BEFORE THE INDIAN CLAIMS COMMISSION

GILA RIVER PIMA-MARICOPA INDIAN COMMUNITY, et al.,	)	
Plaintiff,	)	
v.	)	Docket No. 236-E
THE UNITED STATES OF AMERICA,	)	
Defendant.	)	

Decided: April 5, 1976

Appearances:

Z. Simpson Cox and Alfred S. Cox
Attorneys for Plaintiff.

David M. Marshall, with whom was
Assistant Attorney General Wallace
H. Johnson, Attorneys for Defendant.

OPINION OF THE COMMISSION

Blue, Commissioner, delivered the opinion of the Commission.

On January 10, 1974, the Commission entered an opinion, findings of fact, conclusions of law, and an interlocutory order holding that the plaintiff is entitled to recover from the defendant for operation and maintenance charges wrongfully assessed, and paid from plaintiff's funds, since 1937, for the delivery of water to its lands within the San Carlos Irrigation Project. Gila River Pima-Maricopa Community v. United States, 33 Ind. Cl. Comm. 18. The Commission ordered that the case proceed to the ascertainment of the amount of defendant's liability.

On February 11, 1974, the plaintiff filed a motion for judgment in its favor against the defendant in the amount of $2,754,264.46, the asserted total of operation and maintenance payments up to and including 1973. This sum did not include any interest. Plaintiff claimed interest, but asked to have it determined in a separate accounting. The presiding Commissioner ruled that it would be determined here. On February 27, 1974, the Commission, on its own motion, entered an order stating that issues of fact as well as law required determination, and ordered that a hearing take place on April 8, 1974, on the issues bearing on the amount of the plaintiff's damages.

Following the hearing, on September 30, 1974, the plaintiff filed a further motion to enlarge and correct the record, and to admit into evidence the documents attached thereto and identified as plaintiff's exhibits numbered 71, 72, 73, 74, 75 and 76. In its motion to enlarge and correct the record the plaintiff contends, among other things, that it is entitled to recover an additional $57,500.00 withdrawn from tribal funds in 1952, with interest thereon at the rate of four percent. We will deal with this issue later in this opinion.

On October 15, 1974, the defendant filed its response to the plaintiff's motion, stating that the defendant had no objection to enlarging the record, but that it did object to any correction of the present record.

The Commission will grant plaintiff's motion to enlarge the record by admitting into evidence plaintiff's exhibits as identified above.

The principal matter to be determined in this phase of the case is the amount of money actually withdrawn from plaintiff's funds for the payment of operation and maintenance charges, which charges, we have previously determined, were not authorized by law.

Defendant in its brief has renewed its contentions that the charges were proper; that each appropriation act appropriating some of plaintiff's funds for the contested charges was in itself adequate authorization to make the charges proper. Again, we are not persuaded by the argument. Rather, it seems to us that no intent of Congress to supply any new authorization in the 1937 and subsequent appropriation acts is shown. The 1937 act (Act of August 9, 1937, 50 Stat. 564, 577) recognizes that there is a dispute as to the authorization and that an ultimate judicial determination may be required. The appropriation acts seem in the nature of housekeeping acts determining year by year for budget purposes what portion of the contested charges will be paid from tribal funds and what from appropriated government funds. We reject defendant's contention that no wrong occurred. The first wrongful taking of plaintiff's funds occurred in 1937 and was repeated each year.

The defendant's evidence at the second hearing only strengthens our conviction that the San Carlos Project Act of June 7, 1924, c. 288, 43 Stat. 475, contemplated delivery of irrigation water to the plaintiff free of operation and maintenance charges.

The Supplemental Report of George A. Morrison (def. ex. 4-74, page 3) states that during the period 1952 - 1969 the Tribal Community Farm made

payments to the plaintiff tribe of $1,251,077.96, and the tribe made operation and maintenance payments to defendant of $1,339,814.52 or $88,756.56 more than received.[1/] In 1971 the initial apportionment of water was only .50 of an acre-foot, about one-eight enough to mature a crop, and later in the year was increased by .20 of an acre-foot, for a total of .70 of an acre-foot, resulting in the idling of 34,617.16 acres of project land. Operation and maintenance payments made from farming operations and non-Indian lessees for the years 1937 through 1973 left a deficit of $3,108,406.05 in operation and maintenance costs, which was paid from Government reimbursable funds. As pointed out in our Finding 23, the San Carlos Project has not delivered the plaintiff's full entitlement of water from the Gila River during any year for which there is evidence in the record.

The picture of the San Carlos Project which emerges from the evidence here is that of an engineering white elephant, which at exorbitant cost only partially restores the water plaintiff's members were utilizing gratis over a century ago. Under such circumstances the imposition of operation and maintenance charges, now running $11.00 per acre per year, would be repugnant to the Congressional purpose in enacting the project legislation, to right the moral wrong done when the Government neglected to protect its wards' ancient water rights. See Finding 10, 33 Ind. Cl. Comm. at 36. To make the plaintiff pay more for water than the net profit from the land completely frustrates that purpose.

1/ We have found that the payments made to defendant actually totalled $1,395,710.03 for the period in question. Consequently the tribe actually paid out $144,652.07 more than it earned. See finding 26 and discussion of the 1952 payments below in this opinion.

Continuing Wrong

Defendant argues that no liability occurs for events after August 13, 1946, our jurisdictional limit. We feel this is a continuing wrong, a practice initiated prior to August 13, 1946, and continuing thereafter.

In 1956 the Court of Claims reviewed the subject of continuing jurisdiction by the Indian Claims Commission with respect to these same operation and maintenance charges in Gila River Pima-Maricopa Indian Community v. United States, 135 Ct. Cl. 180, 183, 185-86, as follows:

> Plaintiff's second cause of action seeks to recover the alleged illegal assessment of operation and maintenance charges collected by the defendant for delivery of waters of the Gila River to these plaintiffs. Defendant points out that this cause of action is identical with the plaintiff's third cause of action before the Indian Claims Commission in Docket No. 236 and urges its dismissal on the same grounds as urged above.
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> * * * * * *
>
> One of the questions which may well be involved in plaintiff's suit pending before the Indian Claims Commission is whether the Commission has authority to include in any award made, damages accruing subsequent to August 13, 1946, as a result of wrongs done the Indians prior to that date. In order to protect themselves against the bar of the statute if it should finally be held that the Commission has no such power, petitioners have filed suit in the Court of Claims on all claims now before the Commission that may involve damages or compensation accruing subsequent to the passage of the Indian Claims Commission Act although the causes of action themselves may have accrued prior to that date.
>
> Section 2 of the Indian Claims Commission Act confers on that Commission exceedingly broad jurisdiction to hear and determine claims of Indian tribes, bands and identifiable groups, against the United States, notwithstanding any lapse of time or laches, where

> such claims arose prior to the date of the passage of that act on August 13, 1946. A claim arising prior to such date would not seem to be cut off where it is a continuing one . . . .
>
> . . . It is the usual rule that a court once having obtained jurisdiction of the persons and subject matter of a suit, retains such jurisdiction for all purposes including the awarding of all damages accruing up to the date of judgment. This is a good rule and we find nothing that would prevent its application here.

On May 18, 1962, in Gila River Pima-Maricopa Indian Community v. United States, 157 Ct. Cl. 941, the Court of Claims entered the following order:

> This case comes before the court on a rule to show cause. It appears to the court that action has been instituted by the plaintiffs herein before the Indian Claims Commission seeking recovery from the defendant herein for allegedly wrongful acts of the defendant which took place prior to the passage of the Indian Claims Commission Act on August 13, 1946, and are alleged to have continued thereafter. It further appears that plaintiffs have also instituted in this court in this petition claims for all losses sustained by them since 1946 as a result of said allegedly wrongful acts.
>
> Upon consideration thereof, together with oral argument of counsel, the court concludes that the allegedly wrongful acts of the defendant first accrued, if at all, prior to 1946, and it is held that the Indian Claims Commission has jurisdiction to award just compensation for such acts, whether the full content thereof became apparent before or after 1946. Therefore, since the Indian Claims Commission has jurisdiction of the controversies asserted in the petition filed in this court,
>
> IT IS ORDERED that the plaintiffs' petition be and the same is dismissed.

In 1971, guided by the above decision of the Court of Claims the Commission held in Gila River Pima-Maricopa Indian Community v. United States, Docket 236-I, 25 Ind. Cl. Comm. 305, 306 (1971), that:

> The Court of Claims has held that our Act contains no limitations respecting damages or compensation accruing subsequent to August 13, 1946, following the general rule that, once a court obtains jurisdiction of person and subject matter, it retains such jurisdiction for all purposes including the awarding of all damages accruing up to the date of judgment. . . .

The evidence in this case abundantly reflects a policy of collecting operation and maintenance charges from the plaintiff which began well before 1946 and continued up to 1973. Since these charges were without statutory authorization they were wrongful in their inception and constitute a continuing wrong for which the defendant is liable.

Tribal Claims

In response to plaintiff's motion for judgment, filed February 15, 1974, defendant stated:

> Plaintiff's summary figure includes operation and maintenance charges covering allotted lands. Any claims pertaining to allotments are individual in nature and outside the jurisdiction of the Commission.

At the hearing held in this docket on April 8, 1974, the attorney for the defendant again stated the Government's position as follows:

> . . . the Defendant also considers the Commission without jurisdiction to award any amount in respect

> to payments for operation and maintenance charges in respect to allotted lands because in our view that represents individual claims. [Tr. (1974), p. 3]

In its brief, defendant sets out what it asserts to be all the remaining issues in this docket. The brief does not deal with the question whether the Commission can award damages with respect to operation and maintenance charges wrongfully assessed by defendant upon lands allotted to individual members of plaintiff. Defendant, therefore, seems to have abandoned its earlier contention regarding allotted lands. However, because this contention raises a question concerning the Commission's jurisdiction, the Commission shall deal with it nonetheless.

Under the Indian Claims Commission Act the Commission has jurisdiction to hear and determine claims of tribes, bands or other identifiable groups. 25 U.S.C. § 70a (1970). We do not have jurisdiction to hear and determine claims of individual Indians. E.g. Absentee Shawnee Tribe v. United States, 165 Ct. Cl. 510 (1964), aff'g Docket 344, 12 Ind. Cl. Comm. 161 (1963), aff'g in part, rev'g in part, Docket 344, 12 Ind. Cl. Comm. 180 (1963); Cherokee Freedman v. United States, 161 Ct. Cl. 787 (1963), aff'g in part, remanding, Docket 123, 10 Ind. Cl. Comm. 109 (1961).

In determining whether the claim relating to allotted land is tribal or a collection of individual claims, it is crucial to note that the operation and maintenance charges assessed on these lands, as well

as those assessed on lands owned by the tribe, were all paid from plaintiff's tribal funds. Under the tribal resolution of June 16, 1937, the plaintiff authorized the use of income from its tribal farm to pay operation and maintenance charges assessed on tribal and allotted land. The tribal resolution was adopted by Congress in the Act of August 9, 1937, 50 Stat. 564, 577, which authorized the use of revenue derived from tribal farming operations "for payment of irrigation operation and maintenance charges assessed against tribal or allotted lands of said Pima Indians. . . ."

In its early decisions the Commission set out the standards to be used in determining whether a plaintiff presents a tribal claim or a collection of individual claims. See, e.g., Mitchell ex rel. Omaha Tribe v. United States, Docket 85, 1 Ind. Cl. Comm. 683 (1951); Underwood v. United States, Docket 39, 1 Ind. Cl. Comm. 178 (1949); Lewis ex rel. Creek Freedman Assoc. v. United States, Docket 25, 1 Ind. Cl. Comm. 156 (1949). If the rights alleged to be violated were personal rights, then individual rather than tribal claims are being presented. Further, if it is necessary, in order to decide the claim, that the Commission investigate and rule on the wrong done each Indian and determine the amount of damage due each Indian, then the claim is a composite of individual claims rather than a tribal claim. In this case, the wrongful assessment and payment from tribal funds of operation and maintenance charges was a violation of tribal rather than personal rights.

It should be noted that on June 16, 1937, the plaintiff tribe agreed to assume the responsibility for paying charges assessed against the allotted lands while expressing its intention to challenge the legality of any assessments upon Indian lands within the San Carlos Project. Administrative officers employed by the defendant agreed to accept tribal payment of assessments on allotted lands. By the Act of August 9, 1937, supra, Congress, in effect, ratified this arrangement by authorizing payment of charges assessed on allotted lands from tribal funds, and authorizing plaintiff to hire an attorney to advise it on the legality of the assessments. It is the opinion of the Commission that by this arrangement it was the intention of the parties to treat what might have been individual claims as a tribal claim. Cf. Duwamish v. United States, 79 Ct. Cl. 530, 575 (1934).

We conclude that we have jurisdiction to award damages with respect to operation and maintenance charges assessed upon lands allotted to individual members of plaintiff, but paid out of tribal money.

Amounts Paid on Operation and Maintenance Assessments

Defendant tabulated the operation and maintenance assessments upon Indian lands under the San Carlos Project, and payments thereon, in its exhibit 3-74. The tabulation was prepared especially for use in this case by George A. Morrison, a former cost accountant of the Bureau of Indian Affairs on the Gila River Indian Reservation. Plaintiff adopted as its own exhibit 52 the columns of defendant's exhibit 3-74 entitled "Payments Government Farming" and "Payments Tribal Farming." It later presented evidence that an additional payment was made in 1952. Defendant

contends adjustments should be made for the years 1942 through 1945 because some of the plaintiff's land was farmed under permit by non-Indians. We discuss these matters below.

In our Finding 26 we have adopted defendant's exhibit 3-74, with adjustments for the years 1942 through 1947 and for 1952. We adopt exhibit 3-74 only because the parties have given us no better evidence in this record. A General Services Administration accounting report purporting to cover the same transactions, dated April 16, 1971, filed in other Pima-Maricopa dockets, gives discrepant figures.

a. Conflicting Evidence of 1943--1947 Payments

Mr. Morrison testified that exhibit 3-74 is based in part on a report he prepared in 1947 while employed by the Government on plaintiff's reservation (Tr. 1974 at 10-11). The 1947 report is in evidence as defendant's exhibit 5-74. The figures for San Carlos Project O & M payments from cropping operations for the years 1937 through 1942, given at page 4 of ex. 5-74, coincide with the figures for the same years in the column of ex. 3-74 entitled "Payments Government Farming." There are wide discrepancies, however, for the years 1943 through 1947, as indicated on the following tabulation:

SAN CARLOS PROJECT OPERATION AND MAINTENANCE PAYMENTS 1943-1947

Year	From Exhibit 5-74 Source of Payment: Cropping (page 4)	Saylor Permit (page 5)	WRA Rentals (page 8)	Annual Totals	From Exhibit 3- Payments Government Farming	Asse
1943	$ 23,580.90	$ 14,295.10	$ 30,306.70	$ 68,182.70	$ 23,580.90	$ 8
1944		37,549.81	115,319.89	152,869.70	59,308.70	8
1945	2,604.08		88,631.22	91,235.30	84,308.70	8
1946			168.430.36	168,430.36	100,367.50	10
1947	9,011.10			9,011.10	100,367.50	10
Totals	$ 35,196.08	$ 51,844.91	$402,688.17	$489,729.16	$367,933.30	$45

We find the report Morrison prepared in the field before the Indian Claims Commission Act became law, when his memory was fresh and relevant records were at his finger tips, more reliable than the compilation he prepared 23 years later for this lawsuit. Accordingly, our Finding 26 follows ex. 5-74 rather than ex. 3-74 for the payments made from plaintiff's funds in the years 1943-1947, both inclusive.

b. Defendant's proposed adjustments for 1942-1945 for lands farmed under permit by non-Indians.

(1) One Ray Saylor farmed 770 acres of plaintiff's lands for two years under a permit dated March 1, 1942. Defendant states the word "permit" is an euphemism for "lease," bringing into operation the proviso of section 2 of the San Carlos Act which requires payment of operation and maintenance charges on land in Indian ownership under lease. We agree.

The operation and maintenance assessment for 1942 on the land sharecropped by Saylor was paid by the plaintiff (Tr. Nov. 16, 1970,

at 89; def. ex. 5-74, at 6). The assessment per acre was $2.10 that year, for a total payment of $1,617.00 on the 770-acre area farmed. This sum was lawfully collected by the Government, and will not be ordered refunded to plaintiff.

Saylor paid his own operation and maintenance charges for 1943, which were at the same rate as the previous year. Defendant contends this payment of Saylor's should also be deducted from the amount we order refunded to plaintiff for that year.

The Government also contends deductions should be made from the sums to be refunded to plaintiff, on account of 6,977 acres of plaintiff's land farmed under permit by the War Relocation Authority (WRA) during the years 1942 through 1945.

The 1963 GSA letter-report, which we have made Commission ex. 1, however, shows that the War Relocation Authority paid its own operation and maintenance charges, totalling $69,157.43, over and above the rentals for the years in question.[2/] This sum and Saylor's 1943 payment are not included in the "Payments Government Farming" Column of our Finding 26, which, following def. ex. 5-74, contains only amounts paid out of the Saylor and WRA rentals and Government Cropping operations.

Accordingly, no deduction will be made for these third-party payments in the refund to which Finding 26 shows plaintiff entitled.

2/ See also Gila River Indian Community v. United States, Dockets 236-A and B, 25 Ind. Cl. Comm. 250, 270 (1971), aff'd in part, rev'd in part, 199 Ct. Cl. 586, 467 F.2d 1351 (1972).

c. 1952 Payments.

We turn now to the disputed figure of $57,500, which the plaintiff claims was withdrawn from its account in 1952 for operation and maintenance charges in addition to the $98,286.40 which defendant, in exhibit 3-74, concedes to have been withdrawn.

We adjust defendant's exhibit 3-74 in our Finding 26 to credit the plaintiff with the disputed $57,500 payment. We do so on the basis of plaintiff's exhibit 71, which is a copy of the Individual Indian Account ledger for account No. G-24, Gila River Pima-Maricopa Indian Community, Miscellaneous, for the period July 11, 1951, to September 19, 1952. On June 17, 1952, a withdrawal is shown in the amount of $57,500.00 by check No. 57,352 in favor of the Treasurer of the United States. The purpose of the withdrawal is not stated on the ledger, but reference is made to voucher 455-338, which shows that the payment was for the Indians' half of the Joint Works annual assessment. (See pl. ex. 73). The ledger shows an additional withdrawal on July 3, 1952, in the amount of $98,286.40 by check No. 57,455 in favor of the Treasurer of the United States. The purpose of this withdrawal is noted on the ledger itself, as "1952 O & M."

Thus, there appear to have been three rather than two operation and maintenance payments made in 1952: the $55,129.75 payment shown in the "Payments Government Farming" column in def. ex. 3-74, the $98,286.40 shown in the "Payments Tribal Farming" column and on the ledger for IIM account No. G-24, and the $57,500.00 payment shown only on the ledger. Defendant's counsel writes in his response to plaintiff's motion to enlarge and correct the record that the $57,500 payment was included in the two payments shown on def. ex. 3-74. In effect, the Government asks us to disregard the sworn testimony of its own witness, Morrison, that the figures shown in the "Payments Government Farming" column of the exhibit he prepared represented disbursements from treasury account 14-7273 (Transcript, 1974, at 14-15) and give evidentiary effect to the statement of its attorney. We cannot do that.

The defendant has not satisfactorily explained why the evidence shows three payments in 1952, but def. ex. 3-74 shows only two.

We note from the IIM ledger (pl. ex. 71) that $1,604.49 in operation and maintenance assessments were collected by the tribe from individuals in 1952. This sum will be deducted from the tribe's payment of $57,500.00. In addition to the $55,129.75 payment from

Government farming, the plaintiff is credited in our Finding 26 with a net payment of $154,181.91 for 1952, computed as follows:

$$\begin{array}{r} \$57,500.00 \\ +98,286.40 \\ \hline \$155,786.40 \\ -1,604.49 \\ \hline \$154,181.91 \end{array}$$

Interest

Plaintiff claims interest at the rate of 4 percent per year on operation and maintenance assessments collected from it by defendant. Defendant denies liability for interest.

The "traditional rule" is that interest on claims against the United States cannot be recovered in the absence of an express provision for interest in the relevant statute or contract. United States v. Tillamooks, 341 U.S. 48 (1951). Despite this rule, the Supreme Court has authorized incremental damages equivalent to interest where a wrongful act of the United States diminished an interest-bearing fund. Peoria Tribe v. United States, 390 U.S. 468 (1968); United States v. Blackfeather, 155 U.S. 180 (1894); Menominee Tribe v. United States, 107 Ct. Cl 23 (1946); Blackfeet and Gros Ventre Tribe v. United States, Dockets 279-C, 250-A, 32 Ind. Cl. Comm. 65, 112 (1973). We believe that the unlawful exactions at issue here diminished interest-bearing funds.

The accounts from which operation and maintenance payments were made are identified in our Finding 27. For the period 1937-1947, we have based the finding on def. ex. 5-74, the report Mr. Morrison did in the field before the present case was filed. For the period after 1947, the finding is based on plaintiff's exhibits 71--76 and Mr. Morrison's oral testimony.

a. Payments from the "Proceeds of Labor" account.

Starting in 1938 and extending until 1952, with the exceptions indicated in Finding 27, the revenues derived from farming plaintiff's land were deposited in the United States treasury in account 14x7273, entitled "Proceeds of Labor, Pima Indians, Arizona 'Subjugation and Cropping Operations'"; and operation and maintenance payments were made therefrom. By virtue of the act of June 13, 1930, 25 U.S.C. § 161b, this account paid 4 percent interest. The plaintiff is entitled to damages equivalent to the interest which would have been earned if the unlawful operation and maintenance payments had never been withdrawn from this account.

b. Payments from trust accounts held in the field.

Proceeds of Government farming operations prior to June 30, 1937, were held in a Special Deposits (i.e. suspense) account, from which the $21,947.40 payment for 1937 was disbursed. Another payment, small in amount, was made from a Special Deposits account in 1945. All the other payments of operation and maintenance assessments until 1956

were made from so-called "Individual Indian Money" (IIM) accounts. We are aware of no direct precendent on the question of whether refunds of payments made from Special Deposits and Individual Indian Moneys should be accompanied by an incremental payment for lost interest.

The Court of Claims seems to have spoken with two voices on the interest question.

In Cheyenne-Arapaho Tribes v. United States, 206 Ct. Cl. 340, 512 F. 2d 1390 (March 1975), an original jurisdiction case involving the period after 1946, the Court held that the United States has an obligation to maximize Indian trust income by prudent investment. This duty, the Court held, is not necessarily fulfilled by leaving funds on deposit in the Treasury at the 4 percent annual interest provided by 25 U.S.C. §§ 161a, 161b. If a higher yield is available in one of the investments authorized by 25 U.S.C. § 162a (bank deposits, Government, or Government-guaranteed bonds), then, according to Cheyenne-Arapaho, the United States' duty extends to withdrawing the funds from the Treasury and putting them into such higher yield investments.

In United States v. Mescalero Apache Tribe, 207 Ct. Cl. 369, 518 F.2d 1309 (July 1975), rev'g Dockets 22-G, 326-A, on the other hand, the Court of Claims held that the United States had no duty to make the trust fund known as "Indian Moneys, Proceeds of Labor" (IMPL) productive during the period 1883-1930.

There is no conflict between the holdings in the two cases; they deal with different periods and different funds. There appears to be

a conflict, however, between Cheyenne-Arapaho and some of the dicta in Mescalero Apache. The Court, however, has indicated, in United States v. Fort Peck Indians, 207 Ct. Ct. ____, App. No. 18-74 (October 31, 1975), rev'g Docket 184, that both cases are still the law.

It therefore becomes the duty of this Commission to follow each where it is applicable. We can distinguish the cases only on the basis of the periods involved.

The non-interest-bearing common trust fund known as "Indian Moneys, Proceeds of Labor" ceased to exist on the effective date of the Act of June 13, 1930, 25 U.S.C. 161b, at which time it was broken up into separate interest-bearing accounts for the respective tribes whose moneys had formerly been mingled therein. That effective date, July 1, 1930, in our opinion, marks the point at which we should shift from following Mescalero Apache and follow Cheyenne-Arapaho.

We find no warrant for distinguishing the two cases on the basis of whether the funds were inside or outside the Treasury. Mescalero does not deal with funds held outside the Treasury. Cheyenne-Arapaho, on the other hand states (at page 4 of slip opinion), ". . . holding the money in the Treasury is only one of the defendant's statutory alternatives." Clearly, it applies to Indian trust funds held by the United States outside as well as inside the Treasury.

Since all payments out of trust funds involved in this case occurred after 1930, Cheyenne-Arapaho rather than Mescalero governs.

We proceed to consider Cheyenne-Arapaho's application to the payments out of the trust funds "Special Deposits" and "Individual Indian Moneys."

1. "Special Deposits". The question here is not whether there was any statute requiring the Government to pay interest on a Special Deposit (i.e., suspense account), but whether the Government had any authority of law to hold plaintiff's moneys in such an account at all.

There was, in fact, no law which permitted the defendant so to hold plaintiff's money. By 25 U.S.C. § 155:

> All miscellaneous revenues derived from Indian reservations, agencies, and schools, except those of the Five Civilized Tribes and not the result of the labor of any member of such tribe, which are not required by existing law to be otherwise disposed of, shall be covered into the Treasury of the United States under the caption "Indian moneys, proceeds of labor". . .

Under the rule of Menominee Tribe v. United States (No. 44300), 107 Ct. Cl. 23 (1946), the Government becomes liable for interest 30 days after the date of collection, if deposit in the Treasury is delayed. The Special Deposit accounts involved here were not short-lived. The one from which the 1937 payment was made existed since 1935, when Government cropping operations started; and the unexpended balance was not placed at interest in an IMPL fund, as required by law, until June 30, 1937. (Def. ex. 5-74, page 4). The Special Deposits account from which the 1945 payment was made had been maintained 10 years before its unexpended balance was transferred to the tribe's interest-bearing IMPL account. Def. ex. 5-74, page 10. Clearly the 1937 and 1945

payments diminished interest-bearing funds; and the plaintiff is entitled to reimbursement for the interest lost.

2. The "Individual Indian Money" (IIM) Accounts. These are "funds held in trust for individual Indians, associations of individual Indians, or for Indian corporations chartered under the Act of June 18, 1934 [25 U.S.C. § 477]." See Act of June 25, 1936, c. 814, 49 Stat. 1928. We presume the plaintiff is incorporated under the 1934 act; otherwise there would be no warrant of law for defendant's holding plaintiff's tribal funds in such an account rather than an "Indian Moneys, Proceeds of Labor" (IMPL or PL) account. Lest one be misled by the name, we must emphasize that all the "Individual Indian Money" accounts involved in this case contained tribal money. (Def. ex. 5-14, page 5, 8; Pl. exs. 71-76).

IIM funds may, but need not, be deposited in the Treasury of the United States. See S. Rep. No. 2172, 74th Cong., 2d Sess. (1936). When deposited in the Treasury, daily interest is paid on such accounts at the 4 percent rate provided by the Act of February 12, 1929, 25 U.S.C. § 161a. See Finding 28; Trans. 1974, at 24. Such funds may also be deposited in local banks, either at interest or in non-interest-bearing checking accounts; or they may be invested in any bonds, notes, or other obligations which are unconditionally guaranteed as to both interest and principal by the United States. See Act of June 24, 1938, 25 U.S.C. § 162a. There is no question that IIM funds are trust funds; they are made so by law. See Act of June 25, 1936,

above. By the most basic principles of trust law, it is the trustee's responsibility, not the beneficiary's, to see that trust funds are properly administered. Cf. Restatement (Second) of Trusts §§ 2, 175 (1959).

Cheyenne-Arapaho holds that the United States has a fiduciary duty to maximize income from Indian trust funds. It therefore follows that the Government cannot leave IIM funds in an interest-free account except in such amounts and for such periods as may be reasonably necessary to meet lawful current obligations. Cf. Restatement (Second) of Trusts, §§ 180, 181 (1959). The 30 day rule of Menominee, supra, gives some guidance here. Where the holding period exceeds 30 days, we believe an IIM account should ordinarily be regarded as interest-bearing.

If the sums improperly withdrawn for payment of operation and maintenance charges had remained to the present time in IIM accounts, clearly the Government would have a duty to make them productive. The collection and expenditure figures for the Saylor and WRA rents (see Finding 27), however, show that substantial balances were kept on hand long enough between collection and expenditure to have made it feasible to deposit them in interest-bearing treasury or local savings accounts ever during the 1943-1947 period.[3/] The improper payments from the IIM funds, therefore, must be regarded as having diminished interest-bearing accounts.

3/ The following statement appears at page 14 of def. ex. 5-74:

> The income from the Saylor and WRA permits has made it possible to not only meet current assessments since 1943 but to pay $101,127.38 on delinquent assessments, which were offset by Reimbursable appropriations, without appreciable drain on Cropping profits. This has enabled Cropping to accumulate a backlog of revenue amounting to $171,143.83 as of July 1, 1947, which with 1947 and 1948 crop profits will be available to meet operation and maintenance assessments for the calendar years 1948 and 1949.

Continued

The rule of Peoria, supra, applies; and plaintiff is entitled to reimbursement for its lost interest.

3. The War Relocation Authority rentals. In regard to the WRA rentals of the wartime years, there is an even more compelling reason for awarding damages for lost interest. As in the case of the "Special Deposit" of 1935-1937, these funds should never have been placed in an IIM account in the first place.

The arrangement whereby the War Relocation Authority took over the use of some 17,123.22 acres of the Gila River Indian Reservation as a "Relocation Center" for Japanese-Americans removed from the West Coast gave rise to the claim in Gila River Indian Community v. United States, Dockets 236-A and B, 25 Ind. Cl. Comm. 250 (1971), aff'd 199 Ct. Cl. 586, 467 F.2d 1351 (1972). Findings 5 to 9 in that case (25 Ind. Cl. Comm. at 262-272) reveal that the WRA permits were accepted by plaintiff's

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Footnote 3/ (Continued)

The $101,127.38 mentioned is approximately the excess over assessments of payments made out of Saylor and WRA rentals during the years 1943 through 1946. The correct figure, computed from the tabulations in def. ex. 5-74, is $101,239.48. In addition, $26,184.98 was paid from Government Cropping revenues during those years, making the total overpayment $127,424.46. This was reduced to $36,068.06 in 1947, when only $9,011.10 was paid, while the assessment remained at $100,367.50.

If any of the overpayment was applied against delinquent assessments for years prior to 1943, as the quotation suggests, that fact is not reflected in def. ex. 3-74, upon which we base the figures in our Finding 26 for those years. The entries in the "Payments Government Farming" column of def. ex. 3-74 for the 1937-1942 period total less than payments during that period shown in the 1971 GSA report, which was made up on the basis of contemporaneous vouchers. In any event, whatever years' assessments the defendant applied the overpayment to is immaterial here, since we are ordering the collections in excess of assessments, which caused the overpayment, to be refunded with interest from the years in which made, not from the years to whose assessments such collections were credited.

council only after the WRA was proceeding with construction on reservation lands and plaintiff's governor had been informed by the Superintendent that "any action . . . in opposition would be entirely futile." Id. at 264.

Besides the 6,977 acres of irrigated land, the WRA permits embraced 1,296.22 acres of non-irrigable land for use as campsites, at a rental of $1.00 per acre per year, and some 8,850 acres of undeveloped land, which WRA was to subjugate in lieu of paying rent. See 25 Ind. Cl. Comm. at 262, 270-271.

The permit for the 6,977 acres of irrigable land is quoted in a letter-report dated December 20, 1963, from the General Accounting Office to the Attorney General, which we have made of record here as Commission's exhibit 1. Paragraph 8 provided for payment of the rentals by WRA to the Reservation Superintendent for the credit of plaintiff. Additional unnumbered paragraphs provided as follows:

> The Superintendent of the Gila River Indian Reservation shall place the funds received from the War Relocation Authority under this permit in the Individual Indian Account to the Credit of the Gila River Pima-Maricopa Indian Community. From this account shall be paid, in behalf of all Indian lands both tribal and allotted within the San Carlos Irrigation Project, all operation, maintenance, and other water charges not covered by collections from water users or by reimbursable appropriations.
>
> Of the remaining funds not to exceed $6,000 per annum shall be available to the Council for the payment of the salaries of community officials and for other expenses of public business under applicable provisions of the community's constitution and charter. Said $6,000 may be retained in the special I.I.M. account and disbursed by the superintendent upon the direction of the Treasurer and in accordance with resolutionsadopted by the Council;

> or the Council by appropriate resolution may direct the superintendent from time to time to transfer to the bonded treasurer of the tribe for deposit in a national or state bank any or all of the said $6,000, under applicable provisions of the constitution and charter.
>
> The Council agrees that all balances remaining shall be utilized under applicable provisions of the constitution and charter for the conduct of community business such as the financing of tribal and cooperative economic enterprises, the enlargement of the revolving loan funds and the operation of other constructive programs to be developed by the Council in cooperation with officials of the Indian Service.

Thus, a Federal official, the Superintendent, received and administered the WRA rentals; and not more than $6,000.00 a year was to be placed at the disposal of the tribal council and treasurer.

Defendant's exhibit 5-74 (pp. 8, 9) shows the collections and disbursements of funds accruing under the WRA permits, as follows:

Collections		$427,321.40
Disbursements:		
O & M San Carlos Project	$402,688.17	
O & M Maricopa and Gila Crossing	2,476.82	
Payments to Tribal Council	17,834.00	
Other	5,625.45	
		428,624.44
Deficit		1,303.04

> The deficit was covered by transfer of $2,011.80 from "Special Deposits - West End collections."

It is evident that the WRA rentals were "miscellaneous revenues derived from Indian reservations" within the meaning of 25 U.S.C. § 155; and, as required by that statute, should have been "covered into the Treasury of the United States under the caption 'Indian moneys, proceeds of labor'."

There they would have earned the 4 percent per annum provided by 25 U.S.C. § 161b.

It has been suggested that 25 U.S.C. § 155 did not apply to the revenues of tribes organized under the Indian Reorganization Act (25 U.S.C. §§ 461-479). The true rule is that § 155 governs the use of tribal revenues received by officials or employees of the Interior Department, whether the tribe is so organized or not, although it has no application to payments made directly to tribal officers pursuant to tribal constitutions adopted under the Indian Reorganization Act. See U.S. Department of the Interior, Federal Indian Law 732-734 (1958).

Federal Indian Law quotes the following example from an opinion of the Comptroller General to show the circumstances under which 25 U.S.C. § 155 does not apply:

> Under Article IX, section 3 of the Constitution of the Gila River Pima-Maricopa Indian Community, those community lands which are not assigned to particular individuals for their private benefit or to groups of individuals operating as districts may be used by the community or may be leased by the council to members of the community, rentals to accrue to the community treasury to be used for the support of the helpless or other public purposes. This provision supersedes prior administrative regulations requiring all leases to be approved by the superintendent of the agency and further requiring that all payments made on the leases should be deposited in the United States Treasury. Under the present constitutional provisions the receipts in question are not revenues or receipts of the United States, the agreements from which they arise are not agreements approved by the superintendent and consequently such receipts are not affected by the act of May 17, 1926, [25 U.S.C. § 155] or regulations issued thereunder, with respect to the accounting and deposit of tribal trust funds.

The WRA permits were quite different from the leases to community members contemplated by the tribal constitution. Essentially, the WRA arrangement was imposed upon the plaintiff by the Government. It was not administered by tribal officers, nor even freely consented to by the tribal council. And the rentals used to pay operation and maintenance assessments were never out of the custody of a Federal officer. 25 U.S.C. § 155 was clearly applicable to these rentals. They should have been deposited in the U.S. Treasury at 4% annual interest. Their unauthorized use to pay operation and maintenance assessments clearly diminished an interest-bearing fund and entitles plaintiffs to incremental damages. 4/

c. Interest on payments from plaintiff's commercial bank accounts.

We do not know of any precedent under the Indian Claims Commission Act, one way or the other, on whether interest may be awarded on sums

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4/ The language of the second and third unnumbered paragraphs of the WRA permit quoted above, page 24, seem to provide that rentals should be used by the Superintendent (1) to pay current O & M assessments, (2) to pay the Council $6,000 per year, and (3) the balance to be utilized for Community business. This order of priorities appears not to have been followed, but instead the annual excess of rentals over current assessments and the $6,000 payment was used by the defendant as a sinking fund to secure payment of its future assessments. See footnote 3, above, pages 22-23.

illegally exacted by the Government from an Indian tribe's own commercial bank account. Neither do we know of any case before this Commission where the injustice of applying the traditional rule against interest is more evident.[5/]

This is not the ordinary case where a plaintiff is trying to get from the Government money it never had before. Here the defendant, the plaintiff's fiduciary, illegally took its ward's hard-earned money. The plaintiff is trying to get its own money back.

The evidence in this record (Transcript, April 8, 1974, at 24-25) shows that the money here involved was kept in commercial bank accounts rather than a trust account in the U.S. Treasury for the very purpose of earning interest at a higher rate than the Government paid.

5/ All collections on operation and maintenance assessments on Indian irrigation projects made since August 7, 1946, have been deposited in a treasury trust-fund account. See Act of August 7, 1946, c. 802, 31 U.S.C. § 725s-1. The Act of February 12, 1929, 25 U.S.C. § 161a, would seem to apply to funds held in such an account. When plaintiff's funds were withdrawn and used to pay actual operation and maintenance costs, it could thus be argued that a diversion from an interest-bearing trust fund occurred, entitling plaintiff to interest under the Peoria-Blackfeet rule. In regard to the assessments paid out of plaintiff's commercial bank accounts we do not rest our views on this proposition, however, but face the question head-on of whether we are authorized to add an increment measured by interest when we order such sums paid back.

The defendant coerced this money from the plaintiff during a period when the Government operated year after year at a deficit. The sums illegally extracted saved the Government the interest it would have had to pay on an equal amount borrowed in the money markets. And the longer the defendant continues its wrong, the greater will be its unjust enrichment if no interest is allowed.

To solve the problem of whether plaintiff is entitled to interest in this unprecedented case we believe the intent of Congress in adopting the Indian Claims Commission Act is a better guide than judge-made rules denying interest against the United States in other situations.

If anything is clear in the legislative history of the Indian Claims Act it is that Congress intended to abolish the innumerable technicalities of previous jurisdictional acts which the Court of Claims seized upon to defeat just Indian claims. See H. R. Rep. No. 1466, 79th Cong., 1st Sess. 7, 15, 16.[6/]

6/ See also 92 Cong. Rec. 5316 (1946) (remarks of Congressman Jackson, manager of the bill which became the Indian Claims Commission Act):

> There is a second side of this financial picture that impressed our investigating committee. This was the fact that under present legislative procedures Indian claims bills shuttle back and forth from the Court of Claims to Congress and often have a life tenure of 20, 30, or 40 years. That process is enormously costly and unsatisfactory to everyone.

(continued)

Clause 2 of section 2 of the Indian Claims Commission Act (25 U.S.C. § 70a) [7] "permits suit against the United States on any claim cognizable in the courts of the United States against a private citizen. It thus does away with the immunity of the Government from suit and renounces the dishonored fiction that 'the King can do no wrong.'" H. R. Rep. No. 1466, supra, at 11. No exception to the waiver of immunity is made

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Footnote 6/ (Continued)

> It means that Government clerks and attorneys in the Interior Department, the Department of Justice and the General Accounting Office spend years and years examining and reexamining Indian claims in an effort to determine whether the Indians should have a day in court. And of course, when a special jurisdictional bill is enacted, the process of investigation starts all over again. Then, only too often, the Court of Claims or the Supreme Court finds some fault with the language of the jurisdictional act, and the Indians come back for an amended jurisdictional act and the merry-go-round starts up again. In the last 20 years the General Accounting Office alone has spent over a million dollars in reporting on Indian claims bills. And not one cent of that went to any Indian to settle any claim. Justice and Interior and the committees of Congress have probably spent comparable sums. That, in the judgment of your committee, threatens to be an endless waste of the taxpayer's money. This dilly-dally-ing with the claims problem, according to our investigating committee's findings, promises to "continue to be a real road block on the path to Indian independence 100 years from now."

7/ "The Commission shall hear and determine. . . all other claims in law or equity, including those sounding in tort, with respect to which the claimant would have been entitled to sue in a court of the United States if the United States was subject to suit. . ."

of claims for interest. The entire legislative purpose of the Claims Act militates against reading such an exception in.

In Seminole Nation v. United States, 316 U.S. 286, 296-297 (1942), the Supreme Court spoke of. . . "the distinctive obligation of trust incumbent upon the Government in its dealing with these dependent and sometimes exploited people."

The Court wrote:

> . . . Under a humane and self-imposed policy which has found expression in many acts of Congress and numerous decisions of this Court, it has charged itself with moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards.

The Court continued by quoting an opinion of Benjamin Cardozo rendered when he was chief judge of the Court of Appeals of New York, as follows:

> Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place.

For a private trustee to extort money from his ward under threat of depriving the latter of his livelihood would be universally condemned between private citizens. We need not look to the clause of the Indian Claims Commission Act authorizing claims based upon fair and honorable dealings not recognized by any existing rule of law or equity. Such

conduct is a violation of the ordinary rules of law and equity, as well as of morality. The victim under such ordinary rules is entitled to restitution with interest. See Restatement of Restitution, §§ 70, 156, cf. § 75, comment c; cf. Restatement (second) of Trusts, § 343, comment m, § 207.

Interest is absolutely necessary in such a case to make restitution complete. For example, if the Government wrongfully seized a sum from the commercial savings account of an Indian tribe in 1937, under a no-interest rule the tribe would have no claim so long as the Government returned the principal before we rendered judgment, though it might have withheld and used the money for 40 years.

The only morality which could countenance such a result is that of an embezzler. When the Government occupies Indian land and holds it for many years, we do not absolve the Government from liability for damages, measured by rental, because it eventually gives the land back or pays for it. Lower Sioux Indian Community v. United States, Docket 363, 30 Ind. Cl. Comm. 463, 470, 479 (1973), aff'd Appeal No. 17-74, (Ct. Cl., July 11, 1975). Similarly, when the Government withholds Indian money for a long period, it should not be absolved from payment for the use of the money, measured by interest, because it eventually gives the money back, whether voluntarily or pursuant to judgment of this Commission.

No statute prevents the award of interest, or more accurately, damages for withholding the use of money, in this case. 28 U.S.C.

§ 2516(a) certainly does not.[8/] First, the statute expressly applies only to the Court of Claims, not to the Indian Claims Commission. Second, by all rational rules of statutory construction, the Indian Claims Commission Act, special legislation enacted in 1946, would supersede this general legislation enacted in 1863.[9/]

The intent of Congress to dispose of ancient Indian grievances finally and justly has been largely frustrated by inflation. It is a mockery when we award one 1976 dollar to compensate for an 1876 dollar's value. There is no excuse for this Commission or the courts to seek pretexts to further frustrate Congress's will by adopting more restrictive measures of damages for Indian tribes than apply between private litigants. The primary purpose of the Indian Claims Commission Act was to end discrimination against the tribes, not to aggravate it. See H. Rep. No. 1466, supra, at 1-2:

> The bill in its present form is primarily designed to right a continuing wrong to our Indian citizens for which no possible justification can be asserted. Today any white man who has supplied goods or services to the United States under contract may, if the United States has failed to carry out is part of the bargain, go into the Court of Claims, or, in certain cases, into the Federal district courts, and secure a full, free, and fair hearing on his claims against the Government. This is an integral part of the American

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8/ The Court of Claims' statements to the contrary in Mescalero Apache Tribe v. United States, Appeal No. 2-74 (July 11, 1975) at 2, 8 are dicta, since the plaintiffs in Mescalero were not seeking interest on a judgment, but a judgment for damages for non-payment of interest. The "interest" involved in Mescalero was not on top of the claim, but was the whole claim.

9/ See Act of March 3, 1863, c. 92, 12 Stat. 765, 766.

> system of justice under which the humblest citizen and the highest official are equal before the law. The only American citizen today who is denied such recourse to the courts is the Indian. By virtue of a statute adopted on March 3, 1863, at a time when a good many Indian tribes were engaged in hostilities against the Federal Government, all claims against the United States growing out of Indian treaties were barred from the jurisdiction of the Court of Claims, and from that day to this no Indians have been able to bring their disputes with the Federal Government before the Court of Claims without a special act of Congress permitting them to receive the hearing that it is the right of every other American citizen to demand without special legislation. This lingering discrimination, which arose at a time when Indians were not citizens and were commonly regarded as a hostile or inferior people, is felt today as a badge of shame by some 400,000 of our Indian citizens who, during the war, have contributed voluntarily to the service of the Nation in a measure far out of proportion to their numbers in population, who have won an amazing number of decorations for military valor and sacrifice, and who have contributed to our war bond drives in a measure wholly disproportionate to their limited economic resources.
>
> At the end of the First World War the patriotism of the American Indian was recognized by the Congress in legislation which granted all Indians citizenship. It is only fitting that at the end of World War II the devotion and patriotism of our Indian citizens be recognized by abolishing the last serious discrimination with which they are burdened in their dealings with the Federal Government and by giving them a full and untrammeled right to have their grievances heard under nondiscriminatory conditions by the appropriate courts of the United States.
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> That, in brief, is the primary objective of H. R. 4497. [Emphasis supplied].

Least of all should this Commission and the courts reviewing its decisions pay any attention at all to argument that doing justice will

cost too much. There is no evidence in this or any other record that allowing the Indians interest, or damages measured by interest, will cost "billions." (See Mescalero Apache, supra, at page 37). In any event, as stated in Missouri K. & T. Ry. v. United States, 47 Ct. Cl. 59, 85 (1911):

> If the size of the claim could have anything to do with the result, the sooner this court retires from business the better for the citizen.

Similar arguments that somehow this richest nation in the world could not afford to do justice to the Indians were argued by the Department of Justice in opposition to the original enactment of the Indian Claims Commission bill. See, e.g., Hearings on H.R. 4497 Before the Senate Committee on Indian Affairs, 79th Cong., 2d Sess., 62 (1946).

These arguments were rejected by the Congress, when it passed the bill and by the President when he signed it. The House Report, supra, declared as follows (at page 8):

> It is hardly possible to give any adequate estimate of the total extent of Indian claims that might be found valid under the provisions of the proposed legislation. . . It is possible to say, however, that whatever the amount may be to which the Indian tribes are justly entitled, the sooner it is paid the better it will be for the Federal Government, from a financial point of view as well as from the standpoint of national honor.

If courts continue to follow precedents decided under the Trading with the Enemy Act[10/] rather than the legislative intent of the Indian

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10/ 50 US.C. App. §9(a) (1970).

Claims Commission Act in deciding Indian claims,[11] the tribes will doubtless come back to Congress for repair of the judicial sabotage, and "the merry-go-round starts up again."[12]

We are awarding the plaintiff damages measured by four percent simple interest per annum for the Government's wrongful retention and use of its money.

Our calculations are contained in Finding 29. The award of interest is made from the time the funds were withheld from plaintiff, not from the earlier or later dates of the operation and maintenance assessments against which they were applied.

Brantley Blue
Brantley Blue, Commissioner

We concur:

John T. Vance, Commissioner

Margaret H. Pierce, Commissioner

11/ See Mescalero Apache, supra, note 8, at 30-32.

12/ See note 6, supra.

Yarborough, Commissioner, dissenting in part

However fiercely the majority struggle against it in their quest to award total interest, the case of Mescalero Apache v. United States, Appeal No. 2-74 et. al (Ct. Cl. July 11, 1975) has been decided adversely to the Commission's prior decision. The Court of Claims has clearly held that interest as damages may not be awarded absent a treaty or statute specifically calling for interest. Here, there is such a statute requiring interest on IMPL funds, so where payments were wrongfully withdrawn from those funds (before 1952) 4% interest as damages should be awarded.

The majority cite no statute requiring the United States to pay interest on IIM accounts (much less tribal commercial bank accounts). Without such a statute, there is no reasonable doubt that the Court of Claims mandate in Mescalero forbids interest as damages. To say the Court of Claims rationale applies only to IMPL accounts before 1930 is, mildly put, disingenuous.

The majority appear to believe that the case of Cheyenne-Arapaho Tribes v. United States, Nos. 342-70, 343-70 (Ct. Cl. March 19, 1975) wrought an advance loophole in the doctrine of the Mescalero case. Whatever the present validity of Cheyenne-Arapaho, it should be noted that the author of Cheyenne-Arapaho, the sole dissenter in Mescalero, would not allow the interest sought here on wrongful disbursements, see Mescalero, supra, slip opinion p. 44, note 4, Davis, J., dissenting.

The plaintiff tribe took control of its farming operations in 1952.[1/] By inference, it thereafter controlled receipt and disbursement of the funds generated by the farming operation, both in the IIM accounts and the commercial bank accounts. From the state of the evidence it is doubtful that the United States had an actual trustee's control over the IIM farm funds; it is certain that there was no such relationship over the tribe's commercial bank accounts. But to shift from the trustee-ward relationship to the debtor-creditor relationship makes no difference to the majority's thirst for interest. The Commission has recognized the distinction before, as in payments made under a treaty, affirmed in Mescalero, supra, and should abide at least with its own precedent.

The majority's soul-stirring invocation of justice, morality, and the true intent of the Indian Claims Commission Act expresses a philosophy with which I largely agree. However, warm rhetoric cannot overcome the fact that the Court of Claims in Mescalero rejected the Commission's views on interest as damages. The majority's ringing preachments may give moral satisfaction to themselves and to the plaintiffs, but the latter should not be so sanguine as to suppose that

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1/ The mention of the year 1952 impels me to enter some note of disassociation from the tilted factual determinations made by the majority. The most egregious example of over-kill is in determining the amount of payments made for the year 1952, where the majority, needing to add either two apples or two oranges, adds one apple to two oranges to arrive at a total figure of $209,311.66. Since the amount billed for the year was only $154,565.95 (see table, Finding 26), the opinion might at least suggest some reason why such an overpayment would have been made without recorded protest.

intensity of expression will achieve an ultimate result more favorable than that I have outlined here. Rather, the award to which the plaintiffs are justly entitled will suffer further delay, and the plaintiffs may aptly say, "often do we hear the thunder, but seldom do we feel the rain."

Richard W. Yarborough, Commissioner

I concur

Jerome K. Kuykendall, Chairman