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 4, 1974

Appearances:

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

Craig A. Decker, with whom was Assistant
Attorney General Wallace H. Johnson,
Attorneys for Defendant.

OPINION ON MOTION FOR REHEARING

Blue, Commissioner, delivered the opinion of the Commission.

The plaintiff, Western Shoshone Nation, has filed a motion for rehearing directed to our decision in this docket of October 4, 1973 (31 Ind. Cl. Comm. 427).[1/] There are three things the plaintiff asks us to do:

1/ The other plaintiff involved in the decision of October 4, 1973, the Mescalero Apache Tribe, Docket 22-G, has not joined in the present motion. The defendant has already filed notice of appeal in Docket 22-G.

(1) Rule that the defendant is liable to it for not investing the interest earned on the Western Shoshone's separate "Proceeds of Labor" account established in 1930.

(2) Reverse our ruling that shortages in payments under treaties are not trust funds within the meaning of the Act of September 11, 1841, 31 U.S.C. § 547a.

(3) Rule that the defendant is liable for lost income, if at any time after 1930 the plaintiff's Proceeds of Labor fund could have been invested in authorized securities yielding interest at a higher rate than the 4 percent paid by the treasury.

The defendant opposes all three aspects of the motion.

The plaintiff has also filed supplemental exceptions to the defendant's accounting. Pursuant to leave granted, the defendant answered these exceptions on March 28, 1974. The present opinion does not deal with issues raised for the first time by the answer.

In Part IV of this opinion we present a calculation of the damages due to the Western Shoshone Nation under our October decision.

The first three parts of this opinion dispose of the three aspects of the plaintiff's motion for rehearing.

I.

Investment of non-interest-bearing funds made up of interest on Proceeds of Labor fund.

In our October opinion we declined to adjudicate the question of the Government's duty to invest the non-interest-bearing fund made up of interest paid upon the plaintiff's Proceeds of Labor fund, because

of the plaintiff's failure to raise the question by appropriate exception. The first supplemental exception supplies the deficiency. This exception, designated No. 12 to preserve the sequence with the original 11 exceptions, applies both to the non-interest-bearing treasury accounts and to the interest-bearing accounts which the plaintiff contends in the third part of its motion could have been invested outside the treasury for a greater return. It reads as follows:

> Defendant failed to invest funds in the Treasury held for the benefit of plaintiff and not earning interest equal to what that fund could have earned if invested in United States government securities or deposited in state banks pursuant to the Acts of May 25, 1918, 40 Stat. 561, 591, and June 24, 1938, 52 Stat. 1037.

Defendant answered the supplemental exceptions only on March 28, 1974, raising several issues of law and perhaps also of fact. Obviously, it is too early to adjudicate the supplemental exceptions. On the state of the record existing when it was rendered, our October 4 decision was correct in regard to the question of reinvestment of the Proceeds of Labor interest. It will not be disturbed at this time. 2/

Part I of the motion for rehearing is denied.

II.

Shortages in treaty payments as trust funds.

We stated in our October opinion, "The cases indicate that shortages in payments required by treaty are ordinarily regarded as breaches of

2/ The plaintiff suggests we should consider the question of the defendant's duty to invest IMPL interest as an issue tried by express or implied consent of the parties within the meaning of Commission Rule 13(b), 25 C.F.R. § 503.13(b), because it was argued in the briefs filed before our October 4 decision. Those briefs, however, applied to nine other accounting cases besides Te-Moak and Mescalero Apache. In one or more of those cases the question was appropriately raised by exception and will be decided by the Commission in due course.

contractual obligation rather than as breaches of trust." After quoting an opinion of the Comptroller General (A-27307 of September 30, 1929), which distinguished Indian trust funds from unexpended balances of appropriations for particular objects contemplated by Indian treaty, we stated (31 Ind. Cl. Comm. 543):

> The plaintiffs have given us no reason to reexamine the law upon this point.

What we wrote was literally true; the plaintiffs did not brief their contention that moneys appropriated to satisfy treaty obligations are trust funds; and we considered the contention effectively abandoned. The present plaintiff now strongly urges us to reconsider and change our ruling.

What is really at issue in this case is not the abstract question of the trust status of treaty appropriations, but the very specific question of whether this plaintiff is entitled to interest on shortages in the payments due to it under the Western Shoshone Treaty of October 1, 1863, 18 Stat. 689. One of the theories the plaintiff urged in support of its claim to interest was that the treaty appropriations were trust funds within the meaning of the Act of September 11, 1841, 31 U.S.C. § 547a. In October we did not think they were, and we still do not.

We found the meaning of the phrase in the 1841 law, "funds held in trust by the United States," largely by examining what the Government documents of the day referred to as trust funds. See 31 Ind. Cl. Comm.

443-47, 453-57. Most of these funds were created by law as express trusts. A few were set up by administrative action. But all of them, whether de jure or de facto, shared the common characteristic of being active trusts in actual existence. 3/

In contrast, the appropriations to fulfill the 1863 treaty were

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3/ The quotation from the Comptroller General's 1929 decision given in our October opinion, 31 Ind. Cl. Comm. at 542, would require a specific provision of law to create a trust fund out of appropriated moneys. Historically this has not always been true. The Chippewa, Ottawa, and Pottawatomie mill fund, described at pages 445-46 of our earlier opinion, was set up by the Commissioner of Indian Affairs in 1837 without any clear-cut legal authority. Even one of the accounts identified as a trust fund in the Comptroller General's decision itself (5X065.5 "Payment to Indians of Fort Belknap Reservation, Montana, for Lands") appears to have been set up by administrative action. It consisted of the consideration paid by the United States for school sections in the reservation which it granted to the State of Montana by the Act of March 3, 1921, c. 135, 41 Stat. 1355, a statute without trust provisions. See Blackfeet Tribes v. United States, 32 Ind. Cl. Comm. 65, 124 (1973).

The Comptroller General's decision is good authority for the proposition that unexpended balances of appropriations to fulfill Indian treaties are not ipso facto trust funds, but not for the proposition that a specific or express provision of law is always necessary to create an Indian trust fund.

never required by law to be set up as trust funds,[4/] nor actually set up as such by administrative action. The 1841 act, in our opinion, did not extend to them.

4/ The treaty language is devoid of any implication of a trust (18 Stat. 690):

> . . . The United States promise and agree to pay to the said bands of the Shoshonee nation parties hereto, annually for the term of twenty years, the sum of five thousand dollars in such articles, including cattle for herding or other purposes, as the President of the United States shall deem suitable for their wants and condition, either as hunters or herdsmen.

The appropriation acts are equally devoid of trust language, for example:

Act of March 3, 1865, c. 127, 13 Stat. 541, 557:

> Western Band of Shoshonees.--For first of twenty instalments in such articles, including cattle for herding or other purposes, as the President shall deem suitable for their wants and condition, either as hunters or herdsmen, per seventh article treaty October first, eighteen hundred and sixty-three, for the fiscal year ending June thirtieth, eighteen hundred and sixty-five, five thousand dollars.
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> For second of twenty instalments for same objects for the fiscal year ending June thirtieth, eighteen hundred and sixty-six, five thousand dollars.

Act of July 26, 1866, c. 266, 14 Stat. 255, 272:

> Western Bands of Shoshonees.--For third of twenty instalments, to be expended under the direction of the President in the purchase of such articles as he may deem suitable to their wants, either as hunters or herdsmen, per seventh article treaty October first, eighteen hundred and sixty-three, five thousand dollars.

The same formula, with minor and immaterial variations, was repeated in each appropriation act to and including the Act of March 1, 1883, c. 61, 22 Stat. 433, 443, which provided the twentieth and last installment. See Acts of March 2, 1867, c. 173, 14 Stat. 492, 506; July 27, 1868, c. 248,

We are aware that the Supreme Court held in Quick Bear v. Leupp, 210 U.S. 50 (1908), that moneys appropriated annually by Congress to pay an Indian treaty debt in installments were morally the Indians' own to the same extent as an Indian trust fund. 5/ The question before the Court was whether a congressional policy against making appropriations to educate Indians in sectarian schools applied only to public moneys of the United States, or also extended to the Indians' own moneys in control of the Government. The court held the policy restricted to public moneys. In its further holding that the treaty appropriations fell in the category of Indian money rather than public money, we believe the court was applying the maxim, "Equity regards as done what ought to be done." Since the

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15 Stat. 198, 215; April 10, 1869, c. 16, 16 Stat. 13, 31; July 15, 1870, c. 296, 16 Stat. 335, 351; March 3, 1871, c. 120, 16 Stat. 544, 561; May 29, 1872, c. 233, 17 Stat. 165, 181; February 14, 1873, c. 138, 17 Stat. 437, 454; June 22, 1874, c. 389, 18 Stat. 146, 165; March 3, 1875, c. 132, 18 Stat. 420, 439; August 15, 1876, c. 289, 19 Stat. 176, 190; March 3, 1877, c. 101, 19 Stat. 271, 285; May 27, 1878, c. 142, 20 Stat. 63, 79; February 17, 1879, c. 87, 20 Stat. 295, 309; May 11, 1880, c. 85, 21 Stat. 114, 126; March 3, 1881, c. 137, 21 Stat. 485, 496; May 17, 1882, c. 163, 22 Stat. 68, 79.

Section 5 of the Act of July 12, 1870, c. 251, 16 Stat. 261, R. S. § 3690, was applicable to all installments after the first six. It provided for the lapse of annual appropriations at the end of the fiscal year for which made unless committed to the payment of expenses properly incurred or the fulfillment of contracts properly made during that year. The section did not apply to permanent or indefinite appropriations. Yet the treaty installments continued to be provided by annual appropriations after July 12, 1870, as before. No action was taken to shift them into the form of permanent or indefinite appropriations, or language used to prevent them from lapsing.

5/ The defendant has cited this case to us. The defendant agrees with the plaintiff that there is no significant distinction between treaty appropriations and trust funds. But it contends damages measured by interest should not be awarded on either under authority of the 1841 act, while the plaintiff contends damages should be awarded on both.

treaty appropriations were for payment of a debt owed to the Indians, the court considered the beneficial ownership already transferred, as legal ownership would be upon the actual payment. This was not equivalent to obliterating the distinction between treaty appropriations and trust funds. It was a resort to equitable fiction for the purpose of solving a delicate First Amendment question. In any event, Quick Bear v. Leupp, supra, decided in 1908, sheds no light at all on what the Congress of 1841 may have meant by "funds held in trust by the United States."

Even if the treaty appropriations involved in the instant case were trust funds within the meaning of the 1841 act, plaintiff would not be entitled to interest. The 1841 act requires investment of trust funds only "when not otherwise required by treaty." The Western Shoshone treaty of 1863 required the funds here at issue to be used otherwise than for investment. They were to be paid out annually in goods. In 19 successive appropriation acts Congress reiterated that these moneys were to be used within the fiscal year to purchase articles for the Indians. The treaty and the acts were wholly incompatible with investment.

The 1841 act does not authorize us to award interest against the Government. It merely requires the Government to invest Indian trust funds, unless otherwise required by treaty, in Government securities bearing not less than 5 percent interest. In cases where the Government has failed to comply with the terms of the act, section 1, clause 1, of the Indian Claims Commission Act (25 U.S.C. § 70a) authorizes us to award damages for the resulting loss of interest. But here there was no violation of the 1841 act since the 1863 treaty provided that sums

appropriated in fulfillment of that treaty be used for certain specific purposes, not including investment in Government bonds. Since the 1841 act is not applicable to the 1863 treaty appropriations, plaintiff is not entitled to damages for lost interest on any part of those appropriations, including the parts (i.e., shortages) which have never been paid to it.

Part II of the motion for rehearing is denied.

III.

Failure to withdraw Proceeds of Labor fund from treasury and invest it in securities paying more than 4 percent interest.

The plaintiff asks us to declare that if in the post-1930 period the Western Shoshone Proceeds of Labor fund could have been legally invested at more than the 4 percent provided by the Act of June 30, 1930, 25 U.S.C. § 161b, the defendant is liable for the lost income. For this proposition, plaintiff cites Manchester Band v. United States, No. 50276-CBR (N.D. Cal. June 26, 1973), slip op. pp. 13-14.

We must decline the plaintiff's request for two reasons.

First, the plaintiff appears to be asking us to rule on an academic question. At the present time we do not know if any of the securities legal for the investment of Indian trust funds yielded more than 4 percent during the period 1930-1946. The U.S. Bureau of the Census, Historical Statistics of the United States, Colonial Times to 1957, at 656, for example, shows the average yields on U.S. Government bonds as 3.29 percent in 1930, rising to a high of 3.68 in 1932, falling to a low of 2.05 in 1941, and standing at 2.19 in 1946. The yields never reached 4 percent.

Conceivably, some legal investments for Indian trust funds may have yielded more than 4 percent at some time between 1930 and 1946. Supplemental Exception No. 12 is broad enough to authorize introduction of

evidence at the trial in support of the plaintiff's claim for lost income, if it should wish to pursue the matter further.[6/]

Second, we find no authority outside of Manchester Band to the effect that a trustee is under a duty to maximize income. The rule applicable to private trustees who are restricted to a legal list of investments, like the United States in respect to Indian trust funds, is only that they must use reasonable skill and prudence in choosing among the listed items. G. Bogert, Trusts and Trustees, § 614 (2 ed. 1965).

If the plaintiff establishes that there were legal securities yielding more than 4 percent in the 1930-1946 period, the defendant, therefore, may present evidence or argument to show that its failure to invest in them was consistent with reasonable skill and prudence.

We cannot, of course, consider possible failures of the Government after August 13, 1946, to withdraw moneys from the treasury and invest in securities yielding more than 4 percent, unless the plaintiff proves such failures part of a wrongful course of action which started before that date. Cf. Blackfeet, supra, 32 Ind. Cl. Comm. at 71-76.

Part III of the motion for rehearing is denied.

IV.

Computation of damages for failure to invest the IMPL fund during the period 1883-1930

In our order of October 4, 1973 (31 Ind. Cl. Comm. 558) we directed the lawyers and accountants on both sides of this case to meet together and discuss what further information should be supplied to enable the Commission to complete adjudication of this case in accordance with our

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6/ Defendant, in its answer filed March 28, 1974, denies plaintiff's right to have the supplemental exceptions considered. We will decide this question on an appropriate future occasion and do not prejudge it here.

opinion holding the IMPL fund ought to have been invested during the period from 1883 to 1930. We ordered the parties to submit a joint statement within 45 days, summarizing the results of their discussions; and we stated we would not extend the periods for conferring and submitting the statement on account of the filing of any motion for rehearing.

The lawyers and accountants did meet, but were unable to agree on a statement.

We had hoped that the parties could agree on the method of calculating damages for the noninvestment. We believed such an agreement would have been of substantial value to the Commission in its further consideration of this and similar cases, and to the Court of Claims on appeal. We did not, of course, intend that the defendant's agreement on methods of calculation should be deemed a waiver of its right to appeal. We did, however, expect the parties in good faith to cooperate in removing one potential cause of the well-nigh intolerable delays that have attended our accounting cases. See Blackfeet, supra, 32 Ind. Cl. Comm. at 143-146. We have been disappointed in that expectation.

In view of its failure to agree even on accounting methods, we questioned the basis of the following statement made by the defendant on December 10, 1973, in its Motion to Enlarge Time Within Which to File Record on Appeal in the companion case, Mescalero Apache Tribe, Docket 22-G:

> The October 4th ruling of the Commission (i.e., granting the equivalent of compound interest against the United States extending over many years) is a most far-reaching decision. If allowed to stand, it may give rise (in conjunction with other cases) to the award of as much or more money damages against the United States as all the

other judgments rendered under the Indian Claims Commission Act.

We have, therefore, caused our own calculation of damages to be made. The calculation appears on the following pages. Disbursements disallowed by our 1970 decision have been restored to the fund.[7/] We have obtained the dates of the payments on reimbursable agreements, not given in the General Services Administration report on file herein, by a telephone call to the Indian Claims Division of that agency. Otherwise we have based our calculation exclusively on the existing GSA report.

The attached calculation is tentative and subject to revision prior to our final award. There may be further disallowances as a result of the trial. The dates we obtained outside the record are subject to challenge by either party, and will be changed if shown to be incorrect. And the parties may, perhaps, persuade us to use a different method of calculation. We believe, however, that based on the information we now have, the attached calculation is substantially accurate.

It is notable that the damages since July 1, 1930, which are measured by 4 percent simple interest, greatly exceed the damages before

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7/ See Te-Moak Bands of Western Shoshone Indians of Nevada v. United States, 23 Ind. Cl. Comm. 70, 83 (1970).

The item for "Pay of agency personnel - Clerk, Cook, Laborer, Line Rider, Painter, Plumber," given as $67,481.16 in the 1970 decision, contains an arithmetical error and should be $64,481.16. Accordingly, the total of the disallowed items should be $115,745.91 instead of $118,745.91. Only $87,161.55 of this sum was disbursed prior to July 1, 1930, so as to figure in the attached calculation.

that date, which consist of the aggregate of disallowed items and 5 percent compound interest. The total damages through June 30, 1973 ($379,323.72), would rank among the smaller awards of this Commission.

The attached calculation was made for the Commission by Mr. Martin Callagher of our staff, who was formerly employed in the Tribal Claims Section of the General Accounting Office and the General Services Administration. It took him approximately 60 hours to complete the calculation.

We will expect the revived Indian Claims Division of the General Services Administration, with its staff of 118, to perform similar calculations with equal or greater dispatch.

Brantley Blue, Commissioner

We concur:

John T. Vance, Commissioner

Margaret H. Pierce, Commissioner

"Indian Moneys, Proceeds of Labor, Western Shoshone Indians, Nevada"

Fiscal Year	Carried Forward	Interest at 5%	Receipts	Payments on Reimbursable Agreements	Total	Allowed Disbursements	Balance Forward
1899	--	--	$ 5.00	--	$ 5.00	--	$ 5.00
1900	$ 5.00	$ .25	15.00	--	20.25	--	20.25
1901	20.25	1.01	25.00	--	46.26	--	46.26
1902	46.26	2.31	876.18	--	924.75	--	924.75
1903	924.75	46.24	400.00	--	1,370.99	--	1,370.99
1904	1,370.99	68.55	962.24	--	2,401.78	$ 2,061.24	340.54
1905	340.54	17.03	901.00	--	1,258.57	--	1,258.57
1906	1,258.57	62.93	1,181.98	--	2,503.48	201.00	2,302.48
1907	2,302.48	115.12	923.65	--	3,341.25	209.00	3,132.25
1908	3,132.25	156.61	1,125.00	--	4,413.86	3,119.30	1,294.56
1909	1,294.56	64.73	1,600.00	--	2,959.29	158.70	2,800.59
1910	2,800.59	140.03	3,842.00	--	6,782.62	2,782.48	4,000.14
1911	4,000.14	200.00	4,858.00	--	9,058.14	3,211.62	5,846.52
1912	5,846.52	292.33	5,713.75	--	11,856.60	1,479.90	10,372.70
1913	10,372.70	518.64	6,318.75				
		(a)	487.95		17,698.04	1,953.58	15,744.46
1914	15,744.46	787.22	6,054.28	--	22,585.96	6,383.55	16,202.41
1915	16,202.41	810.12	78.20	--	17,090.73	5,672.19	11,418.54
1916	11,418.54	570.93	11,446.97	$ 1,268.42	24,704.86	11,181.04	13,523.82
1917	13,523.82	676.19	9,538.75	1,371.86	25,110.62	5,581.41	19,529.21
1918	19,529.21	976.46	62.50	1,743.72	22,311.89	3,660.15	18,651.74
1919	18,651.74	932.59	10,804.00	2,162.70	32,551.03	134.28	32,416.75
1920	32,416.75	1,620.84	28,777.22	1,177.09	63,991.90	5,520.69	58.471.21
1921	58,471.21	2,923.56	1,625.12	2,839.98	65,859.87	16,929.47	48,930.40
1922	48,930.40	2,446.52	15,083.03	1,691.50	68,151.45	9,691.69	58,459.76
1923	58,459.76	2,922.99	15,765.00	1,210.04	78,357.79	11,198.60	67,159.19
1924	67,159.19	3,357.95	16,087.00	1,616.37	88,220.51	12,594.20	75,626.31
1925	75,626.31	3,781.31	15,674.61	949.79	96,032.02	8,143.39	87,888.63

"Indian Moneys, Proceeds of Labor, Western Shoshone Indians, Nevada"

Fiscal Year	Carried Forward	Interest at 5%	Receipts	Payments on Reimbursable Agreements	Total	Allowed Disbursements	Balance Forward
1926	$ 87,888.63	$ 4,394.43	$ 15,637.50	$ 1,008.94	$108,929.50	$ 7,436.32	$ 101,493.18
1927	101,493.18	5,074.66	16,229.24	846.07	123,643.15	9,043.49	114,599.66
1928	114,599.66	5,729.98	15,234.61	856.86	136,421.11	9,644.36	126,776.75
1929	126,776.75	6,338.84	15,111.34	756.61	148,983.54	10,568.26	138,415.28
1930	138,415.28	6,920.76	15,397.62	385.32	161,118.98	9,139.89	151,979.09
1930	--	(b) 394.57	--	--	152,373.66	--	152,373.66
		52,345.70	237,842.49	19,885.27		157,699.80	

(a) Transferred from "IMPL, Western Nevada Indian School."

(b) Interest on 1930 receipts and Payment on Reimbursable Agreements from Jan. 1, 1930 to June 30, 1930.

Existing Report:	
Receipts to June 30, 1930	$237,842.49
Payments on Reimbursable Agreements	19,885.27
Add-Disbursed without deposit	50.00
	$257,777.76
Disbursed to June 30, 1930	244,861.35
	$ 12,916.41

Restatement (see above)	
Restated Balance on June 30, 1930	$152,373.66
Deduct-existing Reporting Balance on June 30, 1930	12,916.41
	$139,457.25
Interest at 4% from July 1, 1930 to June 30, 1973 = 43 years at 4%, or 172%	239,866.47
	$379,323.72

Kuykendall, Chairman, concurring in part:

I concur in the results reached by the Commission in parts I, II, and III of its opinion and express no opinion concerning Part IV since I, along with Commissioner Yarborough, have heretofore concluded in this case that compound interest is not allowable (31 Ind. Cl. Comm. 427, 551).

Jerome K. Kuykendall, Chairman

Yarborough, Commissioner, concurring in part, dissenting in part

Since dissenting to the earlier decision in Te-Moak Bands of Western Shoshone Indians v. United States, 31 Ind. Cl. Comm. 427 (1973), insofar as it assessed damages measured by compound interest for failure to invest Indian trust funds, I have accepted that case as precedent and joined the majority of the Commission in other cases and orders based on their principles. Continuing to feel those principles erroneous, however, I temporarily withdraw my acquiescence in order to point out two aspects of the instant decision that compound the intellectual difficulty in which the majority have placed themselves.

In Part II, supra, the majority properly finds that shortages in required treaty payments will not support an award of interest as damages on the shortages. Since the payments were never made, they could not have become part of an Indian trust fund, and the obligation to make such trust funds productive cannot be invoked. I would suggest that similarly interest awarded as damages for the failure to make a trust fund productive is equally a sum that never was in an Indian trust fund (indeed, never existed), and the defendant cannot be charged with a failure to make that non-trust fund sum productive.

In Part IV, supra, the majority provides a table demonstrating how their extraordinary engine of compound interest damages can be computed. Without explanation the compounding is broken off as of June 30, 1930, and the balance that then should have been in the IMPL account is the

basis for damages of simple interest only from then to date. If the requirement for productivity of the 1841 Act requires compound interest on what should have been the balance before 1930, the requirement exists equally on the re-cast balance after 1930. That after that date actual simple interest was being paid on the actual IMPL balance is a complicating factor, but cannot logically be said to destroy the compounding that the majority insists is a requirement of productivity. I doubt that this demonstration will convince the defendant that the majority's rule of damages is innocuous, and it reinforces my belief that it is erroneous.

This said, I concur in the order.

Richard W. Yarborough, Commissioner