BEFORE THE INDIAN CLAIMS COMMISSION

THE YANKTON SIOUX TRIBE, Plaintiff,	)	
v.	)	Docket No. 332-D
THE UNITED STATES OF AMERICA, Defendant.	)	

Decided: November 20, 1975

Appearances:

Jerry C. Straus, Attorney for Plaintiff. Wilkinson, Cragun & Barker, Patricia L. Brown were on the briefs.

Marvin E. Schneck, with whom was Assistant Attorney General Wallace H. Johnson, Attorneys for Defendant.

OPINION OF THE COMMISSION

Vance, Commissioner, delivered the opinion of the Commission.

On August 10, 1951, the Yankton Sioux Tribe filed a petition before this Commission which was assigned Docket No. 332. In that petition there were alleged several claims against the United States including, in Paragraphs 19, 20 and 21, a claim for a general accounting. By Commission order of February 13, 1958, the claims under Docket 332 were severed, the claim for a general accounting being assigned Docket No. 332-B. On the same date, the plaintiff filed an amended petition under said Docket 332-B in which, in Paragraphs 6, 7, 8 and 9, plaintiff realleged almost verbatim the original claim for a general accounting. On December 23, 1971, the defendant filed its response to the amended petition

under Docket 332-B in the form of an accounting report certified by the General Services Administration under date of August 5, 1965. On February 18, 1972, the plaintiff filed exceptions to the defendant's accounting; defendant responded to these exceptions on April 18, 1972; and, on May 18, 1972, the plaintiff filed a reply to the defendant's response.

Among several exceptions to the defendant's accounting, the plaintiff specifically excepted to defendant's accounting as incomplete because, although disclosing balances in various Yankton Sioux funds as of June 30, 1951, it failed to disclose any information for the period after June 30, 1951 (Pl. Exception No. 1, Docket 332-B, at 4). The plaintiff also separately excepted to what it termed the defendant's failure ". . . to account fully for the lands purchased by [defendant] from the petitioner under the Agreement of December 31, 1892, 28 Stat. 314" (Pl. Exception No. 3(b), at 8), and to the defendant's failure to account for the proceeds of the 1892 Agreement (Pl. Exception No. 4, at 12).

In response to plaintiff's Exception No. 1, defendant asserted lack of Commission jurisdiction over claims accruing after August 13, 1946. Alternatively, defendant asserted that, if the Commission does have jurisdiction over those post-August 13, 1946, transactions constituting continuations of transactions which had commenced prior to that date, it is plaintiff's burden to set forth specifically those accounts which reflect such continuing transactions before the defendant may be compelled to supplement said accounts. Defendant responded to plaintiff's Exception No. 3(b) by asserting that this exception actually disguised a claim for the purchase of plaintiff's lands for an unconscionable consideration

which claim, since it had not previously been pleaded, was barred by section 12 of the Indian Claims Commission Act, 60 Stat. 1049, 1052 (1946). Defendant's response to plaintiff's Exception No. 4 was that defendant had fully accounted for the proceeds of the Agreement of December 31, 1892, supra, and defendant affirmatively asserted that the disbursement of plaintiff's funds in per capita payments had been fully authorized by the Act of March 2, 1907, 34 Stat. 1221.

Subsequently, a compromise settlement was reached under Docket 332-B, by the terms of which, however, certain claims were expressly reserved from settlement. On September 8, 1972, the Commission entered findings of fact and an accompanying order approving the compromise settlement and granting the joint motion for entry of final judgment, subject to the terms and conditions set forth in the parties' stipulation for entry of final judgment. See 28 Ind. Cl. Comm. 367. The Commission directed that the claims which, pursuant to the terms of the stipulation, were reserved from settlement, i.e., the claims for an accounting for the period from July 1, 1951, to date, and the claims arising from the Agreement of December 31, 1892, supra, be continued before the Commission under a new docket number.

On October 18, 1972, the plaintiff, pursuant to the Commission's direction, filed a motion under Docket 332-B to sever those claims which had been reserved from settlement under that docket and to permit the filing of an amended petition (which accompanied the motion) to be assigned Docket No. 332-D. This motion was granted on November 9, 1972. See 29 Ind. Cl. Comm. 143.

Paragraph 7 of the amended petition filed under Docket 332-D (332-D petition) realleged that the defendant, at all times material to the pleaded claims, was the guardian and trustee of the property and affairs of the plaintiff and was subject to the obligations to the plaintiff imposed by that status. Paragraph 7 continued as follows:

> Specifically included among the properties managed by defendant-trustee on behalf of plaintiff were certain of plaintiff's reservation lands. Under the Agreement of December 31, 1892, 28 Stat. 314, defendant sold plaintiff's reservation lands to itself or others, purchasing approximately 167,000 acres for $600,000. Plaintiff is informed, believes and alleges that defendant, in breach of its fiduciary duty purchased these lands for less than their fair market value. Thus, the defendant-trustee was dealing in its ward's properties for its own benefit or for the benefit of others, in breach of its fiduciary duty. Defendant has not accounted fully for the proceeds of this transaction in its report of August 25, 1965, or elsewhere.

Paragraph 8 of the 332-D petition was captioned "Completion of General Accounting." This paragraph quoted extensively from Paragraph 7 of the amended petition filed under Docket 332-B on February 13, 1958 (332-B petition), which had been captioned "General Accounting," wherein plaintiff had recited several allegations relating to defendant's actions as trustee of the monies and properties of defendant. Said paragraph 8 also quoted verbatim the language of Paragraph 8 of the 332-B petition which contained allegations that defendant (1) collected or should have collected certain monies for or on behalf of the plaintiff, (2) became liable to pay monies to, for, or on behalf of the plaintiff, and

(3) unlawfully expended monies held by it for or on behalf of the plaintiff for which the defendant had failed to account. Said Paragraph 8 then continued as follows:

> The defendant continues to this day in its role as trustee and guardian of the properties and the monies of the plaintiff, and continues to retain exclusive possession and control of all records pertaining to financial and other property on behalf of plaintiff. However, defendant's accounting report of August 25, 1965 contained no information for the period after June 30, 1951 and defendant has failed to render an accounting for this period as required by decision of this Commission and the United States Court of Claims.
>
> The report does show that there are balances in various accounts belonging to the plaintiff as of June 30, 1951. The plaintiff has not been able to determine the manner in which the defendant-trustee has handled its properties and monies for the period after 1951 because of the total omission from its accounting report of these matters. Plaintiff believes that the defendant has failed to exercise its fiduciary responsibilities in the proper manner, by improperly disbursing plaintiff's funds, by failing to credit plaintiff with interest on these funds or to pay proper interest on said funds, by failing to properly invest such funds or by otherwise mishandling these funds to the detriment of the plaintiff.

Plaintiff's prayer for relief at the conclusion of said amended petition asked that:

> . . . defendant be required to make a full, just and complete accounting for the sale of plaintiff's lands handled by the defendant under the Agreement of December 31, 1892, *supra*, or otherwise, and all proceeds derived therefrom; and for all properties or funds received or receivable and expended for and on behalf of plaintiff, and for all interest paid or due to be paid on any and all funds of plaintiff for the period after June 30, 1951,. . . .

The defendant filed answer to plaintiff's 332-D petition on January 8, 1973, affirmatively alleging that the plaintiff's

claim arising from the sale of its reservation lands pursuant to the Agreement of December 31, 1892, supra, was not a proper accounting claim but was, instead, a claim for the payment of unconscionable consideration for plaintiff's lands, which claim had not been asserted in the original petition filed under Docket 332 on August 10, 1951, and was therefore barred under section 12 of the Indian Claims Commission Act, supra. Defendant also denied that it had not fully accounted for any proceeds of the Agreement of December 31, 1892, supra. Defendant further affirmatively alleged that it was under no duty to account beyond June 30, 1951, since the Commission has no jurisdiction of claims accruing after August 13, 1946.

On April 12, 1973, the plaintiff filed a motion for a supplemental accounting. Plaintiff requested that defendant be ordered to file what amounts to a general accounting for the period beginning July 1, 1951, and, in addition, to provide a full and complete supplemental accounting for defendant's disposition of plaintiff's lands pursuant to the 1892 Agreement and for the proceeds of said Agreement.

On June 7, 1973, the defendant filed a response to plaintiff's motion for a supplemental accounting and joined to said response a motion to dismiss for lack of Commission jurisdiction plaintiff's claim for an accounting subsequent to June 30, 1951, and plaintiff's claim for an accounting for the disposition of its lands (but not for the proceeds of such disposition) under the 1892 Agreement. The grounds upon which defendant based said motion were those same grounds previously raised under Docket 332-B in defendant's response to plaintiff's exceptions and in defendant's amended

answer under Docket 332-D, both of which are described in detail, supra. On June 8, 1973, the defendant filed a motion to strike certain allegedly objectionable statements contained in plaintiff's motion for supplemental accounting. On July 5, 1973, the plaintiff responded to both of defendant's motions and also replied to defendant's response to plaintiff's motion for supplemental accounting. On September 6, 1973, defendant filed its reply to plaintiff's response to the motion to dismiss wherein defendant asserted, inter alia, that plaintiff had not shown that defendant's accounting for the proceeds of the 1892 Agreement was inadequate. On plaintiff's motion, in which defendant concurred, oral argument on defendant's motion to dismiss for lack of jurisdiction was held on October 4, 1973. Subsequently, on August 13, 1975, plaintiff filed a memorandum supplementing its response to defendant's motion to dismiss for lack of jurisdiction.

The Commission now must rule on plaintiff's motion of April 12, 1973, for a supplemental accounting and defendant's motion of June 7, 1973, to dismiss certain of plaintiff's claims for lack of jurisdiction. These two motions raise threshold questions relating to this Commission's jurisdiction to adjudicate these claims. Such suggestions of lack of subject matter jurisdiction may be raised at any time. See Rule 11 (h), Commission's General Rules of Procedure, 25 CFR § 501.11(h). We are not, as plaintiff has suggested, dealing here with factual issues in a summary judgment context. The issues raised by these motions are resolvable as matters of law. Since the differences underlying defendant's motion of June 8, 1973, to strike have been subsequently resolved between the parties,

the issues raised in that motion have become moot and we need not act upon that motion now. We will now proceed to discuss separately each of the issues we must decide.

PLAINTIFF'S CLAIM FOR A POST-1951 ACCOUNTING

Upon reading Plaintiff's Exception No. 1, filed under Docket 332-B on February 18, 1972, and both Paragraph 8 of Plaintiff's Amended Petition filed under Docket 332-D on October 18, 1972, and the prayer for relief forming a part of that amended petition, there is no doubt that what plaintiff seeks from the defendant is a general accounting for the period July 1, 1951, to date. However, the Commission has no jurisdiction to order the defendant to make a general accounting for the period beyond August 13, 1946. We set forth fully our rationale for this position in the case of Blackfeet and Gros Ventre Tribes v. United States, Docket 279-C, et al., 32 Ind. Cl. Comm. 65, 71-76 (1973). In the more recent case of Northern Paiute Nation v. United States, Docket 87-A, 34 Ind. Cl. Comm. 414, 417 (1974), our position was summarized as follows:

> 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 ongoing at the August 13, 1946, cutoff date. Plaintiff's request for a post-1946 accounting will be denied without prejudice to plaintiff's rights 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. Confederated Tribes of the Goshute Reservation v. United States, Docket 326-B, 33 Ind. Cl. Comm. 130, 132 (1974).

It is true (as plaintiff has asserted) that the Commission had, in the case of Mescalero Apache Tribe v. United States, Docket 22-G, 23 Ind. Cl. Comm. 181 (1970), ordered accounts carried down to date without requiring

the plaintiffs to specify in advance the wrongful handling of their funds which they claimed would justify the extension of the accounting period. However, the Commission impliedly overruled the Mescalero case in the Blackfeet case which was decided after completion of the filings on the motions here under consideration. See Blackfeet, supra, 32 Ind. Cl. Comm. at 73.

Thus, adhering to the position so elucidated in the Blackfeet case, supra, we hold that plaintiff's motion for a supplemental accounting must be denied to the extent that it seeks an extension of a general accounting for the period beyond June 30, 1951. There remains, however, the question of whether individual accounts may be supplemented and, if so, under what circumstances.

The general rule we have applied is that the Commission possesses ancillary jurisdiction to order individual accounts supplemented beyond August 13, 1946, where the plaintiff makes a showing of specific wrongdoing which occurred before that date and such wrongdoing can reasonably be expected to have continued thereafter. See Northern Paiute, supra, at 132. We have applied this rule to the ordinary situation of our accounting cases where the plaintiff has sought to obtain either by motion or by way of exception an up-to-date accounting in a pending claim for a general accounting. Here, however, the claim for a general accounting for the period through June 30, 1951, has been resolved by the entry of final judgment pursuant to the compromise settlement under Docket 332-B, 28 Ind. Cl. Comm. 367, 385, supra.

In these circumstances we must devote some attention to the question of whether the final judgment entered under Docket 332-B pursuant to the compromise settlement of the general accounting claim through June 30, 1951, will operate to estop the plaintiff now under this docket from having the opportunity to show that there were continuing wrongs which had begun before August 13, 1946, and which continued (in this particular case) until after June 30, 1951. This question was first raised at the settlement hearing held under Docker 332-B. See Transcript of Hearing of September 7, 1972, Docket 332-B, at 9-10. Defendant's counsel also obliquely referred to this question at the October 4, 1973, oral argument on the motions currently pending under this docket. See Transcript of Hearing of October 4, 1973, Docket 332-D, at 43. Since the question has been specifically raised we must devote some separate attention to its resolution.

The criterion relating to application of the rule of collateral estoppel has been classically stated as follows:

> ... the inquiry must always be as to the point or question actually litigated and determined. Only upon such matters is the judgment conclusive in another action. [Cromwell v. County of Sac, 94 U.S. 351, 353 (1876)]

In the case of consent judgments or judgments entered pursuant to settlement, however, it is frequently the case that questions are not litigated nor determinations made. In the federal courts the rule has been enunciated that a judgment entered pursuant to settlement which is unaccompanied by findings of fact or law does not bind the parties on any issue which might arise in connection with another cause of action. Lawler v. National Screen Service Corp., 349 U.S. 322 (1955); United States v. International Building Co., 345 U.S. 502 (1953).

There are, however, logical limitations on what issues survive the entry of such judgments.

> ... In order to apply collateral estoppel in these situations, it is logically necessary, then, that some substitute for litigation and judicial determination be accepted. As a general proposition the only acceptable substitute is the parties' intention; and this intention must be more than the intention to conclude the issue for purposes of the suit which ends in a default judgment, consent judgment or judgment on stipulation. Normally there must, in addition to the intent to conclude issues for the case at bar, be an intent to conclude the issue or issues for other situations. [1 B Moore's Federal Practice §0.444[1].]

See Armstrong v. United States, 155 Ct. Cl. 177 (1961).

If we apply these principles to the case at bar, we note that in the findings of fact entered in connection with the compromise settlement under Docket 332-B no specific findings of fact (or of law) were entered which interpreted the status of any individual accounts up to June 30, 1951. Furthermore, the stipulation entered into by the parties in connection with the compromise settlement expressly reserved certain issues from settlement as follows:

> Specifically this settlement shall not affect in any way the following claims in Docket 332-B or any procedural or substantive defenses the defendant may have thereto:
> A. Any claims petitioner may have or assert for an accounting for the period commencing July 1, 1951; and
> B. any claims petitioner may have or assert arising from the sale of its reservation lands pursuant to the Agreement of December 31, 1892, 28 Stat. 314.

It logically follows, then, that plaintiff is not precluded under this Docket 332-D from showing that wrongs which existed prior to August 1, 1946,

continued without interruption until beyond June 30, 1951, despite the fact that a final award has been made in Docket 332-B settling plaintiff's general accounting claim through June 30, 1951.

Defendant has argued that the plaintiff's continued failure to show with respect to particular accounts specific wrongdoing which commenced prior to August 13, 1946, and continued without interruption until after June 30, 1951, means that plaintiff is unable to make such a showing. Defendant therefore argues for dismissal of the claims on this basis. Plaintiff has responded by arguing that it cannot make such a showing unless defendant first supplements the information it has already supplied with respect to post-1951 accounts.

Plaintiff's position on this point is erroneous. In order to secure a supplemental accounting for the post-1951 period, plaintiff is first required to show specific wrongdoing which occurred before August 13, 1946. Having shown such specific wrongdoing, plaintiff must then show that such specific wrongdoing can be reasonably expected to have continued (in this particular case, without interruption, until after June 30, 1951). If these can be shown, the supplemental accounting of relevant particular accounts will then be ordered.

At the hearing upon the compromise settlement under Docket 332-B, counsel for plaintiff described his familiarity with the status of plaintiff's accounts through June 30, 1951, in the following terms:

> Mr. Iadarola: ... I do want to say that Mr. Schneck and I spent about a month behind closed doors trying to come to a settlement.
>
> ... we did hammer it out, and it was in the interests in [sic] our part and the Government's part to settle the case ... .

> We took each account, each item, item by item, dollar by dollar, and we went through them, and we hammered away, why this one should be treated as mismanaged, and why this one was not, so this was really a very tiresome task, and it took a long time to put these figures together.
>
> There were points we disagreed on, and on these we tried to work out a compromise, and there were points that Mr. Schneck convinced me we were wrong, and there were points we convinced him we were right, and he accepted it, so I think we worked out a very, very good settlement for both sides in this case. [Tr. at 47-48; emphasis added.]

With such extensive knowledge of each and every account through June 30, 1951, plaintiff should be readily able to show specific wrongdoing which began before August 13, 1946, and did, in fact, continue without interruption until June 30, 1951. If plaintiff is able to show such wrongdoing over that period, it should not be too difficult for the plaintiff to convince the Commission that these wrongs can reasonably be expected to have continued after June 30, 1951. Plaintiff has not, however, offered such proof, although the Commission's position on the issue has been clear since the Blackfeet decision, supra, in October, 1973. Under these circumstances, we consider it appropriate to order the plaintiff to show cause why the claim hereunder for a post-1951 accounting should not be dismissed. We will so order in conjunction with this decision.

PLAINTIFF'S CLAIM FOR AN ACCOUNTING FOR THE DISPOSITION BY DEFENDANT OF PLAINTIFF'S LANDS PURSUANT TO THE AGREEMENT OF DECEMBER 31, 1892, 28 STAT. 314.

Defendant has consistently argued in objecting to plaintiff's request for a supplemental accounting and in moving for dismissal of this claim that the above-captioned claim is not a proper accounting claim but is

actually a disguised claim for unconscionable consideration arising out of defendant's purchase, pursuant to the above-captioned agreement, of all the unallotted lands within the limits of the Yankton Reservation. Defendant has further argued that plaintiff's unconscionable consideration claim was not timely pleaded and that plaintiff's attempt to have the claim treated as part of the plaintiff's claim for a general accounting constitutes an attempt to circumvent the five-year limitation on the filing of claims before the Commission, as provided in section 12 of the Indian Claims Commission Act, 60 Stat. 1049, 1052 (1946).

Plaintiff argues that the original petition filed under Docket 332 included a claim for general accounting for money and property, that an accounting for property is a traditional aspect of an accounting claim, that the above-captioned claim fits within the framework of the general accounting for money and property originally pleaded in the petition under Docket 332 and that the defendant was, therefore, on notice of said claim when the original petition was filed.

Subsequent to the filings hereunder in connection with the motions we are considering, the Commission decided a similar issue in the case of Fort Peck Indians v. United States, Docket 184, 34 Ind. Cl. Comm. 24 (1974), appeal on this ground dismissed as premature, App. No. 18-74 (Ct. Cl.,Oct. 31, 1975). In the Fort Peck case, the plaintiff sought by exception to a general accounting, to recover the difference between fair market value and the $1.25 per acre price established by Act of Congress for the purchase of 6,736.71 acres of plaintiff's reservation lands. In a 1972 decision the Commission, at 28 Ind. Cl. Comm. 171, had held that this claim could not be prosecuted because under the plaintiff's accounting

claim we could consider only whether the defendant had fulfilled the obligations imposed by the Act by authority of which the sale took place and the agreement upon which that act was in part based. Since the defendant had paid the stipulated $1.25 an acre, we concluded that the plaintiff could not obtain relief.

On rehearing, the Commission (with Chairman Kuykendall dissenting on this issue) reversed its prior decision and permitted the prosecution of the claim as a part of the general accounting. The opinion noted that under a prior agreement ratified by Congress, the Government had "... set aside the Fort Peck Reservation as a permanent home for the plaintiffs, thus assuming a fiduciary duty to protect the integrity of the reservation." 34 Ind. Cl. Comm. at 48. It was further stated that:

> ... Transactions between persons in fiduciary relations are presumptively invalid; equity casts upon the party in the position of superiority the burden of proving affirmatively its compliance with equitable requirements and thereby overcoming the presumption .... Equity's traditional remedy was to decree restoration in kind; but where, as under the Indian Claims Commission Act, it is impossible to restore property disposed of in breach of trust, the beneficiary is entitled to personal judgment for complete indemnification and compensation.... In such case, of course, the plaintiff has the burden of proof of damages. [34 Ind. Cl. Comm. at 49-50.]

The Commission went on to note that the plaintiff's allegations in the original petition of the existence of a guardian-ward or trustee-beneficiary relationship and the breach of fiduciary obligations by the defendant in mismanaging the trust properties gave the defendant fair notice of the later claim particularized in the form of an exception. The Commission's opinion concluded that:

> ... the plaintiff, without amendment of its pleadings, may proceed to give evidence as to the fair market value of the land alienated from the reservation under the 1908 act, and argue either or both equitable and Fifth Amendment claims for any difference between such value and the price actually paid. [34 Ind. Cl. Comm. at 60-61.]

In the case presently before us, the original petition which was timely filed as Docket 332 contained allegations sufficient to support a claim for general accounting and prayed for relief in the form of a general accounting for property and funds. As in the <u>Fort Peck</u> case, <u>supra</u>, the original petition filed as Docket 332 contained allegations which gave the defendant fair notice of the claim later first particularized in the plaintiff's Exception 3(b) filed under Docket 332-B and subsequently again particularized in the Petition filed under Docket 332-D.[1]

In paragraph 6 of the original petition, plaintiff alleged as follows:

> 6. <u>Defendant Owes Fiduciary Duty</u>. At all times material hereto, defendant was the guardian and trustee of the <u>property</u> and affairs of petitioner and as such was required to deal fairly and honorably with it as to its <u>property and property rights</u>. [emphasis added.]

Paragraph 13 of said petition cites and quotes from the Treaty of April 19, 1858, 11 Stat. 743, which created the Yankton Reservation. Paragraph

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1/ In the recent case of <u>United States</u> v. <u>Lower Sioux Indian Community</u>, Appeal No. 17-74 (Ct. Cl., July 11, 1975), slip op. at 8-13, <u>aff'g</u>, Docket No. 363, 22 Ind. Cl. Comm. 226 (1969), a petition "... drafted in very broad terms..." and filed in 1951 was permitted to be amended in 1969 to allege specifically claims contained in "...embryonic..." form in the original petition. The court there held that the language of the original petition, although primarily couched in terms of a claim for a general accounting, was broad enough to encompass later particularized claims for the taking of lands and that the broad language of the original petition gave fair and adequate notice to the government of the transactions and occurrences that were later more specifically claimed. The <u>Lower Sioux</u> case is, however, distinguishable from the <u>Fort Peck</u> case and inapposite with respect to the instant case because plaintiffs here, as in the <u>Fort Peck</u> case, assert their claim as an exception to a general accounting and not, as in the <u>Lower Sioux</u> case, as a separate land claim. See <u>Lower Sioux</u>, <u>supra</u>, slip op. at 13.

19, entitled "General Accounting" is as follows:

> During the entire period of dealings between petitioner and defendant, the books of account and all other records pertaining to all moneys and financial transactions of and for petitioner, and property and transactions therein other than money, have been in the exclusive possession and control of defendant, including, but not limited to, the following:
>
> (a) From time to time defendant has been under an obligation to petitioner under various treaties, agreements and acts of Congress to pay to, or to expend for the benefit of, petitioner various sums of money.
>
> (b) From time to time proceeds of property of petitioner, or of rents or other income therefrom, have been payable to or collected by defendant and dealt with by it and disposed of by it.
>
> (c) At all times during its dealings with and supervision of petitioner, defendant has been under a duty to pay interest on funds of petitioner in accordance with applicable provisions of law.
>
> (d) At all times during its dealings with petitioner, defendant has been under a duty to pay to, or for the account or on behalf of, petitioner interest on any and all sums of petitioner's money in the hands of defendant which it retained for its own uses and purposes, whether by way of interest or principal.
>
> (e) At all times during its dealings with petitioner, defendant has been under a duty, in paying out moneys belonging to petitioner and held by it or invested by it, to pay any sum or sums from the least productive funds or property of petitioner before proceeding to pay money from funds or property of greater productivity.
>
> (f) At all times during its dealings with petitioner, defendant has been under a duty as guardian and trustee of petitioner and petitioner's property to invest funds of petitioner coming into its hands promptly and providently and to reinvest the same, and any rents, issues or profits thereof.

In paragraph 21, it is stated that:

> As a result, petitioner has been damaged by having been deprived of the amount of money

> or value of other property, together with interest thereon, which may be shown to be owing to petitioner upon a proper accounting in accordance with the fiduciary duties and liabilities herein set forth.

and, finally, the prayer for relief states in part:

> (4) that defendant be required to make a full, just and complete accounting for all *property* or funds received or receivable and expended for and on behalf of petitioner, and for all interest paid or due to be paid on any and all funds of petitioner, and that judgment be entered for petitioner in the amount shown to be due under such an accounting. [Emphasis added.]

The Agreement of December 31, 1892 28 Stat. 314 is not mentioned in the original petition filed under Docket 332, as the analogous agreement was in the *Fort Peck* case, *supra*. However, the 1858 Treaty, *supra*, whereby the Yankton Reservation was created, was pleaded in the original petition under Docket 332, and it is this Treaty creating the reservation which, following the Commission's reasoning in the *Fort Peck* case, imposed upon the Government the fiduciary duty to protect the integrity of the plaintiff's property, i.e., the reservation lands. Furthermore, the 1892 Agreement makes express reference to "... the land set apart and reserved to said tribe, by the first article of the treaty of April (19th) nineteenth, eighteen hundred and fifty-eight (1858)."

The allegations contained in the plaintiff's original petition under Docket 332 in connection with plaintiff's claim therein for a general accounting were so pleaded that the defendant was put on notice that plaintiff's claim for a general accounting for money and property might later be particularized to include the claim for an accounting for plaintiff's lands acquired and disposed of by defendant pursuant to the 1892 Agreement, *supra*.

Our conclusions with respect to the motions pending before us, insofar as they relate to plaintiff's claim for accounting for the disposition of plaintiff's lands pursuant to the 1892 Agreement, follow as a matter of course from our conclusion explained above that said claim is properly a part of plaintiff's timely-pleaded claim for a general accounting. We will, accordingly, deny the defendant's motion to dismiss this claim. The plaintiff, without amendment of its pleadings, may proceed to give evidence as to the fair market value of the lands alienated from the reservation under the 1892 Agreement, and may argue either or both equitable and Fifth Amendment claims for any difference between such value and the price actually paid.[2/] See Fort Peck Indians v. United States, supra, at 60-61. In such circumstances, that portion of plaintiff's motion of April 12, 1973, which seeks a supplemental accounting for the disposition by the United States of plaintiff's lands pursuant to the 1892 Agreement will be denied.

PLAINTIFF'S CLAIM FOR AN ACCOUNTING
FOR THE PROCEEDS OF THE 1892 AGREEMENT

Plaintiff has also requested a supplemental accounting with respect to the defendant's handling of the proceeds of the sale of plaintiff's unallotted reservation lands pursuant to the 1892 Agreement, stating its position in the following terms:

> . . .
> The 1892 Agreement imposed a number of restrictions on the disbursal of funds received from the Yankton land sale. Basically, it provided for the bulk of these proceeds to be retained in trust for the benefit of the Tribe for a period of 25 years at 6% interest.

2/ We note, however, that plaintiff is not making a claim based upon a Fifth Amendment taking. See Supplemental Memorandum to Plaintiff's Response to Defendant's Motion to Dismiss for Lack of Jurisdiction, filed August 13, 1975.

> The interest was to be used for educational and other social purposes on the basis of matching funds from the United States, with the balance to be used for per capita payments twice a year. The amount of principal which could be used for per capitas was limited to $20,000 a year, if needed. The defendant's accounting report indicates that all these statutory safeguards were flagrantly disregarded and that the Yankton Trust Fund was dissipated long prior to the date on which the Trust was to terminate. Virtually all funds acquired under the Agreement were expended for per capitas, which in many years exceeded the $20,000 limitation on principal set by the statute. There is nothing in defendant's report to indicate that any matching funds were advanced for educational or charitable services in accordance with the 1892 Agreement. Rather, it appears that the defendant-trustee avoided providing matching funds and paying interest by disbursing virtually all of the proceeds of the Yankton land sale in per capita payments over a relatively short period. The defendant should be requested to make a complete accounting for the proceeds of the 1892 Agreement, including the exact nature of all expenditures, the dates, amounts and uses of any matching funds advanced by the defendant in accordance with the terms of the Agreement and the amount of all principal and interest lost to the plaintiff by reason of the defendant's failure to comply with the statutory limitations on the disbursal of funds. [Plaintiff's Memorandum in Support of Motion for Supplemental Accounting, April 12, 1973, at 14-15.]

Defendant's position in response to this argument is that plaintiff has failed to make a showing that defendant's accounting of these funds is inadequate and that the accounting report shows that it did carry out the provisions of the 1892 Agreement. In addition, while admitting that during several years disbursements from the Yankton Sioux Fund in the form of per capita cash payments were in excess of the $20,000 maximum provided for in Article IV of the 1892 Agreement, the defendant has

affirmatively asserted that said excess disbursements of plaintiff's funds in per capita payments were fully authorized by the Act of March 2, 1907, 34 Stat. 1221.

Statement No. 35, Section J (Volume II, at 291) of defendant's Accounting Report lists the appropriation of $500,000, which funds were set up and carried on the books of the Treasury under the heading "Yankton Sioux Fund." Disbursement Schedule No. 41, Section J (Volume II, at 297) lists the total of disbursements from said fund in per capita cash payments during each fiscal year between 1898 and 1925, and shows that the entire principal amount of $500,000 was disbursed by the end of the 1925 fiscal year. The report further indicates that per capita cash payments for the fiscal years 1909, 1910, 1911, 1916, 1919, 1920 and 1922 were in excess of the $20,000 limitation stipulated in Article IV of the 1892 Agreement, and recites the Act of March 2, 1907, _supra_, as authority for such excess disbursements. The report does not, however, explain or categorize the disbursements from the principal fund.

Statement No. 36, Section J (Volume II, at 292) and Statement No. 41, Section K (Volume II, at 305) list the total credits and disbursements of interest on the principal fund carried on the books of the Treasury under heading "Interest on Yankton Sioux Fund." Disbursement Schedule No. 42, Section J (Volume II, at 298) lists disbursements from this fund totalling $537,616.91 in per capita payments broken down for each fiscal year between 1895 and 1925 but said schedule does not explain or categorize the purposes for which the disbursements were made. Disbursement Schedule No. 46,

Section K (Volume II, at 308) lists disbursements totalling $3000 from this fund during the fiscal years 1929 and 1930 and breaks said disbursements down by category of expenditure.

Articles IV, V and VI of the 1892 Agreement read as follows:

ARTICLE IV.

> The fund of five hundred thousand dollars ($500,000) of the principal sum, placed to the credit of the Yankton tribe of Sioux Indians, as provided for in Article III, shall be payable at the pleasure of the United States after twenty-five years, in lawful money of the United States. But during the trust period of twenty-five years, if the necessities of the Indians shall require it, the United States may pay such part of the principal sum as the Secretary of the Interior may recommend, not exceeding $20,000 in any one year. At the payment of such sum it shall be deducted from the principal sum in the Treasury, and the United States shall thereafter pay interest on the remainder.

ARTICLE V.

> SECTION 1. Out of the interest due to the Yankton tribe of Sioux Indians by the stipulations of Article III, the United States may set aside and use for the benefit of the tribe, in such manner as the Secretary of the Interior shall determine, as follows: For the care and maintenance of such orphans, and aged, infirm, or other helpless persons of the Yankton tribe of Sioux Indians, as may be unable to take care of themselves; for schools and educational purposes for the said tribe; and for courts of justice and other local institutions for the benefit of said tribe, such sum of money annually as may be necessary for these purposes, with the help of Congress herein stipulated, which sum shall not exceed six thousand dollars ($6,000) in any one year: Provided, That Congress shall appropriate, for the same purposes, and during the same time, out of any money not belonging to the Yankton

> Indians, an amount equal to or greater than the sum set aside from the interest due to the Indians as above provided for.
>
> SECTION 2. When the Yankton tribe of Sioux Indians shall have received from the United States a complete title to their allotted lands, and shall have assumed all the duties and responsibilities of citizenship, so that the fund provided for in section 1 of this article is no longer needed for the purposes therein named, any balance on hand shall be disposed of for the benefit of the tribe as the Secretary of the Interior shall determine.
>
> ARTICLE VI.
>
> After disposing of the sum provided for in Article V, the remainder of the interest due on the purchase money as stipulated in Article III shall be paid to the Yankton tribe of Sioux Indians semiannually, one-half on the thirtieth day of June and one-half on the thirty-first day of December of each year, in lawful money of the United States, and divided among them per capita. The first interest payment being made on June 30th, 1893, if this agreement shall have been ratified. (28 Stat. at 315-16.)

The Act of March 2, 1907, 34 Stat. 1221, reads, in pertinent part, as follows:

> ... That the Secretary of the Interior is hereby authorized, in his discretion, from time to time, to designate any individual Indian belonging to any tribe or tribes whom he may deem to be capable of managing his or her affairs, and he may cause to be apportioned and allotted to any such Indian his or her pro rata share of any tribal or trust funds on deposit in the Treasury of the United States to the credit of the tribe or tribes of which said Indian is a member, and the amount so apportioned and allotted shall be placed to the credit of such Indian upon the books of the Treasury, and the same shall thereupon be subject to the order of such Indian: Provided, That no apportionment or allotment shall be made to any Indian until such Indian has first made an application therefor: Provided further, That the Secretaries of the Interior and

> of the Treasury are hereby directed to withhold from such apportionment and allotment a sufficient sum of the said Indian funds as may be necessary or required to pay any existing claims against said Indians that may be pending for settlement by judicial determination in the Court of Claims or in the Executive Departments of the Government, at time of such apportionment and allotment.
>
> SEC, 2, That the Secretary of the Interior is hereby authorized to pay any Indian who is blind, crippled, decrepit, or helpless from old age, disease, or accident, his or her share or any portion thereof, of the tribal trust funds in the United States Treasury belonging to the tribe of which such Indian is a member, and of any other money which may hereafter be placed in the Treasury for the credit of such tribe and susceptible of division among its members, under rules, regulations, and conditions as he may prescribe. [34 Stat. 1221-22.]

The first issue to which we will address ourselves is the assertion in defendant's accounting report that the Act of March 2, 1907, supra, 25 U.S.C. § 119-20, had the effect of abrogating the $20,000 limitation upon disbursements in any single fiscal year, which limitation was contained in Article IV of the 1892 Agreement, supra. If the subsequent act of Congress did abrogate said limitation, as defendant urges, then the per capita disbursements during the fiscal years 1909, 1910, 1911, 1916, 1919, 1920 and 1922, to the extent such payments exceeded $20,000, were proper disbursements. On the other hand, if the 1907 Act did not have the legal effect of so abrogating said limitation, said excess payments were improper disbursements for the effects of which defendant will be liable.

The Act of March 2, 1907, supra, was enacted for the purpose of extending to tribal funds held in the Treasury the general theory of the efficacy of allotment in severalty of tribal assets previously applied to

tribal lands in several acts, including the General Allotment Act of 1887, 24 Stat. 388. See Debate on H.R. 5290, subsequently enacted as the Act of March 2, 1907, 40 Cong. Rec. 6470-71 (1906). It is a well-established principle that Congress in providing for allotment of tribal assets had absolute discretion to administer said tribal assets for the benefit of its Indian wards. See Lone Wolf v. Hitchcock, 187 U. S. 553, 566, 568 (1903). Several cases have subsequently held that in dealing with tribal funds Congress possesses authority to direct the use of tribal trust funds for any purpose it deems for the best interests of the tribe even if such use might not be in accordance with the provisions of prior treaties, agreements or acts of Congress. See Chippewa Indians v. United States, 307 U. S. 1 (1939); Choctaw Nation v. United States, 91 Ct. Cl. 320, 396 (1941), cert. denied 312 U. S. 695 (1941); Fort Peck Indians v. United States, 132 Ct. Cl. 373 (1955), aff'g Docket 183, 3 Ind. Cl. Comm. 78 (1954).

The Act of March 2, 1907, supra, represents an instance of the exercise of Congress' power to administer tribal funds for the benefit of its Indian wards as it deems beneficial. This statute applied to all Indian trust funds and mandated the implementation of Congress' decision that allocation of tribal funds to individual tribal members was the course it devised to follow. See Cherokee Nation v. Hitchcock, 187 U. S. 294, 307-308 (1902). Thus we agree with defendant that the effect of the Act of March 2, 1907, supra, was to abrogate the $20,000 limitation on annual disbursements contained in Article IV of the 1892 Yankton Sioux Agreement; that such abrogation was within the power of Congress, and that disbursements subsequent to the enactment of the Act of March 2, 1907, supra, in excess of

$20,000 in any single fiscal year did not constitute mismanagement for which defendant must account.

Both the 1892 Agreement and the 1907 Act, however, subject the defendant to several restrictions in the handling of the Yankton Sioux Fund. Article IV of the 1892 Agreement provided for disbursements from principal of the Yankton Sioux Fund only where ". . . the necessities of the Indians shall require it." (28 Stat. at 315.) The 1907 Act placed definite restrictions upon the disbursement of Indian trust funds to individual tribal members. Section 1 of the latter act provided that the Secretary of the Interior could from time to time in his discretion designate ". . . any individual Indian . . . , whom he may deem to be capable of managing his or her affairs," to receive his or her pro rata share of trust funds of his or her tribe on deposit in the Treasury, but said Indians had first to make an application therefor. Section 2 of the Act provided that certain sick and handicapped Indians could be paid their pro rata shares, or portions, thereof, of Indian trust funds under such rules, regulations and conditions as the Secretary of the Interior might prescribe.

Whether the defendant complied with these restrictions is the subject of the plaintiff's claim for accounting for the proceeds of the 1892 Agreement which were placed in the Yankton Sioux Fund and the defendant has the burden of making a proper accounting. Cf. Sioux Tribe v. United States, 105 Ct. Cl. 725, 802 (1946).

The Commission's position with respect to the supplementation of existing accounts was set forth in detail in the Blackfeet case, supra, 32 Ind. Cl. Comm. at 84-86. The Commission there held that where defendant's

accounting report contained annual disbursement schedules stating at least in general terms the purposes for which most items of expenditure were made, the proper course of action for the plaintiff is to except rather than to ask defendant to plead again in the form of a supplemental accounting. See also Fort Peck Indians v. United States, supra, 34 Ind. Cl. Comm. at 63-64. The Commission added, however, that in an extreme case a new accounting for disbursements will be required.

We believe that with respect to the Yankton Sioux Fund the situation with which we are presented here constitutes such an extreme case. Defendant's accounting for the proceeds of the 1892 Agreement which were placed in trust merely recites the annual amounts disbursed in "per capita cash payments." See Disbursement Schedule No. 41, Defendant's Accounting Report, Vol. II, at 297. Under such circumstances, plaintiff pursued the only options available; namely, in the first instance, to except generally to the defendant's accounting for the proceeds of the 1892 Agreement (as plaintiff did under Docket 332-B) and, later, to move for a supplemental accounting (as plaintiff has done under Docket 332-D).

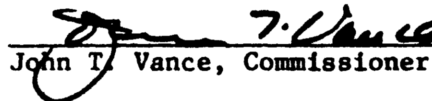
At this juncture we can either permit the accounting report to stand and let defendant satisfy the Commission as to the legality of each disbursement, or we can require the defendant to file a supplemental accounting, including the itemization of disbursements. If the former course were to be followed the trial would be extremely lengthy and defendant would be required, should it choose to contest plaintiff's general exception, to produce detailed records of disbursements to show compliance with its fiduciary duties. In our opinion, the same result can be reached by

ordering the defendant to supplement its accounting with the added advantage that the number of exceptions left to be tried should be substantially reduced.

Thus we will order that the defendant supplement its accounting under the Yankton Sioux Fund to set forth the purposes for which all disbursements were made and the authority under which said disbursements were made during the twenty-five year period beginning on August 15, 1894, the effective date of the Agreement, and ending August 14, 1919. Beyond that date defendant, pursuant to Article IV of the 1892 Agreement, was free to pay out of said fund at its pleasure. Thus the per capita payments made after August 14, 1919, were not in violation of defendant's fiduciary obligations.

With respect to defendant's accounting for the disposition of the fund entitled "Interest on Yankton Sioux Fund," we believe that defendant has properly accounted and, consequently, that no supplemental accounting is necessary. Article V, Section 1, and Article VI of the 1892 Agreement read in conjunction provide, in effect, that the Secretary of the Interior had discretion to set aside out of interest amounts not in excess of $6000 per year for certain enumerated purposes, and, in those instances where said funds might be so set aside, Congress became obligated to appropriate an amount equal to or greater than the amount so determined by the Secretary of the Interior. All interest not so set aside at the Secretary's discretion was to be paid semi-annually to individual Yankton Sioux Indians per capita. Since disbursements under Article V, Section 1 of the Agreement were discretionary and since Congress was required to appropriate matching funds only where the Secretary chose to disburse funds pursuant to said

provision of the Agreement, no liability arose when the Secretary chose not to disburse funds under said provision. Disbursement Schedule No. 42, Section J (Volume II, at 298) shows that during each fiscal year between 1895 and 1925 (except 1924 when the principal fund contained a balance of only $89.69) all interest was paid out in per capita installments. This distribution of interest was proper based upon the provisions of the 1892 Agreement enumerated above. Furthermore, with respect to disbursement of interest during the years 1929 and 1930 in the amounts and for the purposes enumerated in Disbursement Schedule No. 46, Section K (Volume II, at 308) of defendant's report, exception rather than supplementation is the proper procedure. See Blackfeet and Gros Ventre Tribes v. United States, supra, at 85.


John T. Vance, Commissioner

We concur:

Richard W. Yarborough, Commissioner

Margaret H. Pierce, Commissioner

Brantley Blue, Commissioner

Kuykendall, Chairman, dissenting in part:

In denying defendant's motion to dismiss plaintiff's claim for an accounting of defendant's disposition of plaintiff's lands pursuant to the Agreement of December 31, 1892, 28 Stat. 314, the majority of the Commission have relied upon their holding in the case of Fort Peck Indians v. United States, Docket 184, 34 Ind. Cl. Comm. 24 (1974), appeal on this ground dismissed as premature, App. No. 18-74 (Ct. Cl., Oct. 31, 1975). I dissented in the Fort Peck case at 34 Ind. Cl. Comm. 67-76, where I set out in detail my reasons for so doing. I adhere to those views and believe they are applicable here. Accordingly, I would grant defendant's motion to dismiss.

Jerome K. Kuykendall, Chairman