

BEFORE THE INDIAN CLAIMS COMMISSION

TE-MOAK BANDS OF WESTERN SHOSHONE)
 INDIANS OF NEVADA, suing on)
 behalf of the Western Shoshone)
 Nation of Indians,)
)
 Plaintiff,)
)
 v.)
)
 THE UNITED STATES OF AMERICA,)
)
 Defendant.)

Docket No. 326-A

Decided: April 29, 1970

Appearances:

Wilkinson, Cragun and Barker and
 Charles A. Hobbs, Attorneys for Plaintiff.
 Frances L. Horn, of Counsel.

John D. Sullivan, with whom was Mr.
 Assistant Attorney General Shiro Kashiwa,
 Attorneys for Defendant.

OPINION OF THE COMMISSION

Commissioner Blue delivered the opinion of the Commission.

The issues raised by this accounting action originally comprised paragraphs numbered 28 through 32 of the petition filed on August 10, 1951, in Docket No. 326. By Order of the Commission dated July 5, 1957, the causes of action set forth in those paragraphs were severed from Docket No. 326 and docketed as Docket No. 326-A. The plaintiff filed its amended petition herein on May 18, 1967. Pursuant to the procedure adopted by the Commission for accounting cases in Sioux Tribe of the Cheyenne River Reservation v. The United States, 12 Ind. Cl. Comm. 541, 547 (1963), defendant filed an Accounting Report

prepared by the Indian Tribal Claims branch of the General Services Administration on September 18, 1968; thereafter plaintiff filed its Exceptions on February 11, 1969, and defendant filed its Response on March 13, 1969.

Plaintiff filed the instant motion for partial summary judgment on May 6, 1969, maintaining that defendant had not sufficiently answered the objections raised by its Exceptions to the Accounting Report. We are prepared to rule on some issues raised under the exceptions. However, with respect to other issues we find that more evidence and research is required to resolve the questions which have been presented. We will, therefore, in this opinion briefly discuss our position respecting each exception, pointing out wherein we feel additional material must be furnished.

Exception No. 1

In Exception No. 1, the plaintiff states that the accounting is incomplete, pointing out that the Accounting Report filed on September 18, 1968, shows the transactions respecting plaintiff's funds until June 30, 1951. Defendant argues that the Indian Claims Commission Act (60 Stat. 1049) bars an up-to-date accounting. The Court of Claims recently answered this objection in Southern Ute Tribe v. United States (Ind. Cl. Comm. Docket No. 328, Appeal No. 7-66, decided March 20, 1970), 190 Ct. Cl. _____, _____ F. 2d _____, slip op., p. 27, as follows:

Defendant's third procedural contention is that the Commission's order for an up-to-date accounting report is beyond its jurisdiction. 25 U.S.C. 70(a) (1964) on its face bars the Commission from considering any claims accruing after August 13, 1946. In a

previous interpretation of this section, however, we have said that where the Government's initial wrongdoing giving rise to a claim accruing before August 13, 1946, but continued past this time, the Indian Claims Commission was free to determine the extent of its jurisdiction in framing an award. Gila River Pima-Maricopa Indians, et al. v. United States, 135 Ct. Cl. 180, 186 (1956), 157 Ct. Cl. 941 (1962). We expressed agreement in that case with the established principle 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." We hereby reaffirm our adherence to this principle and hold the Commission correctly ordered an up-to-date accounting for continuing Government wrongdoings which predated and postdated the statutory time bar.

Accordingly, plaintiff's motion for partial summary judgment respecting Exception No. 1 is granted and defendant will furnish an up-to-date accounting for all matters originating prior to August 13, 1946, and which have continued past that statutory time bar.

Exception No. 2

Plaintiff asserts that the financial obligations which defendant assumed pursuant to the Treaty of October 1, 1863 (18 Stat. 689), have not been fulfilled. The 1863 Treaty provided for an annuity of \$5,000.00 for 20 years, aggregating \$100,000.00. The Accounting Report shows that direct annual appropriations of \$5,000.00 were made for 18 years, aggregating \$90,000.00. Additional funds in the amount of \$6,763.18 were transferred from other appropriated funds to be used in fulfillment of the 1863 Treaty obligations. There was, therefore, a total sum of \$96,763.18 appropriated.

The disbursement schedules in the Accounting Report show that only \$83,607.24 of the appropriated funds were disbursed pursuant to the 1863 Treaty leaving a balance of \$13,155.94 for which the Indian Agent failed to account. Although the Indian Agent's surety paid \$2,000.00 to defendant in settlement of an alleged misappropriation of funds, there is no showing that any of the amount recovered was disbursed to fulfill the 1863 Treaty obligations. In the absence of any proof of disbursement no credit can be given the defendant for any part of the \$13,155.94.

Defendant contends that an additional \$25,728.67 was expended for the benefit of plaintiff together with other Shoshone bands. Defendant states that no records are available to establish what amounts, if any, of the \$25,728.67 were actually expended for plaintiff's sole benefit. However, defendant alleges that at the time the \$25,728.67 was appropriated approximately \$5,000.00 was owing from 1863 Treaty obligations and that approximately \$11,000.00 was owing from different treaty obligations to other Shoshone bands. Defendant suggests that an amount equal to 5/11ths of the \$25,728.27 or \$11,694.85 should be considered to have been expended for plaintiff's benefit in fulfillment of the 1863 Treaty obligations. The amount thus due plaintiff according to the defendant's theory would be \$4,697.91. We cannot accept this mathematical resolution of a difficulty arising from the defendant's inadequate records of disbursement of these funds. In the absence of records showing that any part of the \$25,728.27 was expended in fulfillment of the 1863

Treaty obligations or disbursed for plaintiff's sole benefit, the Commission will not allow defendant any credit under this item.

In summary the defendant has established that only \$83,607.24 was disbursed to plaintiff in fulfillment of a \$100,000.00 obligation. There remains a balance of \$16,392.76 which is due and owing plaintiff under this Exception. However, our rulings on other exceptions as to specific items appearing in the accounting might alter this \$16,392.76 figure. Our eventual rulings on other matters, such as Exception 4, may also involve an overlapping of payments or require other adjustments. Accordingly, we will not at this time enter summary judgment on this Exception.

Plaintiff also seeks interest on certain of the deficiencies under this exception. The claim is based on trust theories and/or a taking of funds within the meaning of the Fifth Amendment of the Constitution. Defendant did not respond to plaintiff's arguments beyond a general denial of liability. We are not prepared at this time to rule on the issue of interest. We believe the parties should elaborate on their contentions on this issue, particularly concerning the basis for classifying moneys appropriated to satisfy treaty obligations as trust funds. Accordingly, we will hold our decision on the interest question in abeyance to permit the parties to research the question more fully.

Exception No. 3

Plaintiff takes exception to certain 1863 Treaty disbursements made under a number of categories. Article VII of the 1863 Treaty required defendant to pay plaintiff "annually ... the sum of five thousand dollars in such articles, including cattle for herding or

other purposes, as the President of the United States will deem suitable for their wants and conditions, either as hunters or herdsmen." (Emphasis supplied) The expenditures to which plaintiff takes exception are as follows:

Clearing, breaking and fencing land	\$ 120.00
Pay of farm laborers	355.75
Medical expenses, including pay of physician	1,330.72
Miscellaneous agency expenses	392.63
Paid for blacksmithing	5.50
Pay of Clerk	783.61
Pay of farmer	6,677.13
Pay of inspector	12.40
Pay of interpreter and manager	245.00
Presents to Indians	<u>8.00</u>
Total	\$9,930.74

Plaintiff contends that the above items do not constitute "articles" within the meaning of Article VII of the 1863 Treaty. We agree with plaintiff. None of the above described payments can be construed as fulfilling the specific obligations of the United States undertaken under Article VII of the 1863 Treaty. Using the annuity payments to pay for the employees enumerated above cannot be construed as "articles." The expenditures for clearing land, agency expenses, medical expenses, and presents to Indians likewise do not fit the treaty requirements for the annuity payments.

Since these items may also involve an overlapping with items

covered by rulings under other exceptions, we will withhold entry of judgment on this exception. Plaintiff has also raised the issue of interest. For the same reasons set forth in Exception 2 we will hold any decision on this question in abeyance to permit the parties to elaborate on their contentions on this issue.

Exception No. 4

In Exception No. 4, plaintiff argues that it was wrongfully forced to perform services as a condition precedent to receiving its annuities under the 1863 Treaty. In support of this argument, plaintiff points to §3 of the Act of March 3, 1875 (18 Stat. 449), which reads:

That for the purpose of inducing Indians to labor and become self-supporting, it is provided that hereafter, in distributing the supplies and annuities to the Indians for whom the same are appropriated, the agent distributing the same shall require all able-bodied male Indians between the ages of eighteen and forty-five to perform service upon the reservation, for the benefit of themselves or of the tribe, at a reasonable rate, to be fixed by the agent in charge, and to an amount equal in value to the supplies to be delivered; and the allowances provided for such Indians shall be distributed to them only upon condition of the performance of such labor, under such rules and regulations as the agent may prescribe: Provided, That the Secretary of the Interior may, by written order, except any particular tribe, or portion of tribe, from the operation of this provision where he deems it proper and expedient. (Emphasis added)

The statute relied upon by plaintiff appears to be mandatory. The plaintiff has submitted an excerpt from the report of the Commissioner of Indian Affairs for 1875, in which, speaking of Indian tribes in general, it was stated:

Congress, at its last session, recognizing the propriety that Indians, like other people, should toil for what they have, directed that all annuities should hereafter be paid only in return for some form of labor, giving, however, to the Secretary of the Interior discretion which allows the exemption of certain tribes from the operation of this restriction. This eminently wise legislation has been of great avail to the Bureau

during the year in enforcing industry. While in some cases it has excited hostility and produced slight disturbance, it has on the whole worked with eminent satisfaction.

The question has been raised by the Indians, and sometimes by their friends, as to the right of the Government to compel them to labor as a condition antecedent to receiving that which the Government has promised to give them, and without any such restriction being named in the promise. But when it is recollected that the Indian actually receives that which the Government has promised him, and enjoys beside the benefit of all the labor he performs, not only in its moral effect in promoting habits of industry, but also in the improvements made and crops raised, there can be no hesitation as to the positive benefit conferred upon the Indian by holding him to this restriction in the enjoyment of his funds.

Plaintiff argues that the Court of Claims holding in Rogue River Tribe of Indians v. United States, 105 Ct. Cl. 495, 64 F. Supp. 339 (1946) is determinative of the issue raised in this exception. Referring to the above quoted provision of the Act of March 3, 1875, and the Commissioner of Indian Affairs Report for 1875, the Court held the 1875 Act to have been a violation of the terms of the Rogue River treaty providing for annuity payments. We do note, however, that the "work" statute did provide that the Secretary of the Interior might, by written order, exempt any particular tribe.

There are some questions raised under this exception, such as:

- (1) Did the Secretary issue an exemption order affecting the plaintiff herein?
- (2) Was Indian labor actually performed by members of plaintiff tribe?

These are questions of interest to this Commission in view of the language of the 1875 statute and in view of the Rogue River case.

The motion for Summary Judgment will be Denied at this time on Exception No. 4, and the defendant is directed to produce any records available touching on the questions just discussed, and any other pertinent facts that might be applicable to the issue raised by this exception.

Exception No. 5

Plaintiff asserts, under Exception No. 5, that it was entitled to interest at the rate of 5% on its tribal fund: "Indian Moneys, Proceeds of Labor, Western Shoshone Indians, Nevada" for the period from March 27, 1899, through December 31, 1930. In support of this assertion plaintiff cites the following:

1. Act of January 9, 1837, 5 Stat. 135, section 3 of which provided that where treaties with Indians provided for the payment to the Indians annually of interest on the proceeds of their ceded lands the Secretary of the Interior should invest those proceeds at no less than 5% interest.

2. Act of September 11, 1841, 5 Stat. 465, section 2 of which provided that all funds held in trust by the United States, and the interest thereon, when not otherwise required by treaty, should be invested in stocks of the United States bearing not less than 5% interest.

3. Act of April 1, 1880, 21 Stat. 70, which authorized the deposit in the United States Treasury of certain Indian trust funds and sums received on account of sales of Indian trust lands and directed that interest should be paid thereon at a rate governed by pertinent treaty or statute.

The Commission is aware of the fact that there is much legislative material bearing on the Congressional intent and scope of

the cited statutes. There are also other pertinent statutes affecting the status of Indian funds and the question of the payment of interest thereon. We believe that all this material should be made a part of the record in this case.

The motion for summary judgment will be denied as to Exception No. 5, and the parties are directed to fully research the pertinent statutes and legislative materials relating to the "Indian Moneys, Proceeds of Labor, Western Shoshone Indians, Nevada" fund.

Exception No. 6

Plaintiff states that the Accounting Report is insufficient because it fails to show whether interest bearing funds held by defendant were covered into the U. S. Treasury within 30 days after receipt. Plaintiff points out that the case of Menominee Tribe v. United States, 107 Ct. Cl. 23, 67 F. Supp. 972 (1946) requires defendant to cover interest bearing funds into the Treasury within 30 days. Plaintiff urges that defendant be ordered to amend the Accounting Report to show the dates of the receipts and deposits of the Indians' interest bearing funds. Defendant denies that interest bearing funds were untimely covered into the Treasury.

The United States has an obligation to show when interest bearing funds were deposited in plaintiff's account. The defendant has in its possession the pertinent records, and the plaintiff is entitled to the information contained therein. Southern Ute Tribe v. United States, 17 Ind. Cl. Comm. 28, 56-57. ^{1/}

^{1/} This issue was not involved in defendant's appeal to the Court of Claims.

Accordingly, plaintiff's motion for partial summary judgment is granted respecting Exception No. 6, and defendant will be ordered to amend the Accounting Report to show the length of time interest bearing funds were held before they were covered into the Treasury.

Exception No. 7

Under this exception plaintiff seeks to have the defendant's Accounting Report supplemented to indicate the length of time which elapsed between each withdrawal from the Indian's interest bearing accounts and the actual disbursement of such funds. The Accounting Report does not reveal the length of time that plaintiff's funds were withheld from interest bearing status to the credit of defendant's disbursing agents prior to expenditure. Whether these funds were spent with reasonable promptness or not cannot be determined from the accounting submitted by defendant. Plaintiff is entitled to the requested information Southern Ute Tribe case, supra, at page 57.

Accordingly, plaintiff's motion will be granted respecting Exception No. 7 and the defendant will furnish the information concerning the dates of withdrawal and subsequent disbursements from plaintiff's interest bearing accounts.

Exception No. 8

Plaintiff's contention under this exception concerns an alleged loss of interest occasioned by expenditures from the plaintiff Indians' interest bearing accounts when non-interest bearing funds were available and should have been used first. The issue involved was ruled upon by the Court of Claims in Menominee Tribe v. United States, 101 Ct. Cl. 10

(1944) wherein it was stated at page 21:

We conclude, therefore, that to whatever extent the Secretary of the Interior could have, in the course of prudent management of the affairs of the Indians, and without impairing funds which he reasonably thought it was necessary to keep supplied for the purpose of meeting authorized expenditures, used the non-interest-bearing funds or those bearing the lower rate of interest, and instead used funds bearing interest, or a higher rate of interest, the Government is under a duty to pay to the plaintiffs the interest thereby lost by them.

The Accounting Report lists by years the disbursements which may be involved in this matter. Accordingly, it is not possible for plaintiff to determine the amount of interest which it claims was lost by the alleged imprudent management.

Plaintiff's motion will be granted as to this exception, and defendant will furnish appropriate information concerning the exact dates when the funds involved were acquired, the exact dates of the disbursements, and data which will reveal the credit balances in available non-interest bearing accounts when, if as alleged, disbursements were being made from interest bearing funds. Southern Ute case, supra, at pages 60, 61.

Exception No. 9

Plaintiff contends that the accounting is deficient in that it does not establish that goods, if purchased, actually were delivered to the Indians or that services, if rendered, were for the benefit of plaintiff. The law has required that the Indian agents report the number of Indians present and the number actually receiving any issue

of food, clothing, and supplies, Act of February 14, 1873 (17 Stat. 463).

Insofar as the required records may be still available the defendant should produce them. Accordingly, to that extent, plaintiff's motion for summary judgment on this exception will be granted.

Exception No. 10

Plaintiff objects to an "obvious omission" in that the accounting does not show, with respect to goods purchased for plaintiff with its tribal funds, any credits to plaintiff's funds for undelivered, spoiled or rejected goods or for goods sold or delivered to government employees or individual Indians. Because of the isolated location of the plaintiff Indians, the existing transportation difficulties, the needs of the federal personnel at the reservation outposts, and other related factors, plaintiff considers it virtually inconceivable that none of the Indians' goods was diverted, spoiled or rejected.

To the extent that there are records reflecting the information desired by plaintiff, the defendant should produce them. Plaintiff's motion for summary judgment on this exception will be granted, and defendant will produce such information as may be available on the objections raised by plaintiff.

Exception No. 11

Plaintiff alleges that funds from its account "Indian Moneys, Proceeds of Labor, Western Shoshone Indians, Nevada," were expended by defendant for administrative purposes. The money in this account included funds obtained through the management and development of plaintiff's economic resources. Defendant was the trustee of this

account and as such was governed by the legal duties which a trustee owes to his cestui que trust. See Sioux Tribes v. United States, 105 Ct. Cl. 725, 64 F. Supp. 312 (1946), cert. denied 329 U.S. 680 (1946).

The Accounting Report lists administrative expenses for the welfare and upkeep of the Indian Agency which were paid from plaintiff's trust account. Defendant offers no explanation for expending these funds for administrative purposes. The goods and services wrongfully charged to plaintiff's trust account are as follows:

Agency building and grounds maintenance and repairs	\$ 1,587.20
Miscellaneous agency expense	9,785.37
Miscellaneous building material	2,046.61
Pay of agency personnel - Clerk, Cook, Laborer, Line Rider, Painter, Plumber	67,481.16
Roads and bridges	2,926.64
Unidentified items	11,483.07
Automobiles, vehicles maintenance and repair	21,571.68
Household equipment and supplies	<u>1,864.18</u>
Total expended for Administrative Purposes	<u>\$118,745.91</u>

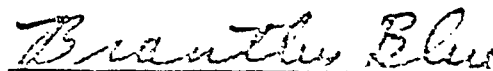
Plaintiff is entitled to recover this total sum of \$118,745.91.

Plaintiff also seeks interest from the dates of withdrawal of the various sums which comprise the total amounts in each of the above enumerated categories. The account in question was established pursuant to the Act of March 3, 1883 (22 Stat. 582, 590), as amended by the Act of March 2, 1887 (24 Stat. 463), and the Act of May 17,

1926 (44 Stat. 560). Section 2 of the Act of June 13, 1930 (44 Stat. 584) requires simple interest on and after July 1, 1930, at the rate of 4 per centum per annum on all tribal funds (with balances exceeding \$500.00) arising under the Act of March 3, 1883, supra, as amended by the Act of May 17, 1926, supra, and included in the fund "Indian Money, Proceeds of Labor."

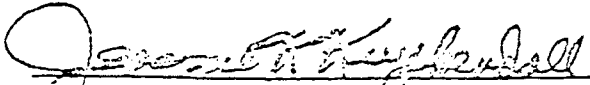
The plaintiff is entitled to simple interest at the rate of 4% on and after July 1, 1930, in the categories listed above. We are holding in abeyance any determination as to a possible award of interest on withdrawals prior to that date. A resolution of this question will depend on our ruling as to the effect of the various statutes involved in Exception No. 5. Accordingly, the plaintiff's motion will be granted as to the items totaling \$118,745.91 plus simple interest at the rate of 4% per annum on and/or after July 1, 1930, for the withdrawals made under the various categories comprising the said \$118,745.91. The motion will be denied as to the claim of interest prior to July 1, 1930, and the parties will, as previously stated, submit further information on the pertinent statutes and legislative materials relating to this fund.

Accordingly, an order will be entered granting in part and denying in part plaintiff's motion for partial summary judgment, and this case will proceed to a hearing on those matters which we have outlined above.



Brantley Blue, Commissioner

Concurring:




Jerome K. Kuykendall, Chairman



John T. Vance, Commissioner

Richard W. Yarborough, Commissioner



Margaret H. Pierce, Commissioner