BEFORE THE INDIAN CLAIMS COMMISSION

THE THREE AFFILIATED TRIBES OF THE FORT BERTHOLD RESERVATION, Plaintiff,	)	
v.	)	Docket No. 350-G
THE UNITED STATES OF AMERICA, Defendant.	)	

Decided: December 18, 1975

Appearances:

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

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

OPINION ON RESPONSE TO ORDERS TO SHOW CAUSE

Yarborough, Commissioner, delivered the opinion of the Commission.

The Commission, on May 29, 1975, ordered plaintiff to show cause why exceptions 5 and 8, portions of exception 10, and exceptions 11, 13, 18 and 36 should not be dismissed from these proceedings. 36 Ind. Cl. Comm. 116, 166. On July 25, 1975, plaintiff responded insofar as the order affected exception 8, certain portions of exception 10, and exception 11. Plaintiff stated it had considered but would offer no response as to exceptions 5, 13, 18 and 36; and the 4th list of exception 10. The defendant replied to plaintiff's response on August 14, 1975, and the matter is now ready for our decision.

Exception 8. In the eighth exception, plaintiff alleged that defendant's 1966 accounting report indicated that a portion of the funds appropriated for the benefit of plaintiff pursuant to the Act of October 29, 1949, 63 Stat. 1026, was wrongfully diverted for payment of miscellaneous agency expenses including pay of superintendent, or was dissipated because of poor judgment or poor supervision on the part of agents for defendant. In our May 1975 opinion, cited above, at page 159 we observed with regard to this exception that we had no jurisdiction over the 1949 act and ordered plaintiff to show cause why the exception should not be dismissed.

Plaintiff, in its response to our order, says that its reference to the 1949 act was but an instance showing poor judgment and poor supervision of expenditures, and urges that the exception be allowed to stand for the purpose of permitting plaintiff to prove at trial instances of losses arising from poor judgment and poor supervision prior to August 13, 1946. In this way, plaintiff argues, the exception would stand as notice to the defendant that plaintiff takes the position that the exercise of poor judgment or poor supervision in the expenditure of plaintiff's funds is a form of mismanagement for which defendant must account in damages.

Defendant, in its reply, points out that in the eighth exception the plaintiff refers specifically and exclusively to an alleged dissipation of funds under the 1949 act, and that plaintiff conceded that insofar as the exception relates to that act it should be dismissed.

Defendant also contends that the eighth exception cannot be allowed to stand as notice to defendant as a claim for funds dissipated prior to 1946 because the exception as originally pleaded did not pertain to such funds.

Defendant is correct. Moreover, to allow plaintiff to maintain the 8th exception under its argument would be tantamount to allowing plaintiff to stand on a general exception concerning unspecified wrongs against which defendant cannot defend itself. Had plaintiff's original exception 8 been worded as plaintiff now argues it was meant, we would have determined that the exception was too vague to permit the defendant to respond to it, and would order plaintiff to be more specific or suffer dismissal. Cf. Gila River Pima-Maricopa Indian Community v. United States, Docket 236-N, 35 Ind. Cl. Comm. 209 (1974). Plaintiff is required to specify particulars in challenging defendant's obligations of care and diligence in administering funds or other property of plaintiff. Specificity in exceptions was an early requirement of this Commission as evidenced in Sioux Tribes v. United States, Dockets 114-119, 12 Ind. Cl. Comm. 541, 547 (1963). We have not relaxed this requirement as can be seen by a reading of recent decisions such as Lower Sioux Indian Community v. United States, Docket 363, 36 Ind. Cl. Comm. 295, 305 (1975); Gila River, supra; Fort Peck Indians v. United States, Docket 184, 34 Ind. Cl. Comm. 24, 64 (1974); and Blackfeet and Gros Ventre Tribes v. United States, Dockets 279-C and 250-A, 32 Ind. Cl. Comm. 65, 85 (1973).

Plaintiff's response is therefore rejected, and we will dismiss the 8th exception. Plaintiff, however, suffers nothing from dismissal

since it has pending several specific exceptions regarding defendant's handling of its funds which carry implicit challenges that defendant was guilty of poor judgment or poor supervision in expending those funds, and that such was a form of mismanagement. (Examples are exceptions 2, 4, and 10.)

Exception 10. In its tenth exception to the 1966 accounting report, plaintiff alleged that the report revealed that the defendant wrongfully charged tribal funds with agency expenses which were obligations of defendant. This exception was itemized in plaintiff's supporting brief into five lists, each list representing expenditures made under specific statutory authority. Since disbursements under the second and third lists were made after our jurisdictional cut-off date of August 13, 1946, we ordered plaintiff to show cause why such portions of this exception should not be dismissed.

Plaintiff's response to the foregoing is that the alleged wrongful expenditures in the second and third lists were the result of defendant's policy of improper disbursement of tribal funds for administrative purposes, a policy originating prior to 1946, and carried on into post-1946 expenditures, thereby giving us jurisdiction. Plaintiff argues further that it is immaterial that the disbursements questioned in lists 2 and 3 were made entirely after our jurisdictional cut-off date. Plaintiff cites our decision in Gila River Pima-Maricopa v. United States, Docket 236-I, 25 Ind. Cl. Comm. 305, 308 (1971).

Defendant maintains that plaintiff failed to meet its burden regarding the establishment of a continuing wrong, and that therefore the second and third lists of exception 10 should be dismissed.

Plaintiff's argument that we have jurisdiction because the expenditures were the result of defendant's continuous wrongful policy of disbursement of tribal funds for administrative purposes, which commenced prior to our cut-off date, cannot be used to sustain an exception at this stage of the proceedings. The expenditures in question are not subject to an exception at this stage of the proceedings simply because the expenditures were all made after our jurisdictional cut-off date.

Under our jurisdictional limitations the only way that we can consider these expenditures is if it is shown in some later stage of these proceedings that they were part of a continuing wrong that originated prior to our jurisdictional cut-off date. Plaintiff's lists 2 and 3 in exception 10 are not appropriate in this regard. See Blackfeet and Gros Ventre Tribes v. United States, supra at 75. We will therefore dismiss plaintiff's exception 10 as to lists 2 and 3.

Exception 11. In its eleventh exception, plaintiff alleged that defendant illegally required plaintiff to perform labor as a condition to receiving money or goods due plaintiff under treaty obligations. Plaintiff cited the Act of March 3, 1875, 18 Stat. 449, and the Court of Claims decision in Rogue River Tribe v. United States, 105 Ct. Cl. 495, 64 F. Supp. 339 (1946). The 1875 act required Indians to perform useful labor as a condition of receiving payments of money or goods which the

United States was pledged to make. Rogue River concerned the effect of the 1875 act on prior treaties: the court ruled that where payments were promised by treaty, a further requirement for Indian labor to earn such payments was unjustified.

In our prior decision, we noted the Rogue River decision, observed that the accounting herein showed there were no payments to plaintiff made after 1875 under treaties entered into prior to the 1875 act, and ordered plaintiff to show cause why the exception shouldn't be dismissed.

Plaintiff does not question our analysis, in its response, but points out that its statement in support of exception 11 argues that the 1875 act was applied unfairly to funds resulting from an agreement made after the 1875 act, namely, the agreement of December 14, 1886, 26 Stat. 1032. Plaintiff also argues that the 1875 act labor requirement was unfair to the extent that it applied to funds earned by plaintiff from sale or lease of its assets after 1875, or funds resulting from judgments against the United States. Plaintiff cites an 1891 Report of the Commissioner of Indian Affairs to indicate that the labor requirement was exacted from plaintiff Indians.

In its reply, defendant contends that plaintiff failed to show that the 1875 act was applied to plaintiff, and questionsplaintiff's interpretation of the 1886 agreement.

As defendant's reply demonstrates, plaintiff has raised questions of fact and law as concerns application of the labor requirement of the 1875 act. We will therefore vacate our order to show cause with regard to plaintiff's eleventh exception.

CONCLUSION

The foregoing considered, we will dismiss exceptions 5, 8, 13, 18, and 36; the second and third lists of exception 10; and the agency building item in the 4th list of exception 10. We will recall and vacate our order to show cause with regard to exception 11.

Richard W. Yarborough, Commissioner

We concur:

Jerome K. Kuykendall, Chairman

John T. Vance, Commissioner

Margaret H. Pierce, Commissioner

Brantley Blue, Commissioner