BEFORE THE INDIAN CLAIMS COMMISSION

| | | |
|---|---|---|
| COLORADO RIVER INDIAN TRIBES, et al., | ) | |
| Plaintiffs, | ) | |
| v. | ) | Docket No. 283-B |
| THE UNITED STATES OF AMERICA, | ) | |
| Defendant. | ) | |

Decided: July 10, 1975

Appearances:

I. S. Weissbrodt, Attorney for Plaintiffs. Weissbrodt and Weissbrodt were on the briefs.

James M. Upton, with whom was Assistant Attorney General Kent Frizzell, Attorneys for Defendant.

OPINION ON PLAINTIFFS' MOTION TO COMPEL A PROPER ACCOUNTING AND FOR DETERMINATION OF ISSUES OF LAW

Vance, Commissioner, delivered the opinion of the Commission.

Before the Commission is plaintiffs' motion to compel a proper accounting and for determination of points of law, filed on December 18, 1969. On May 16, 1973, the defendant filed its response to plaintiffs' motion.

I. Motion to Compel a Complete and Proper Accounting

On May 27, 1963, defendant filed with the Commission an accounting report prepared by the General Accounting Office (hereinafter abbreviated as "Rep."), and on November 9, 1965, defendant filed additional materials supplementing this report.

On February 3, 1964, plaintiffs filed their exceptions to the defendant's accounting report.

The defendant filed its response on May 4, 1964.

On October 14, 1969, C. M. Wright, who had formerly been attorney of record for the plaintiffs, filed a statement advising the Commission that he had inadvertently allowed his attorney contract with the plaintiffs to expire.

On December 15, 1969, a new approved attorney contract was submitted which joined the firm of Weissbrodt and Weissbrodt as counsel for the plaintiffs and designated I. S. Weissbrodt as attorney of record.

On December 18, 1969, plaintiffs filed supplemental exceptions to defendant's accounting along with the aforementioned motion to compel a proper accounting and for determination of issues of law.

The Commission, on May 16, 1973, permitted defendant to file a late-filed response to the plaintiffs' supplemental exceptions.

The petition in Docket 283-B was filed on behalf of the Colorado River Indian Tribes and on behalf of the Mohave Indians and the Chemehuevi Indians who are components and members of the Colorado River Indian Tribes. However, the report prepared by the General Accounting Office includes information about the accounts and affairs not only of the plaintiffs in Docket 283-B but also of certain other groups of Mohave and Chemehuevi Indians. This information was assembled in connection with claims made by groups of Indians in a number of cases, Dockets 185, 283, 283-A, 283-B, 295, 295-A, 351 and 351-A. We note that the accounting report states (p. 2) that "the records do not distinguish in many instances, the disbursements for the various groups of petitioners."

The plaintiffs state that they are particularly interested in the funds administered in the four accounts designated as follows:

(a) Indian Moneys, Proceeds of Labor, Colorado River Indians, Arizona.

(b) Interest on Proceeds of Labor, Colorado River Indians, Arizona.

(c) Proceeds of Townsites, Colorado River Reservation, Arizona.

(d) Interest on Proceeds of Townsites, Colorado River Reservation, Arizona.

In addition, the plaintiffs set forth issues raised under specific exceptions. We will examine them in the light of two of our decisions which are determinative of certain accounting issues raised in this and other cases before the Commission. These cases are Te-Moak Bands of Western Shoshone Indians v. United States, Dockets 326-A and 22-G, 31 Ind. Cl. Comm. 427 (1973), and Blackfeet and Gros Ventre Tribes v. United States, Dockets 279-C and 250-A, 32 Ind. Cl. Comm. 65 (1973). We will refer to these opinions, where applicable, throughout this opinion.

Exception No. 1

In Exception No. 1, the plaintiffs state that the accounting is incomplete, pointing out that the report filed on May 31, 1963, supplemented by the materials filed on November 9, 1965, shows only the transactions up to June 30, 1951. The plaintiffs further contend that each of the four accounts mentioned above are open and continuing at the present time and that

each of the accounts was established long prior to August 13, 1946. In short, the plaintiffs seek an up-to-date accounting.

In Blackfeet, supra, at 75-76, we held that we have no jurisdiction to order defendant to simply extend its general accounting. Our jurisdiction to order a post-1946 accounting depends upon finding a course of wrongful action which was still going on at the August 13, 1946, cutoff date. Plaintiffs' request for a post-1946 accounting will be denied without prejudice to plaintiffs' right to make a further request for an accounting beyond August 13, 1946, upon showing a specific wrongdoing which occurred before that date and can reasonably be expected to have continued thereafter. See Confederated Tribes of the Goshute Reservation v. United States, Docket 326-B, 33 Ind. Cl. Comm. 130, 132 (1974).

Exception No. 2

The plaintiffs except generally to the defendant's report on the grounds that it is incomplete and inadequate in that it fails to disclose the following essential facts with sufficient particularity to be meaningful:

A. When or from what sources funds deposited in the two principal accounts "Indian Moneys, Proceeds of Labor, Colorado Indians, Arizona" (IMPL), and "Proceeds of Townsites, Colorado River Reservation, Arizona," were derived.

B. The total proceeds received by the defendant from transactions involving plaintiffs' lands and other property which resulted in sums being credited to their principal accounts, or the amounts deducted by defendant from such total proceeds for administrative or other charges or expenses;

C. When or for what purposes funds in any of the four accounts were expended;

D. The state of the accounts on an annual or other periodic basis;

E. The meaning and content of many of the terms and categories used.

We will examine each of these alleged inadequacies:

A. Plaintiffs allege that the only information which the accounting report furnishes with respect to funds deposited in the petitioners' accounts is warrant numbers and the dates and amounts of deposits, Rep. pp. 246-252, 254-255, 257-260, and a summary of miscellaneous revenues by categories over the entire reporting period from 1895 to 1951. Rep. p. 19, note (a). In order to determine whether the defendant faithfully and properly discharged its responsibilities, the plaintiffs ask that they be provided specific information concerning the revenue-producing transactions, relating the proceeds from those transactions to specific deposits. Defendant responds that it has established a prima facie accounting and that it has fulfilled its duty to account to plaintiffs.

We agree with plaintiffs' objection to this form of accounting. The defendant will be ordered to present a new accounting of all its receipts down to August 13, 1946, of moneys of each of the plaintiffs from every source other than congressional appropriations, showing, item by item:

1. Date of first receipt (i.e., if item was collected in the field, the date of such collection).

2. Amount.

3. Nature of transaction which produced the receipt. Where the collection was under a contract, for example, if it represented an installment of rent under a lease, the contract should be identified. Any charges for defendant's services should be shown.

4. Date the item was covered into the treasury, and the account in which it was placed. If the item was never covered into the treasury, what other disposition was made of it should be disclosed.

B. Plaintiffs ask the defendant to identify all of their tribal property which the United States has disposed of, the amount of any moneys received from such disposals, and any charges which the defendant may have made for its services. The supplemental accounting ordered in 2A, above, will provide the requested information for all disposals which were revenue-producing transactions. In addition, we will order defendant to identify other of the plaintiffs' property, if any, which was disposed of without producing revenue. This accounting must conform to the standards set down in Blackfeet, supra, at 82-83.

C. Plaintiffs argue that the disbursement schedules, Rep. pp. 13-59, do not show the dates funds were withdrawn from the accounts, the obligations they were used to pay, or the dates on which payments were actually made, and that the report completely fails to provide the information necessary to determine whether the defendant administered the funds in a timely manner and whether it expended them for authorized and permissible purposes. Defendant denies that it is obligated to report the dates that funds were withdrawn

from these accounts to pay obligations of the plaintiffs and the dates these payments were made.

We see two problems arising from the sketchy disbursement accounting provided by defendant. The first of these goes to the validity of the disbursements themselves. As we stated in Blackfeet, supra, at 85-86:

> . . . The disbursement accounts are not so detailed nor revealing as good practice requires, but they are adequate to start bringing the issues into focus. Accounting reports are, after all, pleadings. If a plaintiff questions a particular disbursement, his remedy is to except, not to ask that the defendant be compelled to plead again. The plaintiff certainly has no right to demand that the defendant point out to him which of the listed disbursements was illegal. Sioux Tribe v. United States, Dockets 114, et al., 12 Ind. Cl. Comm. 541 (1963); Southern Ute, supra, 17 Ind. Cl. Comm. at 59.
>
> The burden is on the defendant to make a proper accounting. Sioux Tribe v. United States, 105 Ct. Cl. 725, 802 (1946). Thus for a particular item to be exceptionable, the test is not whether the report shows it to be improper; it is enough if the report fails affirmatively to show that it was proper. When the plaintiff makes his exception, it then becomes incumbent upon the Government to satisfy the Commission as to the legality of the challenged item. Southern Ute, supra, 17 Ind. Cl. Comm. at 60; Bogert, supra, §970 at 203.

In Blackfeet we found that the accounting was not so incomplete as to require a new accounting. The same applies here. Plaintiffs are, of course, entitled to use the discovery means at their disposal to obtain detailed information of these disbursements.

The second disbursement problem is that plaintiffs may have been deprived of interest on certain of their accounts because defendant withdrew funds from interest-bearing accounts and held them for an unreasonably long time before they were disbursed.

In Blackfeet, supra, at 88, we held that "[u]nless the amounts and periods are disclosed during which the Government held plaintiffs' legally interest-bearing funds out of the treasury, it will be impossible to determine whether defendant fulfilled its fiduciary obligation." Plaintiffs are entitled to such information in the instant case. We will meet with attorneys and accountants for the parties to determine the form in which this additional information is to be supplied.

D. This exception concerns defendant's allegedly improper failure to credit interest on the Proceeds of Townsites account until the effective date of the Act of February 12, 1929, 45 Stat. 1164 (as amended by the Act of June 13, 1930, 46 Stat. 584); and on the IMPL account until July 1, 1930.

We have held that the defendant has the duty to make trust funds productive. Te-Moak, supra. IMPL accounts, in particular, are funds held in trust by the United States, and should be invested in federal securities pursuant to the Act of September 11, 1841, 5 Stat. 465, except during periods when alternative means, authorized by later legislation, were used to make such monies productive. Id. at 508. We discuss the IMPL account further under Section II of this opinion.

The issue, then, is whether the funds in the Proceeds of Townsites account were funds held in trust, which the defendant had the duty to make productive. Further accounting, including restatement of plaintiffs' accounts, is unnecessary for resolution of this issue. Therefore, the motion for supplemental accounting will be denied as to exception 2D. If defendant is adjudged to be liable as to this exception, we will then determine whether the existing accounting is adequate to determine damages, if any. We discuss the Proceeds of Townsites account further under Section II of this opinion.

E. Plaintiffs state that the terms and categories used by defendant in the Report are so ambiguous, nonspecific and ill-defined that the report fails to provide the rudimentary data necessary to judge the fidelity and propriety of defendant's conduct. Defendant denies that these categories represent any improper expenditures.

As in exception 2C, supra, concerning disbursements, we feel that defendant's accounting, although not as complete or detailed as it could be, is adequate. Plaintiffs may use discovery to obtain the vouchers, receipts, reports and other such data as may be available to explain the various categories of expenditures.

Exception Nos. 3 and 4

Exception 3 and 4 do not contain a request for supplemental accounting. They involve determinations of legal issues which we discuss under Section II of this opinion.

Exception No. 5

This exception is substantially the same as exception 2E, supra. We need not discuss it further.

II. Motion for Determination of Matters of Law

Plaintiffs ask that we determine as matters of law that:

> 1. All expenditures of petitioners' funds representing proceeds of sales of townsites and interest thereon were illegal for the reason that they were not authorized by Congress;
>
> 2. After the effective date of the Act of May 18, 1916, 39 Stat. 123, 158, all expenditures

of funds from the accounts designated "Proceeds of Labor" and "Interest on Proceeds of Labor" were illegal for the reason that they were not authorized by Congress;

3. Until the effective date of the Act of February 12, 1929, 45 Stat. 1164, funds in the account designated "Proceeds of Townsites" were required to be credited with interest or otherwise so managed as to earn not less than five percent per annum compounded annually; and

4. Until the effective date of the Act of June 13, 1930, 46 Stat. 584, funds in the account designated "Proceeds of Labor," were required to be credited with interest or otherwise so managed as to earn not less than five percent per annum compounded annually.

1 and 2. The plaintiffs contend that all of the expenditures of funds representing the proceeds of sales of townsites or interest thereon, and, after the effective date of Section 27 of the Act of May 18, 1916, 39 Stat. 123, 158, all expenditures of funds from the accounts designated "Proceeds of Labor" and "Interest on Proceeds of Labor" were unauthorized by law. Plaintiffs argue that tribal trust funds may be expended only upon appropriation and for purposes authorized by Congress. Section 27 of the Act of May 18, 1916, provided that:

> No money shall be expended from Indian tribal funds without specific appropriation by Congress except as follows: Equalization of allotments, education of Indian children in accordance with

> existing law, per capita and other payments, all of which are hereby continued in full force and effect: Provided, That this shall not change existing law with reference to the Five Civilized Tribes.

Defendant argues that any expenditures from these funds were made for the benefit of the plaintiffs, and are not recoverable by plaintiffs even if made without specific congressional appropriation.

Expenditures for education of Indian children and "per capita" payments did not require congressional appropriation. In addition the 1916 statute exempts "other payments." Since the parties have not addressed themselves to the significance of the term "other payments", we will defer a decision on the issues raised by questions 1 and 2 until we have considered the briefs of the parties.

3. Plaintiffs ask us to rule as a matter of law that the account entitled "Proceeds of Townsites" represents the proceeds of sales of "Indian trust lands" within the meaning of the Act of April 1, 1880, 21 Stat. 70, and should therefore have been invested or otherwise credited with interest at the rate of not less than five percent per annum compounded annually.

In two recent cases we have had the opportunity to examine the meaning and the legal effect of the 1880 Act. In Te-Moak, supra, at 478-486, we found that although the 1880 Act does not set a rate of interest to be paid on Indian trust monies, the legislative history is clear that the rate of interest intended was 5 percent. In Fort Peck Indians v. United States, Docket 184, 34 Ind. Cl. Comm. 31-36 (1974), we examined the meaning of the phrase "Indian trust lands," as used in the 1880 Act. Since the 1880 Act authorized the Secretary of the Interior to deposit in the United

States, Treasury, at interest, "all sums recieved by him on account of sales of Indian trust lands," that phrase is critical. We concluded that "Indian trust lands" referred to lands ceded to the United States and sold to third parties.

The question remains, then, whether the funds in the account entitled "Proceeds of Townsites" are the proceeds from the sale of lands ceded to the United States for the purpose of sale to third parties? Neither side has briefed this issue, and the accounting report is not sufficiently clear as to the nature of these sales. The report indicates that the sales were made pursuant to two Acts of Congress, 35 Stat. 70, 77 (1908), and 36 Stat. 879, 880 (1910). These Acts appropriated five thousand dollars to reserve, set apart and survey lands on the Yuma Indian Reservation and the Colorado River Indian Reservation and to sell the tracts so set apart, the net proceeds to be credited to the Indians of the respective reservations.

Although it appears from these Acts that the lands were not ceded to the United States prior to their sale, we feel that this evidence is insufficient for us to decide at this time whether these funds represent the proceeds of sales of Indian trust lands. We will defer a ruling on this issue until we have received the briefs of the parties.

4. Plaintiffs ask us to rule as a matter of law that defendant was under an obligation to credit funds deposited in the IMPL account with interest, or otherwise to manage these funds to earn not less than 5 percent per annum, compounded annually. Defendant paid no interest on IMPL funds until an interest account was established pursuant to the Act of June 13, 1930, 46 Stat. 584. The IMPL fund was created by Congress by

the appropriation act of March 3, 1883, c. 141, 22 Stat. 582, 590.

In Te-Moak, supra, we concluded that the United States had a duty to make all its Indian trust funds productive, finding, at p. 449, that Congress intended trust funds to be invested "if they were on hand long enough to make investment practicable."

We determined that, as to IMPL funds, the damages will be measured by the loss of growth of the Indians' respective shares therein due to the failure of the government to invest, and that the correct measure is 5 percent interest, compounded annually. Id. at 481. Accordingly, the defendant is liable to the plaintiffs for its failure to make these funds productive during the period prior to July 1, 1930, the effective date of the Act of June 13, 1930.

An informal conference will be scheduled with Commissioner Vance within twenty days to determine the form of the supplemental accounting for those exceptions for which we have found the accounting report to be inadequate and to determine a procedure for the briefing of other issues which must be decided. At that conference we will also fix a time certain for the supplemental accounting, a pretrial conference, and the trial of this case.

John T. Vance, Commissioner

We concur:

Margaret H. Pierce, Commissioner

Brantley Blue, Commissioner

Kuykendall, Chairman, and Yarborough, Commissioner, concurring:

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

In each case since Te-Moak we have filed a concurring opinion in which we stated our view of the proper measure of damages. It is obvious that in the future the same principles will be followed by the majority in cases involving the failure of the defendant to make IMPL funds productive. Since our position has been made clear and since we are bound to follow the authority of Te-Moak, supra, we will not hereafter file separate concurring opinions in cases which involve this issue.

Jerome K. Kuykendall, Chairman

Richard W. Yarborough, Commissioner