under the Act of September 11, 1841, 5 Stat. 465.

Under the 1946 act defendant appropriated $400,000 in accordance with the enabling act providing such funds, the Act of June 28, 1946, an act which attempted to settle all claims and demands of the plaintiff with regard to the unratified treaty of July 27, 1866, 2 Kappler 1052. Defendant's 1966 accounting report, at pages 75 through 82, renders an accounting for these funds. The same report, at page 135, discloses that the funds appropriated by the 1946 act were not credited until January 31, 1947, after the jurisdictional cut-off date of our act. We therefore have no jurisdiction over defendant's accounting for these funds. For the same reasons we have no jurisdiction over the funds derived under the 1949 act.

The question of interest on IMPL funds raised in exception 18 is duplicative of exception 9, which has been disposed of above in favor of plaintiff (see part IV B.3).

Plaintiff's final complaint in exception 18 was that interest was set at only 3% on funds created pursuant to the 1910 act, supra, while the 1841 act provided interest at 5%. However, plaintiff has offered no basis for its implicit proposition that the 1841 act, which was simply a statute that

had none of the elements of a treaty or agreement, could prohibit a subsequent Congress from fixing interest in accordance with rates prevailing at a future date.

For the aforesaid reasons we will order plaintiff to show cause why its eighteenth exception should not be dismissed.

C. Exception 35. In exception 35, plaintiff complains that defendant failed to account for forfeitures of payment and lands under the provisions of Section 9 of the Act of June 1, 1910, supra. This section of the 1910 act provides, inter alia, that defendant was empowered to sell plaintiff's surplus lands under terms of one fifth down at time of entry, with the balance of the purchase price payable in five equal installments due two, three, four, five, and six years, respectively, after the date of entry. The section further provides that:

> . . . . In case any entryman fails to make the annual payments, or any of them, when due, all rights in and to the land covered by his entry shall cease, and any payments theretofore made shall be forfeited and the entry cancelled, and the lands shall be again subject to entry under the provisions of the homestead law at the appraised price thereof:

Section 11 of the act provides:

> That the net proceeds derived from the sale of said lands in conformity with this act shall be paid into the Treasury of the United States to the credit of the Indians. . . .

Based on the foregoing language of the statute, plaintiff's exception appears to have merit. However, defendant has not yet had an opportunity to answer this exception. Therefore, we will order defendant to file a timely response to this supplementary exception.

Future Proceedings

In the foregoing opinion we have ordered a supplemental accounting as to certain items; we have left certain issues (such as quantum, as to items where we have decided that there is liability) to future proceedings; and, we have determined as to certain items that we will make rulings unless one or the other party can show cause for us not to so rule.

Accordingly, we will schedule a conference in order to determine: how much time to allow for supplemental accounting, and for plaintiff's response thereto; and, the most effective manner of, and schedule for, disposing of the matters left to future proceedings.

The parties will be given 45 days in which to respond to our orders to show cause.

Richard W. Yarborough, Commissioner

We concur:

Jerome K. Kuykendall, Chairman

John T. Vance, Commissioner

Margaret H. Pierce, Commissioner

Brantley Blue, Commissioner

TABLE OF EXCEPTIONS

*Note: exceptions 13, 18, and 35 were not involved in plaintiff's motions.