Boyden, John S., 7-13-1973, Exceptions (re: GSA Accounting Report, 1966), Docket 196 Count 9. RG 279, Records of the Indian Claims Commission, Box 1865, file 2, Hopi Tribe 196, Original Papers. National Archives, Washington, D.C.

ORIGINAL
INDIAN CLAIMS COMMISSION

Before the

INDIAN CLAIMS COMMISSION

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INDIAN CLAIMS COMMISSION

THE HOPI TRIBE, an Indian Reorganization Act Corporation, suing on its own behalf and as a representative of the Hopi Indians and the Villages of FIRST MESA (Consolidated Villages of Walpi, Shitchumovi and Tewa), MISHONGNOVI, SIPAULAVI, SHUNGOPAVI, ORAIBI, KYAKOTSMOVI, BAKABI, HOTEVILLA and MOENKOPI, Plaintiff,	Docket No. 196 Count 9
v.	
THE UNITED STATES OF AMERICA, Defendant.	

EXCEPTIONS

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INDIAN CLAIMS COMMISSION

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Plaintiff,	)	Docket No. 196 Count 9
v.	)	
THE UNITED STATES OF AMERICA,	)	
Defendant.	)	

EXCEPTIONS

I. Introduction

This action for a general accounting was filed with the Indian Claims Commission as Count 9 (Paragraphs 32-36) of Docket No. 196. Counts 5,6,7, and 8 of the petition, although in the nature of accounting for rentals for the use of certain of plaintiff's lands, are being litigated in connection with land claims, and are not covered by these exceptions.[1/] In response to Count 9, the General Services Administration (GSA) filed

1/ The scope of the entire accounting will ultimately be determined by the Commission's decisions relative to the extent of Hopi land title both extinguished and extant. It is for this reason that plaintiff delayed filing of these exceptions. When final determination of the extent of Hopi land title has been made, supplemental exceptions will be filed, if necessary.

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an accounting report in two volumes covering disbursements from fiscal year 1872 through fiscal year 1951. Only Part One and a portion of Part Five of the report relate to the claim for an accounting; the bulk of the report was submitted as the basis for possible offsets against any claim which the plaintiff might establish against the defendant.

II. Duty to Account

The courts have consistently held that the government has a fiduciary duty to its Indian wards when it assumes control over their funds and other properties. In Seminole Nation v. United States, 316 U.S. 286, 297 (1942), the Supreme Court declared that in its dealings with the Indians, the government should be judged by "the most exacting fiduciary standards." In Menominee Tribe v. United States, 101 Ct.Cl. 10, 19-20 (1944), the court considered it "settled doctrine that the United States as regards its dealings with the property of the Indians, is a trustee," whose conduct is to be tested "by the standards applicable to a trustee." In Iowa Tribe v. United States, 2 Ind.Cl.Comm. 167, 176 (1952), the Commission stated that:

> "While many of the obligations of defendant would seem to be contractual rather than fiduciary, the fact is that in its dealings

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> with the tribe the defendant kept the only records of these transactions as a self-imposed duty to its illiterate and incompetent wards and thereby became accountable to them for the manner in which it discharged its treaty, other assumed and Congressionally imposed obligations...."

In Navajo Tribe v. United States, 176 Ct.Cl. 502, 364 F.2d 320 (1966), where the United States was "responsible for supervision of the affairs of the tribe, including, in particular, supervision of oil and gas leases on tribal property," the court held that in judging the conduct of the government in such a situation "the most exacting fiduciary standards" must be applied (id. at 507).[2/]

As trustee of the moneys and properties of the plaintiff tribes, defendant has a duty to account to plaintiff for its administration:

> "The principle is firmly established that trustees, guardians, executors, or agents are bound to keep clear, distinct, and accurate accounts, and to render them whenever legally demanded." 3/

2/ See also, Creek Nation v. United States, 16 Ind.Cl.Comm. 431, 465-469 (1965) (Government held to standard of fiduciary with respect to its stewardship of Indian tribal land which was conveyed to third parties); Oneida Tribe v. United States, 165 Ct.Cl. 487, 493 (1964) (Government held to be under a special relationship and special responsibility to safeguard Indian timber); Ottawa and Chippewa Indians v. United States, 42 Ct.Cl. 240, 246 (1907) (Government liable as a "trustee" with respect to its handling of government securities). See also, Mason v. United States, 198 Ct.Cl. 599, 461 F.2d 1364 (1972), rev'd other grounds, ___ U.S. ___ (June, 1973).

3/ Richardson v. Van Auken, 5 App. D.C. 209, 215 (1895). See also, Bogert, Trusts and Trustees, § 961 (1962) (Cont'd)

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The burden is upon the trustee to provide sufficient information to allow the beneficiary to determine whether his property has been adequately managed:

> "[t]he onus is upon [the trustees] to show how the estate entrusted to them has been administered or applied, and how, and to what extent, they are entitled to acquittance. If full and accurate accounts have not been kept, all presumptions are adversely indulged, and all obscurities and doubts are to be taken most strongly against them." 4/

In Sioux Tribe v. United States, 105 Ct.Cl. 725, 802 (1946), the Court of Claims stated that

> "[t]he primary duty to so classify and report as to the nature and amount of disbursements rest[s] on defendant.... The defendant is the trustee; it kept and has all the records and evidence, and it has the burden of making a proper accounting."

This Commission has clarified the defendant's duty to account. It noted in Mescalero Apache Tribe, et al v. United States, 23 Ind.Cl.Comm. 181, 185 (1970) that:

3/ and In Re Pittsburgh Rys. Co., 117 F.2d 1007, aff'd 312 U.S. 168 (1941), where the court stated that

> "[t]here is no more fundamental duty imposed on those who hold property for others than that of rendering an account of its management...." (Id. at 1008.)

4/ Richardson v. Van Auken, 5 App. D.C. 209 at 215 (1895).

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> "The burden is on the United States to provide a report in such detail, from all available data, so that it may be readily ascertained whether plaintiffs' funds were properly managed. It is not up to plaintiffs to cull through raw data to arrive at this conclusion."

It is the plaintiff's contention that defendant's accounting report does not meet the requirements laid down by the court or this Commission.

III. Exceptions

Plaintiff, the Hopi Tribe, takes exception to defendant's accounting in the following respects:

Exception No. 1. The accounting is incomplete on its face. Although completed March 14, 1966, it observes a cut-off date of June 30, 1951.

Authority. In Southern Ute Tribe v. United States, 17 Ind.Cl.Comm. 28 (1966), the Commission noted that its decision in Kiowa, Comanche and Apache Tribes v. United States, 5 Ind.Cl.Comm. 72 (1957), established the right of the defendant to present claims for gratuitous offsets beyond the cut-off date for filing cases before the Commission. The Commission then reasoned (p. 65):

> "Since this is a matter wherein defendant will be under the necessity of accounting further for its handling of petitioner's money and the issues are not yet closed by decision of the Commission it is our opinion that defendant should bring its accounting up

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> to the date of the judgment herein. This would be equivalent to the right of defendant to assert offsets to the same date. Since our act is silent as to both questions it appears equitable that both parties be treated the same with respect to the offsets of defendant and the accounting due petitioner."

In Gila River Pima-Maricopa Indian Community v. United States, 135 Ct.Cl. 180 (1956), 157 Ct.Cl. 941 (1962), the United States Court of Claims reached the same conclusion for different reasons. The Gila River Pima-Maricopa Indians filed in the Indian Claims Commission a petition seeking, inter alia, an accounting. That petitioner filed identical claims in the Court of Claims. The petitions alleged continuing wrongs; the petition in the court was intended to cover damages that accrued subsequent to the passage of the Indian Claims Commission Act. On defendant's motion to the court for summary judgment on the pleadings, the court in 1956 held seven of the claims and the accounting in abeyance pending the Commission's action on the claims, noting, however (135 Ct.Cl. at 185):

> "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." (Emphasis added.)

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Thereafter, in 1962, without waiting for the Indian Claims Commission to act, the Court of Claims dismissed the Pima-Maricopa petition filed in that court on the ground that the jurisdiction of the Indian Claims Commission includes all injuries suffered by a petitioner as a result of a continuing wrong when "the allegedly wrongful acts of the defendant first accrued, if at all, prior to 1946." 5/

Exception No. 2. The accounting shows on its face that funds are due plaintiff by reason of defendant's failure to credit interest to trust funds.

Authority. The defendant set up several accounts in the Federal Treasury, in which tribal funds were deposited, namely Indian Moneys, Proceeds of Labor, Hopi Agency, deposits made August 31, 1918 through June 28, 1951 in the amount of $155,046.71, (GSA Report, pp. 228-234); Indian Moneys, Proceeds of Labor, Hopi Agency, Sheep Dipping, $4,463.25 deposited 1939 through 1948 (GSA Report, p. 235); Indian Moneys, Proceeds of Labor, Hopi Agency Telephone, April 30, 1938 through March 14, 1951 in the amount of $2,720.95 (GSA Report, pp. 235-236); Indian Moneys, Proceeds of Labor,

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5/ See also, Fort Peck Indians v. United States, 28 Ind.Cl. Comm. 171, 174-175 (1972); Te-Moak Bands v. United States, 23 Ind.Cl.Comm. 70, 71-72 (1970); Mescalero Apache Tribe, et al. v. United States, 23 Ind.Cl.Comm. 181, 185-186 (1970).

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Hopi Agency, Traders Regulation, December 31, 1937 through June 28, 1951 in the amount of $5,158.51 (GSA Report, pp. 237-238); and Indian Moneys, Proceeds of Labor, Hopi School, deposits December 1, 1899 through June 28, 1951 in the amount of $51,210.59 (GSA Report, pp. 238-244); Proceeds of Labor, Hopi Indians, Arizona, deposits August 30, 1919 through July 17, 1951 in the amount of $376.76 (GSA Report, pp. 244-246). Defendant paid no interest on any of these funds. This failure to pay interest was contrary not only to the obligation which the defendant bore as trustee of these funds which it held on behalf of the plaintiff, but also it was contrary to the specific statutes adopted by the defendant governing tribal funds. By the Act of September 11, 1841, 5 Stat. 465, R.S. § 3659, 31 U.S.C. § 347(a), the defendant promised that Indian trust funds held by the United States and the annual interest accruing thereon should be invested in stocks of the United States, bearing interest at 5 percent.[6/] Since, however, most of the deposits of Hopi funds in the Federal Treasury occurred subsequent to 1918, it must be noted that the Act of May 25, 1918, 40 Stat. 561, 591, codified at 25 U.S.C. 162, authorized the Secretary of the

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6/ The legislative history of this statute was discussed at length in Memorandum on Legislative History, Congressional Acts Pertaining to Indian Trust Funds in Connection With The Te-Moak Bands v. United States, Docket No. 22-G, et al., pp. 56-68. The Memorandum, filed June 1, 1971, is incorporated by reference as an appendix to these exceptions and is referred to herein as "Legislative History."

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Interior to deposit in state banks tribal trust funds "on which the United States is not obligated by law to pay interest at higher rates than can be procured from the banks" or "if he deems it advisable and for the best interest of the Indians, [the Secretary] may invest the trust funds of any tribe ... in United States Government bonds." Tribal funds required for support of schools or pay of tribal officers was excepted from deposit or investment.[7/] In connection with the 1918 statute, it is notable that in 1926 the Controller General ruled that interest accruing on funds deposited in banks pursuant to the 1918 act "should become a part of the principal amount thereof."[8/]

By Act of February 12, 1929, 45 Stat. 1164, amended June 13, 1940, 46 Stat. 584, 25 U.S.C. 161(a)-(d), Congress provided for payment of interest on all money in excess of $500 held by the United States in a trust fund account and carried on the books of the Treasury Department to the credit of an Indian tribe, if the payment of interest thereon was not otherwise authorized by law, requiring payment of simple interest at 4 percent.[9/]

7/ For discussion of this statute, see Legislative History, pp. 81-86.

8/ H. Rept. 897, 69th Cong., 1st Sess., Legislative Report, App. B, No. 57.

9/ See, Legislative History, pp. 89-93.

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By Act of June 24, 1938, 52 Stat. 1037, 25 U.S.C. 162(a), the Congress repealed the 1918 statute and substituted therefor a statute giving the Secretary of the Interior greater latitude in dealing with tribal trust funds to make them as productive as possible. The 1918 act had limited the Secretary's authority to deposit the funds of a given tribe to state banks within the state where that tribe resided. The 1938 act extended the authority to all state banks (with proper safeguards to insure the deposits) and widened the choice of investments open to the Secretary to include any public debt obligation of the United States and any bonds, notes or other obligations which are unconditionally guaranteed as to both interest and principal by the United States.[10/] The Hopi funds, however, were totally unproductive.

The defendant should account to the plaintiff for the interest lost by the plaintiff by reason of the defendant's failure to take advantage of any of these options to make the Hopi funds productive.

In order that the amount of interest which should have been paid might properly be determined, defendant should be ordered to supplement its accounting report[11/] by supplying the following information:

10/ See Legislative History, pp. 94-96.

11/ Fort Peck Indians v. United States, 28 Ind.Cl.Comm. 171, 184-185 (1972).

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(1) As to revenues, the dates when funds were received and the dates when they were deposited to plaintiff's accounts in the Treasury;[12/]

(2) The dates when funds were removed from plaintiff's accounts to pay obligations, the precise nature of such obligations and the dates on which they were paid;[13/]

(3) The state of the accounts on an annual or other periodic basis so that the interest which should have been earned may be calculated.

Exception No. 3. Defendant's accounting for miscellaneous revenue (GSA Report, p. 9) is totally inadequate.

Authority. Except for sale of coal, for which defendant accounts by fiscal year, tons and unit price (GSA Report, pp. 11-13), defendant's accounting for revenue is completely inadequate. Even as to the coal sales, the information given is insufficient on which to make a determination of adequacy of consideration. The Report gives neither location of the mines nor grade of the coal disposed of in the sales nor any other information necessary or helpful to determine whether the sales were proper management of plaintiff's coal assets. As to the balance of the revenues

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12/ Menominee Tribe v. United States, 107 Ct.Cl. 23, 32-33 (1946), followed by the Commission in Te-Moak Bands v. United States, 23 Ind.Cl.Comm. at 70-80; Mescalero Apache Tribe v. United States, 23 Ind.Cl.Comm. 181, 182-183 (1970).

13/ Te-Moak Bands at 79.

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some 33 years of revenues are listed in the most general of terms, and apparently do not include all tribal revenues. For example, the House Report 2503 (1952), Materials, Laws and Treaties Affecting Indians (p. 387), notes that the Hopis had a tribal ram distribution enterprise and a tribal livestock breeding enterprise which are not reflected in the Report. The defendant in no way accounts for rights-of-way through or on plaintiff's lands for railway, telegraph or telephone lines or for construction, operation or maintenance of such lines or offices, or construction, operation or maintenance of pipelines for conveyance of oil and gas, although notice was given to defendant by plaintiff of the need for such information in its petition, pages 7-8, reciting the statutes under which defendant has arrogated unto itself the right to grant such rights-of-way and other interests in plaintiff's land to third persons for plaintiff's benefit.

With respect to plaintiff's property other than money, defendant should be ordered to provide a supplemental accounting containing all relevant data including information relating to funds handled by field offices, from which plaintiff may ascertain whether its properties were properly managed by the defendant (Mescalero Apache v. United States, 23 Ind.Cl.Comm. 181 (1970)), including, but not limited to:

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(1) As to plaintiff's lands available for leasing for the purpose of grazing or mining, a statement showing whether such leases were executed and, if so, the dates of the leases, the lessees, location of the lands, the nature of the minerals and the acreage and periods involved, and the income received from such leases;

(2) As to rights-of-way through or on plaintiff's lands for railway, telegraph, or telephone lines, or for the construction, operation or maintenance of such lines or offices, or for the construction, operation or maintenance of pipelines for the conveyance of oil and gas, a statement showing whether such rights-of-way were granted, and, if so, the dates of the grants, their purpose, the grantees, the acreage and term involved, the amount of compensation or tax assessed, if any, and the reason for not requiring compensation or tax where none was required (Fort Peck Indians, 28 Ind.Cl.Comm. at 186);

(3) As to plaintiff's lands, whether the defendant conveyed any of plaintiff's land to railroads operating on plaintiff's reservation for reservoirs, material, or ballast pits, or for the purpose of planting trees to protect its line;

(4) Dates and nature of all transactions which produced funds which were deposited in plaintiff's principal account;

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(5) Whether the sums deposited in the account represent the entire proceeds derived from the transactions which produced them or net proceeds after deduction by the defendant of administrative or other charges or expenses;

(6) The amounts and character of and the authority for any charges made by the defendant.

Exception No. 4. The accounting is deficient in its statement of disbursements.

Authority. The defendant should supply the meaning and content of the terms and categories used in the Report. (Fort Peck Indians v. United States, 28 Ind.Cl.Comm. at 191-192.) Although some categories such as "Agency buildings and repairs" (GSA Report, p. 6) seem clearly to be an agency expense which should not have been taken from tribal funds (Sioux Tribe v. United States, 105 Ct.Cl. 725, 780-785 (1946); Cherokee Nation v. United States, 102 Ct.Cl. 720, 766-768 (1945)), it is impossible to determine from the categories used in the Report whether ultimate benefit from the use of the funds was enjoyed by the tribe or the government or by some third person. Defendant should submit proof that plaintiff actually received the goods charged to their account. (Six Nations v. United States, 23 Ind.Cl.Comm. 376, 380 (1970); Te-Moak Bands, 23 Ind.Cl.Comm. at 81-82.)

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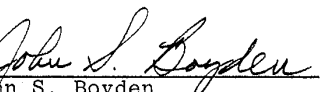
Exception No. 5. The accounting contains insufficient description of the several funds set up in the Federal Treasury in the name of the plaintiff.

Authority. As noted, pages 7-8, supra, the defendant shows a number of different funds "Indian Moneys, Proceeds of Labor, Hopi Agency, Hopi School, Hopi Indians." Examination of income and expenditure from "Indian Moneys, Proceeds of Labor, Hopi Agency Telephone" (GSA Report, pp. 15, 35) indicates that although laborers and line men were paid from this fund and $1,278.52 remained on hand, construction of telephone lines and expenses of the telephone system (GSA Report, pp. 6-7) apparently came from some other fund. It is impossible to determine from the present report whether funds were properly expended.

Respectfully submitted,



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