BEFORE THE INDIAN CLAIMS COMMISSION

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| THE LOWER SIOUX INDIAN COMMUNITY IN MINNESOTA, et al., | ) | |
| Plaintiffs, | ) | |
| v. | ) | Docket No. 363 (Accounting) |
| THE UNITED STATES OF AMERICA, | ) | |
| Defendant. | ) | |

Decided: August 22, 1975

Appearances:

Marvin J. Sonosky, Attorney for Plaintiffs.

Bernard M. Sisson, with whom was Assistant Attorney General Wallace H. Johnson, Attorneys for Defendant.

OPINION OF THE COMMISSION

Vance, Commissioner, delivered the opinion of the Commission.

INTRODUCTORY STATEMENT--
HISTORY OF THE EASTERN SIOUX

This is a claim of the Sioux of the Mississippi for a general accounting of their money and other property under the management and control of the United States.

The Sioux of the Mississippi are the eastern division of the Dakota people. They are not one tribe, but have grouped and regrouped at different times into several separate polities. Toward one or more of these the United States assumed various obligations here under review,

starting with the Treaty of September 23, 1805, 2 Kappler 1031.

The nominal plaintiffs in this case are modern Indian organizations in which descendants of the Sioux of the Mississippi hold membership, and certain individual descendants.

Traditionally, the eastern Dakota people were divided into four bands, the Medawakanton, Wahpakoota, Sisseton, and Wahpeton. When the United States first had dealings with them, they were living along the Mississippi River in Minnesota and ranging into what are now Iowa and North and South Dakota.

The eastern Sioux are sometimes referred to collectively as the Santee Sioux; but this term is frequently restricted to the Medawakanton and Wahpakoota. "Santee" is also used specifically of the Santee Sioux Tribe of the Santee Reservation in Nebraska, one of the nominal plaintiffs in this case, a modern organization in which many, but not all, the descendants of the aboriginal Medawakanton and Wahpakoota Indians hold membership.

In 1851 the four bands were settled on reservations along the Minnesota River in what is now the southwestern part of that State. The Sisseton and Wahpeton Reservation was upstream, extending into present-day South Dakota; and the Medawakanton and Wahpakoota Reservation was downstream. The first two bands were then known as the Upper Sioux, and the latter two as the Lower Sioux--terms which, again, should not be confused with the present nominal plaintiffs, the Upper Sioux

Indian Community of Granite Falls, Minn., and the Lower Sioux Indian Community near Redwood Falls, Minn.

A number of the Minnesota Sioux rebelled against the United States in 1862. In consequence, Congress denounced existing treaties with all the four bands and confiscated their lands and rights of occupancy in Minnesota. See Act of February 16, 1863, c. 37, 12 Stat. 652.

The major part of the Medawakanton and Wahpakoota were eventually resettled on the Santee Reservation in Nebraska. The Sisseton and Wahpeton were resettled on the Sisseton Reservation, overlapping the boundary between the present States of North and South Dakota, and at the Devil's Lake or Fort Totten Reservation in North Dakota. Substantial numbers of the Indians, however, settled elsewhere, some returning to Minnesota.

The Santee Indians became a party to the treaty of April 29, 1868, 15 Stat. 635, setting up the Great Sioux Reservation. Nine bands of the Sioux of the Missouri also adhered to that treaty, but the Sisseton and Wahpeton did not; with the result that the Santees' financial interests thereafter are more entwined with the western than the eastern branch of the Dakota people. 1/

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1/ For further history of the Sioux of the Mississippi, see Sisseton and Wahpeton Indians v. United States, 58 Ct. Cl. 302, 304-305 (1923); Medawakanton Indians v. United States, 57 Ct. Cl. 357, 359-361 (1922); Sisseton and Wahpeton Bands v. United States, Dockets 142 et al., 10 Ind. Cl. Comm. 137, 142-144 (1962).

The Government has responded to the plaintiffs' petition for general accounting with two lengthy reports of the General Services Administration.

The first report, dated June 28, 1966, contains an accounting of moneys paid out pursuant to the treaties entered into between 1830 and 1858, and certain supplemental legislation. This report was served on the plaintiffs with apparent promptness, but was not filed with the Commission until July 15, 1974.

The second report, in two volumes, dated June 23, 1967, accounts under the treaties, agreements, and statutes of 1863 and later years. It includes an accounting for the miscellaneous tribal revenues known as IMPL funds. The 1967 report was filed with the Commission on June 27, 1967, and appears to have been served on the plaintiffs at about the same time.

Two letter reports have also been prepared by the Government's accountants. One, dated March 17, 1958, accounts for disposition of the Court of Claims judgment in Sisseton and Wahpeton Indians v. United States, 42 Ct. Cl. 416 (1907), aff'd, 208 U.S. 561 (1908). This report was put in evidence as Exhibit 128 in our Docket No. 359, a land claim between the same parties as the present case; but we have no record that it was filed in the instant docket before July 15, 1974. The second letter report is dated December 13, 1965, and contains an accounting under the treaty of September 23, 1805, 2

Kappler 1031. We could not find a copy in the Commission's files, or any record of having received a copy. We have no evidence that it was served on the plaintiffs. The General Services Administration sent us a copy, at our request, on July 15, 1974.

On September 17, 1968, the plaintiffs filed 34 exceptions to the 1966 and 1967 accounting reports. The defendant answered, denying liability.

Plaintiffs' "Motion for an Order Directing the Defendant to Furnish Data and Information" was filed on July 3, 1969; and defendant responded on August 5 of the same year. The parties briefed the legal questions raised by the exceptions and answer, pursuant to a pretrial order, and argued them before the Commission on September 16, 1969.

Thereafter the Commission concentrated on adjudicating several issues involving real estate which arose on the record, while the other aspects of the case were held in abeyance. A final judgment on many of the real estate matters was entered on February 27, 1974, See 33 Ind. Cl. Comm. 389, aff'd Appeal No. 17-74 (Ct. Cl., July 11, 1975).

The exceptions skip around among the various transactions covered in the accounting reports, so that their numerical order could be followed in the ensuing discussion only at considerable sacrifice of clarity. We therefore deal with the general exceptions first, and then dispose of the more specific objections in the chronological order of the statutes and treaties which gave rise to the accountable

transactions to which they are directed. The following table shows where in this opinion the various exceptions are discussed.

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| 25 ) | | 404 |
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| 27 [See 30 Ind. Cl. Comm. 463] | | |
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I

ACCOUNTING FOR PERIOD FROM 1946 TO PRESENT

The plaintiffs ask us in Exception No. 1 to order the defendant to bring its accounts down to date. They allege no continuing wrong in the defendant's administration of any particular fund; what they want is an extension of the general accounting past the June 30, 1951, closing date of the reports defendant has filed.

We have no jurisdiction over general accounting for any period after August 13, 1946, and accordingly dismiss the exception. Blackfeet and Gros Ventre Tribes v. United States, Dockets 279-C et al., 32 Ind. Cl. Comm. 65, 74-75 (1973) [hereinafter cited as Blackfeet]. This dismissal is without prejudice to plaintiffs' right to have necessary special accounting extending past the cutoff date if the Commission hereafter finds a course of wrongful action still going on at August 13, 1946.

II

"FAILURE TO CREDIT INTEREST ON FUNDS ENTITLED TO INTEREST UNDER THE LAW AND FAILURE TO DEFINE MONEYS ENTITLED TO INTEREST"

The foregoing is the text of plaintiffs' Exception No. 2. The supporting statement follows:

> Statement in support of Exception No. 2. This exception is applicable to the report as a whole. The report does not identify per se moneys entitled to be placed at interest but which were not so placed, nor does the report identify monevs where interest was credited for only part of a period.

The defendant's answer denies that there was any money entitled to be placed at interest that was not so placed, and states that the GSA report identifies all funds and interest payments held by defendant belonging to the plaintiffs.

Insofar as Exception No. 2 seeks to require the defendant to identify the occasions on which it breached a duty to pay interest to plaintiffs, it is ill-taken: ". . . the defendant is not required to search its accounts and pull out the incriminating items." Blackfeet, 32 Ind. Cl. Comm. at 95.

Insofar as the exception takes substantive issue with the Government's failure to pay interest, it is too vague for us to rule upon. The funds involved should at least be identified by the plaintiffs. Indeed, this has been done in Exceptions 7, 20, 26, and 28, discussed later in this opinion, making the present exception redundant.

Exception No. 2 will be dismissed.

## III

## LOSS OF INTEREST FROM HOLDING FUNDS OUTSIDE THE TREASURY

In Exception No. 3, plaintiffs complain that the GSA report fails to set forth facts showing whether tribal funds were covered into interest-bearing treasury accounts within 30 days of receipt. In Exception No. 6, plaintiffs complain that the report fails to show the time lag between withdrawal and actual disbursement of funds from interest-bearing treasury accounts.

These exceptions are well-taken. Blackfeet, 32 Ind. Cl. Comm. at 88-89. The reports on file, like those in Blackfeet, do not show how long tribal funds were retained in Federal custody in the field.

It is probably because the Government's duties with respect to incoming and outgoing trust moneys were declared in separate cases that the present plaintiffs objected to delays in inflow in one exception and outflow in another. In Menominee Tribe v. United States, 107 Ct. Cl. 23 (1946), it was decided that the Government had a duty to begin paying interest within 30 days on incoming collections required by law to be deposited to specific interest-bearing trust accounts in the treasury. In Southern Ute Tribe v. United States, Docket 328, 17 Ind. Cl. Comm. 42, 57 (1966),[2/] it was decided, at least inferentially, that the United States has a duty not to withdraw funds from such accounts an unreasonable time in advance of actual expenditure.

These cases suggest that the Government ought to show how long it took each payment of trust money to make its way into or out of the main treasury at Washington -- an accounting that would be exceedingly laborious and time-consuming. To require such an accounting would be prejudicial to both defendant and plaintiffs -- to the defendant because of the expense involved, and to the plaintiffs because of the resultant delay in recovery.

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2/ Aff'd 191 Ct. Cl. 1 (1970), rev'd on other grounds, 402 U.S. 159 (1971).

Both the delays in depositing field collections and in expending advances to disbursing officers are aspects of a single problem -- whether excessive sums were held outside the treasury in an unproductive condition.

The problem appears to be confined to moneys required by law to be deposited in specific interest-bearing treasury accounts. In Te-Moak Bands v. United States, Docket 326-A, et al., 31 Ind. Cl. Comm. 427, 449 (1973), we held the law requires all funds held in trust by the Government for an Indian tribe to be made productive, if they are on hand long enough to make investment feasible; but the Court of Claims reversed. Appeal No. 2-74 (July 11, 1975). A petition for certiorari to the Supreme Court of the United States will undoubtedly be filed. In Fort Peck Indians v. United States, Docket 184, 34 Ind. Cl. Comm. 24, 40 (1974), we held that the Government's obligation to invest extends to the non-interest-bearing treasury accounts made up of interest on other Indian trust funds. It would necessarily appear to extend to advances from these accounts held for excessive periods in disbursing officers' non-interest-bearing checking accounts. The Court of Claims make a ruling similar to ours in Fort Peck in Cheyenne-Arapaho Tribe v. United States, No. 342-70 (March 19, 1975). The effect of the reversal of Te-Moak on the latter case has not yet been determined.

We will reserve ruling on exactly what information is required by the exceptions charging delay in deposit and disbursement, pending further rulings from the Court of Claims and the Supreme Court. Commissioner Vance will discuss this matter at the conference of attorneys and accountants called by the order following this opinion.

IV

REVERSE SPENDING

Exception No. 4 alleges that the GSA report "fails to set forth the amounts lost to the tribes because the defendant expended interest-bearing funds when non-interest-bearing funds were available." Exception No. 5 alleges that the report fails to set forth the amounts lost by reason of the defendant's disbursement of funds bearing interest at a higher rate when funds bearing interest at a lower rate were available. The supporting statements for both exceptions conclude with the sentence: When the essential facts and computations sought in other exceptions are furnished, the Tribes' loss can be ascertained." We construe the exceptions as both a request for information and a substantive claim for losses from reverse spending.

The defendant answers that the GSA report shows all disbursements and the funds from which they were made. It denies that reverse spending occurred.

In their Motion for an Order Directing the Defendant to Furnish Data and Information, plaintiffs state of Exceptions 4 and 5, ". . . the defendant's response is adequate or the petitioners are in position to proceed without the data requested."

We held in Blackfeet (32 Ind. Cl. Comm. at 90) that losses from reverse spending could be calculated on the basis of year-end balances. These, we said, could be derived from the yearly schedules of receipts and expenditures in the GSA reports, or obtained from published treasury reports. The plaintiffs' abandonment of Exceptions 4 and 5 insofar as these exceptions demanded more information was well-advised.

The substantive question of whether reverse spending occurred and of the plaintiffs' resultant damages remains open.

V

DISBURSEMENTS-GENERAL OBJECTIONS

A. Lack of explanation of disbursement categories. Plaintiffs

complain under Exceptions 8 and 15 that the disbursement classifications used in the GSA report are not defined and that there is inadequate explanation of the nature of the items included in each classification. The plaintiffs' "Motion for an Order Directing the Defendant to Furnish Data and Information" asks that further information be supplied.

Exception 8 deals with the IMPL fund.[4/] Exception 15 deals with the fund "Proceeds of Sioux Reservation in Minnesota and Dakota," governed by the Act of March 3, 1863, c. 119, 12 Stat. 819, and sections 7 and 8 of the Act of July 15, 1870, c. 296, 16 Stat. 335, 361. We dispose of other questions raised in these two exceptions later in this opinion.

We understood the disbursement categories in GSA reports are taken from documents known as Trust Fund Allocation Guides, which list in detail what kinds of disbursements are to be included in each category. Plaintiffs may obtain a certified copy of the guide used in this case by making a request of the General Services Administration under section 14 of the Indian Claims Commission Act (25 U.S.C. § 70m).

B. Deprecated captions. Under Exception 34, plaintiffs ask us to rule expenditures under some 61 captions and forty-odd subheadings

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4/ This fund, misnamed "Indian Moneys, Proceeds of Labor," consists of miscellaneous reservation revenues, not the result of the labor of any member of the tribe. See 25 U.S.C. § 155.

to be unauthorized. Apparently the Commission is expected to search the GSA reports and, wherever one of these captions appears, to make a ruling on the expenditure listed beside it. Since the captions may soon be defined and explained, such action at the present time would be premature as well as laborious. But in any event, we have no intention of examining accounts on the basis of such a shotgun exception.

Exception 34 will be dismissed, with leave to the plaintiff to amend within 30 days after the expiration of the time allowed defendant to file the Trust Fund Allocation Guide. The amended exception, if plaintiff chooses to file one, should, at the very least, identify the pages of the GSA report on which the captions complained of appear and give some explanation of why each one is considered improper in its actual context. The amended exception should be accompanied by a motion for summary judgment.

C. Disallowable items. Under Exceptions 8, 14, 15, 17, 18, 21, and 25, plaintiffs have listed a number of entries from the GSA report, which, they allege, represent improper expenditures. Plaintiffs have not, however, asked for summary judgment. They have asked us to rule as a matter of law that these items are improper.

By not asking for summary judgment, plaintiffs have failed to invoke our Rule 11(c)(1), 25 CFR 503.11(c)(1). The defendant thus was not put on notice here, as it was in Blackfeet (see 32 Ind. Cl. Comm. at 106), to disclose its evidence in support of the propriety

of dubious items or suffer disallowance. On the present motion we can disallow only where the defendant has in effect admitted liability.

We discuss the individual challenged items elsewhere in this opinion.

VI

ACCOUNTING FOR PROPERTY OTHER THAN MONEY

The only remaining general objection to defendant's accounting is Exception 33, where the plaintiffs complain of defendant's "Failure to furnish an accounting as to property of Tribes controlled and disposed of by the United States."

According to the supporting statement and subsequent memoranda of plaintiffs, Exception 33 is concerned only with lands, specifically with plaintiff's lands held in trust by the United States for disposal to third parties, or acquired by the United States absolutely.

As to lands held in trust, the plaintiffs want to be informed of the number of acres ceded, the number sold and the proceeds received therefor, the number of acres given away free, the number reserved for public or Indian purposes, and the number remaining undisposed of or restored to the tribes.

As to lands ceded outright to the United States, or taken by it, the plaintiffs want to know the acreages involved in the various transactions, in order to match them with the funds appropriated for payment, which are shown in the report; and plaintiffs want to know what lands, if any, were taken without payment.

The plaintiffs are certainly entitled to this information. They may obtain it by discovery procedures under the Commission's General Rules of Procedure.

Exception 33 will be dismissed, with leave to the plaintiffs, within 30 days of defendant's supplying the information sought by discovery, to file specific exceptions to particular property transactions.

## VII

## EARLY TREATIES: 1805-1858

A. Accounting under early treaties not barred by prior settlement in this docket. In Exceptions 30, 31, and 32, plaintiffs challenge the defendant's accounting for expenditures under the treaties antedating the Forfeiture Act of 1863.

Defendant does not answer these exceptions on the merits. Rather, it contends that all claims which could have been asserted under the early treaties have been settled by the compromise which this Commission approved in Dockets 142, 359-362 and 363 (First Claim), reported as Sisseton and Wahpeton Bands v. United States, 18 Ind. Cl. Comm. 477 (1967). Defendant states that these dockets consisted of claims that the defendant obtained the lands ceded under the early treaties for unconscionable consideration. "The consideration which petitioners [plaintiffs] received from the defendant, was therefore," defendant continues, "the important issue in those cases." Since Exceptions 30, 31, and 32 relate to that consideration, by this reasoning they are barred by the settlement.

We disagree. Section 13 of the stipulation for settlement (quoted at 18 Ind. Cl. Comm. 481) states:

> "13. There shall be entered in Docket No. 363 a final consent order dismissing, with prejudice, the claim of the Sisseton and Wahpeton Tribes of Sioux Indians relating to Royce Cession 440. It is stipulated and expressly understood and agreed that, upon the entry of such final consent order, the only remaining claim in Docket No. 363 will be the claim denominated "Second Claim" in the first amended petition in Docket No. 363 for an accounting and report by the defendant as to the claimants' property and funds.

The final judgment, entered July 25, 1967, reads in pertinent part as follows:

> 6. Docket No. 363. Final judgment on the claim denominated "First Claim" in the first amended petition in Docket No. 363 be and is hereby entered in favor of the Medawakanton and Wahpakoota Tribes of Sioux Indians against the defendant for the sum of $66,940.00, and these tribes shall have and recover said sum from the defendant; and all other claims in Docket No. 363, except the claim for an accounting and report denominated "Second Claim" in the first amended petition in Docket No. 363, be and the same are hereby dismissed with prejudice.

We must read the stipulation literally and enforce it strictly. See United States v. Southern Ute Indians, 402 U.S. 159 (1971).[5/] The stipulation and the 1967 judgment in this Docket 363 are clear and unambiguous. They mean that the general accounting claim -- all of it -- is not affected by the settlement.

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5/ Cf. Pueblo of San Ildefonso v. United States, Dockets 354 et al., 30 Ind. Cl. Comm. 234, 244-249, where we allowed a stipulation containing an internal inconsistency to be partially repudiated before judgment.

B. Prior Court of Claims cases did not involve all the early treaties.

Defendant also asserts in its Memorandum of Points and Authorities filed September 15, 1969, that the payment of consideration under the early treaties "was a necessary issue, and was fully litigated" in Sisseton and Wahpeton Indians v. United States, 42 Ct. Cl. 416 (1907), and Medawakanton Indians v. United States, 57 Ct. Cl. 357 (1922); and that res judicata applies to these treaties. The first of the cited cases involved only the Treaty of July 23, 1851 (10 Stat. 949). The second involved only the treaties of September 29, 1837 (7 Stat. 538) and August 5, 1851 (10 Stat. 954). When we come to these treaties in the ensuing discussion, we shall take up the Court of Claims cases. It is enough to state at this point that Exceptions 30, 31, and 32 involve several additional treaties, and hence cannot be barred completely by those decisions.

C. Treaties of 1805, 1830, 1837, and 1851.

"Exception No. 30. - Failure to furnish facts and computations reflecting effect of failure to pay funds in accordance with treaty provisions." The foregoing statement and the quotations in the ensuing discussion, unless otherwise noted, are taken verbatim from plaintiffs' Exception 30 and its numerous subdivisions.

"a. Treaty of September 23, 1805, 2 Kappler 1031. GSA reports that $4,000 was appropriated under this treaty, but does not state when the money was appropriated, or deposited, nor is there a

definable statement showing disbursements from the $4000. (See GSA, 6/28/66, p. 17)."

The 1805 treaty is described as follows in Sisseton and Wahpeton Bands v. United States, Dockets 142 et al., 10 Ind. Cl. Comm. 137, 181 (1962):

> In 1805 Zebulon Pike reached the Upper Mississippi Valley where he had no difficulty finding Sioux villages along the west bank of the Mississippi River. Little Crow, the Medawakanton Chief, was encamped in the only village of any consequence situated on the east side of the Mississippi. Pike had been instructed among other things to look for suitable positions that would accomodate military outposts. He decided upon two small tracts, one situated at the mouth of the St. Croix River, the other at the falls of St. Anthony further up the Mississippi. The St. Croix River tract was nine miles square and contained 51,840 acres. The tract beginning at the confluence of the St. Peters and Mississippi River, and extending up the Mississippi to include the falls of St. Anthony, was 9 miles by 18 miles and contained 103,680 acres. Pike lost no time in concluding an agreement on September 23, 1805, for the conveyance of Sioux interest in the two tracts. He dealt exclusively with the Medawakantons whose chief, Little Crow, signed the agreement.

The consideration to be paid the Indians was left blank in the treaty. According to Kappler, the treaty was submitted by the President to the Senate on March 29, 1808. The Senate committee reported favorably on April 13, with an amendment filling in the blank to provide for payment of $2000 in money or goods; and on April 16, 1808, the full Senate ratified unanimously.

For an unknown reason, the President failed to proclaim the treaty of 1805, and it was not published in the Statutes at Large; but the army took possession of the ceded areas.

The accounting under the 1805 treaty is not included in either bound GSA report, but appears in the letter report of December 13, 1965, referred to at page 301, above. According to the account, $4,000 was paid to the Medawakanton Indians in 1838 for the 1805 cession, the excess over $2,000 representing interest to compensate for the delay in payment.

As far as our records show, the letter report has never been served on the plaintiffs. However, it consists merely of a condensation of the accounting set out in volume 6, pages 2934 to 2941, of a report of the General Accounting Office, re: Petition of the Sioux Tribe of Indians, Court of Claims No. C-531, dated April 12, 1932. The old GAO report was known to plaintiff's counsel, who withdrew a copy from the custody of the Court of Claims and filed it with this Commission.

Since the defendant failed to make service of the 1805 treaty accounting in the instant case, the period for the plaintiffs to file exceptions never started running. A copy of the letter report of December 13, 1965, will be furnished by the Commission to plaintiff's attorney of record; and 30 days will be allowed for filing exceptions. The defendant will have another 30 days to answer the exceptions.

b. Treaty of July 15, 1830, 7 Stat. 328. This treaty was made at Prairie du Chien, Michigan Territory (now in Wisconsin) with a number of midwestern Indian tribes, including the Medawakanton, Wahpakoota, Sisseton and Wahpeton Sioux. In return for a cession of

about two million acres in northern Iowa,[6/] the United States made the promises to these Sioux bands referred to in the following excerpt from Exception 30b:

> . . . Under Article IV of the Treaty the Tribes were to receive each year, for ten years, $2,000 "one blacksmith *** and the necessary tools", instruments for agricultural purposes", [sic] and $700 in iron and steel. (GSA, 6/28/66, p. 9.) GSA furnishes partial information (i) showing in response to the $2,000 annuity that $12,000 was appropriated over a period of seven years (GSA, 6/28/66, pp. 10, 25) leaving a balance of $8,000 not clearly explained or identified; (ii) showing the disbursement of funds for a blacksmith and tools for three years, not ten years (GSA, 6/28/66, pp. 10-11); (iii) showing the disbursement of funds for agricultural instruments for four years, not ten years (GSA, 6/28/66, pp. 11, 24); and (iv) showing nothing expended for iron and steel.
>
> Under Article V of the 1830 Treaty, the United States agreed to set aside $3,000 per year for ten years for the education of the children of the tribes parties to the Treaty (GSA, 6/28/66, p. 9).
>
> GSA reports that $3,000 per year was appropriated from 1831 through 1840 (idem, pp. 11-12, 146) and that such sums are accounted for in Statement No. 4, p. 21 of the report. Statement No. 4 discloses that $1,758.10 of the money was paid to Indians foreign to the treaty, $6.01 is identified under "Surplus warrant dated June 30, 1847" with no explanation of what that caption means, $151.02 is reported disbursed for the Tribes, with no explanation of how it was disbursed. The balance of $28,084.87 is reported disbursed "jointly with other Indians". (GSA, 6/28/66, p. 21.)

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6/ See Sisseton and Wahpeton Bands, supra, 10 Ind. Cl. Comm. at 186.

> A schedule of the disbursements of the $28,084.84 shows only that the money was disbursed "jointly with other Indians at Choctaw Indian Academy, Kentucky" in varying amounts over the years 1832 through 1848. There is no identification of the "other Indians at Choctaw Indian Academy, Kentucky" and no facts are furnished concerning the number of children, if any, belonging to the tribal parties to the treaty who were at the academy during the years 1832-1848.
>
> The report does not disclose the facts concerning dates of deposit and expenditure of those payments which were made under the 1830 Treaty....

While the foregoing statements of the plaintiff are not entirely accurate, we must agree that the General Services Administration has presented an accounting under the 1830 treaty which is incomplete and needlessly difficult to follow.

(1) Article IV. There are three financial obligations toward the Sioux of the Mississippi to be accounted for under Article IV:

(a) The annuity of $2,000 for ten years--total obligation: $20,000

(b) The blacksmith and tools--total obligation not stated. 7/

(c) The agricultural instruments and iron and steel to the amount of $700 annually--total obligation: $7,000.

Statement No. 1 on page 14 of the 1966 GSA report shows the total expenditures identified by the GSA accountants as having been made under Article IV, as follows:

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7/ On the basis of the $600.00 annual compensation for a blacksmith in the Indian Service furnishing his own shop and tools, provided by section 9, Act of June 30, 1834, c. 162, 4 Stat. 735, the minimum obligation over ten years would be $6,000.00. Actually, $720.00 appears to have been appropriated yearly for one blacksmith and one assistant, and nothing for tools. See Acts of March 3, 1835, c. 50, 4 Stat. 780, 784, and June 14, 1836, c. 88, 5 Stat. 36, 40.

| | |
|---|---|
| Agricultural implements and equipment | $5,431.00 |
| Annuities | |
| Cash | 7,900.00 |
| Goods | 7,300.00 |
| Pay of blacksmiths and apprentices | 4,842.20 |
| Supplies for blacksmith shops | 3,822.96 |

Thus, Statement No. 1 shows apparent deficiencies of $4,800 in annuities ($15,200 paid versus $20,000 due) and of $1,569 in agricultural implements and equipment ($5,431 paid versus $7,000 due). However, a later section of the 1966 report shows $80,904.72 in expenditures which the GSA accountants were unable to allocate between the 1830 treaty and the treaty of September 29, 1837, 7 Stat. 538. The $80,904.72 is reported as made jointly under the two treaties.

The disbursement schedules under the 1830 treaty are not keyed to Statement No. 1, but to the various treasury accounts to which the treaty appropriations were credited. The accounts had no consistent relationship to the categories of expenditures authorized by the treaty, but changed from year to year according to the Treasury Department's unsettled bookkeeping practices. Abstract No. 1 at page 23 of the 1966 report, reading as follows without the footnotes, lists the appropriation accounts to which the disbursement schedules are keyed:

ABSTRACT NO. 1

Abstract of disbursements for the Sioux of the Mississippi pursuant to the treaty of July 15, 1830.

| Schedule No. | Name of Appropriation | Amount Disbursed |
|---|---|---|
| 1 | Agricultural Implements for the Sioux of the Mississippi | $ 2,800.00 |
| 2 | Annuities to various Indians and Indian Tribes | 12,000.00 |
| 3 | Blacksmith Establishments | 2,645.16 |
| 4 | For Presents, Provisions, Pay of Commissioners and Secretary, Transportation and all other expenses attending the negotiation of said Treaties | 5,132.00 |
| 5 | Fulfilling Treaties with Sioux of the Mississippi | 9,798.44 |
| 6 | Fulfilling Treaty Stipulations under Article 5 of the Treaty of Prairie du Chien | 28,235.89 |
| 7 | Gun and Blacksmiths, etc. | 3,000.00 |
| 8 | Running the lines per 7th Article, Treaty of July 15, 1830 | 8,689.58 |
| | TOTAL | $ 72,301.07 |

The above total is the same as that given in Statement No. 1, where entries are arranged according to articles of the treaty; but that is the only recognizable correlation between Abstract No. 1 and Statement No. 1.

An accounting covering Article IV of the treaty of July 15, 1830, as well as numerous later treaties and statutes affecting the Santee

Sioux was made by C. J. Brown under the supervision of the Auditor for the Interior Department (an officer of the Treasury Department) in the early part of this century. Dated January 14, 1920, it appears in the printed record of Medawakanton and Wahpakoota Bands v. United States, No. 33728 in the Court of Claims, although that litigation was not concerned with the 1830 treaty. The 1920 accounting shows no deficiencies, and no expenditures made jointly under the 1830 treaty and a later treaty.

The 1920 accounting shows disbursements of the following sums under three subdivisions of Article IV, which differ slightly from the three headings we used on page 319, above.

| Annuities | Blacksmith, tools, iron and steel | Agricultural implements |
|---|---|---|
| $22,000.00 | $19,190.00 | $13,060.00 |

The wide discrepancy between the 1966 GSA figures and the 1920 figures given immediately above is probably explainable in large part by the differing manner in which the two accounts were prepared.

The method by which GSA reports were prepared is described as follows in Blackfeet, 32 Ind. Cl. Comm. at 99-100:

> The defendant's accountant, who helped prepare some of the later accounting reports, Mr. Martin Gallagher, testified that they were based, for transactions up to 1922, on treasury ledgers, and for more recent transactions, on treasury cash cards. . . The nature of the entries would be further particularized by examining the receipts and vouchers available at the National Archives, the National Record Center, or a regional Federal Record Center. The accountants, Mr. Gallagher testified, were not empowered to go to the Department of Interior, the Indian agencies or Area Offices for further information.

Since, as Abstract No. 1, copied on page 321, above, demonstrates, the treasury ledgers were set up according to appropriations, not the treaties which the appropriations were intended to fulfill, the GSA method on occasion provided insufficient information to allocate bulk appropriations to the proper treaty clause, or even to the proper treaty, when more than one was in force with the same tribe at the same time.

In contrast to the GSA accountants, the auditor who prepared the 1920 account appears to have taken as his starting point ledgers maintained in the Office of Indian Affairs, where the accounts were set up by treaties and their clauses. While the 1920 account balances so perfectly as to make its authenticity suspect, it shows that records upon which to base an allocation of disbursements between the 1830 and the 1837 treaties must have existed. Such records would have been necessary to show the extent to which the Government's outstanding financial obligations had been fulfilled, and the additional funding to be requested annually from Congress to continue performance as the treaties provided. But we have no indication that the GSA accountants who reported "joint" expenditures under two and more treaties even looked for such records.

We find the 1966 account under Article IV of the 1830 treaty to be unacceptable. Our ruling as to the further action that will be required of the Government is set out in the concluding section of this Part VII of the present opinion.

(2) Article V. This treaty provision reads as follows:

> ARTICLE V. And the United States further agree to set apart three thousand dollars annually for ten successive years, to be applied in the discretion of the President of the United States, to the education of the children of the said Tribes and Bands, parties hereto.

While the article did not require strict apportionment of the education money on the basis of the school age populations of the various tribes which signed the treaty, it clearly contemplated that each signatory would get substantial benefit. Without information as to the number of Mississippi Sioux pupils in attendance at the Choctaw Academy, the defendant cannot receive credit for any part of the $28,084.87 shown as expended for board and tuition at that institution for the plaintiffs jointly with other Indians. Cf. Blackfeet, 32 Ind. Cl. Comm. at 106, 127, 131. Under the present accounting, we can give the defendant credit only for the $151.02 shown as expended solely for the Sioux of the Mississippi. This sum is such an insignificant fraction of $30,000 as to indicate non-fulfillment of the obligation.

For reasons set out in section F , below, however, we do not think liability should be imposed on the defendant on the basis of the 1966 report, but that a revised accounting should be presented.

(3) Dates of deposit and expenditure of payments under the 1830 treaty. The plaintiff's objection that the 1966 report fails to disclose the dates of deposit and expenditure of funds made under the 1830 treaty is not well taken. The appropriation acts are listed in Part

III at pages 141-148 of the report. Their effective dates are the dates the treaty funds became available. The years of expenditure are shown in the disbursement schedules. If the plaintiffs desire more exact dates, defendant will make the payment vouchers available for inspection and copying. The Commission will not require that the month and day of each disbursement be set out in the accounting reports.

(4) Article VII. The defendant has set out an account of its expenses for the surveys required by Article VII of the 1830 treaty, in Part II, Section A, of the 1966 report. The defendant's obligation under this article was to run certain lines; how much the work cost was immaterial. Hence, the account of expenditures under Article VII should not have been made, and must be eliminated from any new account under the 1830 treaty.

c. Treaty of September 29, 1837, 7 Stat. 538.

(1) Department's contention that 1837 treaty accounting is res judicata. In Finding XVII of Medawakanton Indians v. United States, No. 33728, 57 Ct. Cl. 357, 371 (1922), an account is stated between the United States and the Santee bands under the 1837 treaty and the treaty of August 5, 1851, 10 Stat. 954. In regard to these two treaties, thus, the defendant's claim of res judicata (see page 315, above) has colorable support.

As the Court of Claims pointed out in Creek Nation v. United States, 168 Ct. Cl. 483, 488 (1964), the doctrine of res judicata has two

branches. Where the parties in the prior litigation were the same and the cause of action was the same the strict rule applies, and all issues decided or which could have been decided are barred from re-litigation. Where the parties[8/] were the same, but the claim or demand was different, only the issues actually litigated and decided are barred. This second branch of res judicata is called collateral estoppel.

Case No. 33728 was brought under a special jurisdictional act of March 4, 1917, c. 181, 39 Stat. 1195, directing the Court of Claims to ascertain the balance of annuities due the Santee Sioux under the 1837 and 1851 treaties as if the Act of February 16, 1863, c. 37, 12 Stat. 652, had never been passed. The latter law, popularly called the Forfeiture Act, abrogated the treaties, stopped annuities from accruing in the future, and diverted part of the annuities already appropriated but unpaid to provide indemnity to white victims of the Minnesota Sioux War of 1862. The court was directed to set off against the annuities which would have been due but for the forfeiture "all monevs paid to said Indians or expended on their account by the Government of the United States since the treaties were abrogated." The jurisdictional act, thus, clearly did not authorize a suit for a general accounting in equity like the present claim under the Indian Claims Commission Act. There was no provision

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8/ Cf. Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313 (1971).

in the 1917 jurisdictional act whereby the plaintiffs could claim damages for late and irregular payments and deliveries, which, according to both the 1920 and the 1966 accounts, did occur. There was no way under that act for plaintiffs to claim damages so long as expenditures were made in the correct total amount, even if treaty requirements for allocation between various objects were violated. In short, the 1917 act did not subject the defendant's fulfillment of the 1837 and 1851 treaties to testing under a fiduciary standard. Res judicata in the strict sense is not applicable here.

To determine the extent to which collateral estoppel arises from the 1922 case, we must examine what issues were actually decided there.

Only one issue was litigated in connection with the plaintiffs' case in chief. That was whether plaintiffs were limited to recovering the unpaid annuities accrued to date of judgment, or were also entitled to a principal sum representing the present value of the perpetual annuity promised in the 1837 treaty. The court decided in favor of the principal sum.

All the other issues arose on the offsets--under a jurisdictional act having markedly different offset provisions from the Indian Claims Commission Act. Large categories of payments were proposed to be set off by the Government and were challenged by the Indians. Examples of such issues are: Whether payments under the Treaty of April 29, 1868, 15 Stat. 635, were chargeable to the plaintiffs; whether the indemnity paid for depredations and damages under the Forfeiture Act

were chargeable; whether the cost of removal of the plaintiffs from Minnesota was a proper offset; whether a Congressional appropriation of $42,086.93 used to pay plaintiffs' debts was chargeable, when plaintiffs' own money applicable to that purpose was stated to have been diverted by the Government; whether the value of the Santee Reservation in Nebraska, to which plaintiffs were removed, was chargeable. And so on.

All the issues were issues of law. There was no line by line examination of the accounts, as there may be in equitable accounting. The plaintiffs do not, for example, challenge the defendant to prove delivery of the goods it purchased for the Indians. Indeed, while the amounts, disbursing officers, payees, and even the voucher numbers, are identified in the accounts presented by the Government to the Court of Claims under the treaty provisions calling for delivery of goods and services, the nature of the goods and services is not disclosed. The record does not reveal whether they were blankets or barrels of whiskey.

The account stated in Finding XVII of Court of Claims case No. 33728, 57 Ct. Cl. at 371, incorporates the Government's entire accounting, including portions which were not challenged as well as those portions which were the subject of the court's decisions. Clearly, it does not estop the defendant from presenting in the instant case a different account under the 1837 and 1851 treaties from the one

presented to the Court of Claims in 1920. Indeed, the Government has done just that. By the same token, the decision in case No. 33728 does not estop the plaintiffs from raising issues not previously decided.

The issues now before us are those raised by Exception 30b. We have examined them. None is the same as an issue previously decided by the Court of Claims. We proceed to consider them on the merits.

(2) Plaintiffs' objections to 1837 treaty accounting. The Medawakanton Band ceded all its land east of the Mississippi River and all its islands in said river by this treaty. See Sisseton and Wahpeton Bands, supra, 10 Ind. Cl. Comm. at 158. In consideration of the cession, the United States made the promises listed below (the underlined words correspond to the subdivisions of Article 2d of the treaty). Pertinent excerpts from Exception 30 are quoted in the interspersed single-spaced paragraphs:

First. To invest $300,000 in State stocks and pay annually, forever, an income thereon of not less than 5 percent.[9/]

> . . .Between the date of the 1837 Treaty and the 1863 Forfeiture Act, GSA reports a total of $214,039.16 was disbursed in response to the $15,000 annuity instead of $390,000 (26 years x $15,000) (GSA, 6/28/66, Disbursement Schedule 14, p. 59). The $214,039.16 was not evenly distributed through the years 1838-1861 inclusive. Some years the United States paid nothing. Some years the United States paid less than $15,000 and some years more.

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9/ The investment was in fact never made, but Congress appropriated $15,000 a year out of the general fund of the treasury. See Te-Moak, supra, 31 Ind. Cl. Comm. 437-439, 465-466.

Second. To pay relatives and friends of chiefs and braves $110,000.

> . . . Only $2,500 was paid. (GSA, supra, pp. 48-50).

Third. To pay $90,000 to the Indians' creditors.

> [The plaintiffs make no comment upon the accounting under this subdivision.]

Fourth. To deliver to the chiefs and braves $10,000 worth of goods annually for 20 years.

> . . . This totals $200,000. (GSA reports disbursements of $158,053.29 for "Annuity goods". GSA, supra, p. 46, paid over the years 1838-1859.) In this twenty-two year interval, nineteen payments were made (none in 1841, 1842, 1843). Of these, fourteen were below $10,000, four were over and only one was for the agreed amount. (GSA, supra, Disbursement Schedules: No. 12, p. 50; No. 14, pp. 52-59; No. 15, p. 61.)
>
> The GSA does not furnish a breakdown of the reported expenditure of $158,043.29 even by its usual classifications.

Fifth. To expend $8,250 annually for 20 years for medicines, agricultural implements and stock, for the support of a physician, farmers, and blacksmiths, and for other beneficial objects.

> This annuity totals $165,000. GSA reports that $119,839.15 was expended in response to this treaty provision over the years 1839 through 1858. (GSA, supra, p. 46; see Disbursement Schedules: 12, p. 50; 14, p. 59; 15, p. 61.)

Sixth. To supply agricultural implements, mechanics' tools, cattle, and other articles, to an amount not exceeding $10,000 as soon as practicable after ratification of the treaty.

> GSA reports that $13,004.48 was expended in satisfaction of Article 2d, Sixth. (GSA, supra,

> p. 47; Disbursement Schedules: No. 12, p. 50; No. 14, p. 59; No. 15, p. 61.) Of the $13,004.48, the sum of $7,427.68 is classified as "Annuity goods" (idem, p. 47). There is no breakdown of the $7,427.68. There is no explanation of what "Annuity goods" means in the context of Article 2d, Sixth. On its face, the $7,427.68 is an improper charge.

Seventh. To deliver $5,500 worth of provisions annually for 20 years.

> This annuity totals $110,000. GSA reports that $75,595.34 was expended in response to this treaty provision over the years 1839 through 1857. Payments were uneven and irregular. (GSA, supra, p. 47; see Disbursement Schedule No. 14, pp. 52-59.)

Eighth. To deliver $6,000 worth of goods to the chiefs and braves signing the treaty.

> [Plaintiffs do not comment. The 1966 report does not account under this subdivision].

As in the case of the 1830 treaty, plaintiffs' exception to the accounting under the 1837 treaty is generally well taken, although not accurate in all details. The defendant has indeed presented an incomplete account.

The account submitted to the Court of Claims in 1920 in Case No. 33728 covers the 1837 treaty, as well as the 1830 treaty and several subsequent treaties and statutes. We are unable at this time to determine whether it is more or less accurate than the 1966 report, but it is certainly more comprehensive.

In the following table we show, for each subdivision of Article 2d of the treaty the total obligation through fiscal year 1863, and the

expenditures in fulfillment of the obligation as shown in: (1) the 1920 account (p. 27), and (2) the 1966 report (pp. 46-47). Cents are rounded off.

TABLE I
Payments Under Medawakanton-Wahpakoota Treaty of 1837

| | Total Obligation through 1863 | 1920 Account | 1966 Report |
|---|---|---|---|
| 1. Perpetual annuity ($15,000 a year) | $ 390,000 | $ 360,000 | $ 234,039 |
| 2. Payment to relatives and friends | 110,000 | 110,000 | 2,500 |
| 3. Payment of debts | 90,000 | 90,000 | 90,000 |
| 4. Twenty year annuity ($10,000 a year) | 200,000 | 200,000 | 158,053 |
| 5. Medicines, etc. $8,250 for 20 years) | 165,000 ) | 170,875 | 119,839 |
| 6. Agricultural implements, etc. | 10,000 ) | | 13,003 |
| 7. Provisions for 20 years ($5,500 a year) | 110,000 | 110,000 | 75,595 |
| 8. Gifts to chiefs and braves | 6,000 | 6,000 | No account |
| | $1,081,000 | $1,046,875 | $693,030 |

In addition, the 1966 report shows "Miscellaneous items" not allocated to any subdivision of the treaty totalling $17,666.77, and "Unidentified disbursements" in the amount of $120,147.51. In the 1966 report, thus,

the grand total of reported expenditures under the 1837 treaty is $830,844.70.[10/]

According to note (b) on page 50 of the 1966 report, the "Unidentified disbursements" were those allowed in account No. 5070 of Superintendent E. A. Hitchcock, for which vouchers and other supporting papers are missing. The disbursements are scheduled in calendar year 1838.

The 1920 account (page 42) shows a total of $131,500 advanced to Hitchcock in 1838, with $123,500 disbursed and an unexpended balance at year-end of $8,000. Of the $123,500, $107,500 was disbursed for relatives and friends (Art. 2, Second), $10,000 was disbursed for the 20-year annuity (Art. 2, Fourth), and $6,000 was disbursed for presents (Article 2, Eighth). Account No. 5070 is referred to in support of these disbursements.

If correct, the foregoing information from the 1920 account completely supplies the shortages in the 1966 report's accounts under subdivisions 2 and 8, Article 2d, of the 1837 treaty.

Additional disbursements totalling $3,739.47 for which Hitchcock was allowed credit in account No. 5070 are shown in the 1920 account under Article IV of the 1830 treaty.

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10/ Statement No. 6 at pages 46-47 of the 1966 report shows a total of $839,343.31; but this sum includes $4,972.01 "Expenses of Indian delegations" and $3,526.60 "Expenses of negotiating treaty," items not properly chargeable to the Indians under the 1837 treaty.

Some apparently significant information, however, which does not figure in the 1920 account, is shown only in the 1966 report. For example, Statement No. 7 on page 48 reveals that $17,956.72 of the initial appropriation of $258,250 to carry into effect the 1837 treaty, made by the Act of July 7, 1838, c. 186, 5 Stat. 300, was carried to the surplus fund in 1846. The 1920 account (page 28) misstates the appropriation as $254,750 and shows it all as expended.

Similarly, Statement No. 3 on page 18 of the 1966 report refers to balances in the hands of Amos J. Bruce, Indian Agent, and Clark W. Thompson, Superintendent of Indian Affairs, in the amounts of $6,190.11 and $984.75 respectively. Bruce, according to the 1920 account, held office from 1840 to 1847; and Thompson held office from 1861 to 1865. Nothing is stated in the 1920 account about balances remaining in their possession. Notes on page 20 of the 1966 report suggest that these "balances" represent unrecovered defalcations, which are not otherwise accounted for. 11/

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11/ The Indian Department Appropriation Act for 1858, Act of March 3, 1857, c. 90, 11 Stat. 169, at 183, contains the following paragraph:

> Sioux of the Mississippi, viz:-- For the reappropriation of this amount, being the legitimate balance found due to the Meda-wa-kan-toan and Wahpay-koo-tah Sioux, under the treaties of eighteen hundred and thirty, and eighteen hundred and thirty-seven, for moneys heretofore carried to the surplus fund, to be paid to said Indians as annuity, or applied as the President may direct, in whole or in part, for the civilization and general improvement of said Indians, forty-two thousand eight hundred and forty-one dollars and forty-seven cents.

The necessity for this appropriation is explained as follows in the Interior Department estimate of appropriation for fiscal year 1858. See Estimates of Appropriations for the Service of the Fiscal Year Ending June 30, 1958 at 267 (Serial 909, published 1856):

11/ (Continued)

DEPARTMENT OF THE INTERIOR, OFFICE INDIAN AFFAIRS,
May 27, 1856.

SIR: I have the honor to acknowledge the reference from your office, on the 22d instant, of the letter of the Secretary of the Treasury of the 19th, transmitting a report of the Second Auditor, dated the 17th instant, stating the result of the examination in his office of the state of the account between the United States and the Medawa-kan-toan and Wahpay-koo-tah Sioux, under the treaty of September, 1837, to which your attention was called by my report of the 8th ultimo.

In response to your request that I would examine and report in relation to the $12,799.89, which the Second Auditor states in his report was carried to the surplus fund in 1848 and 1852, being part of certain refundments by Amos J. Bruce, under the appropriations by the act of March 3, 1843, for "fulfilling treaties with various Indian tribes." I have the honor to state that the transactions out of which this additional liability arises originated and were carried through almost entirely by the Department of the Treasury, and owing also to be imperfect records of the financial transactions of this office before the organization of the Department of the Interior, I am unable to make any reliable examination and report in this particular matter.

The transactions and papers relating thereto are fully within the possession and records of the Second Auditor's office, and full credit is given to his report on that point.

The papers referred I have the honor to return to the department herewith, and to respectfully recommend that copies thereof be laid before Congress, or the appropriate committees in each House, with your request that there be an appropriation accordingly made as follows:

"For the reappropriation of this amount, being the legitimate balance found due to the Medawa-kan-toan and Wahpav-koo-tah Sioux, under the treaties of 1830 and 1837, for moneys heretofore carried to the surplus fund, to be paid to said Indians as annuity, or applied, as the Presidemt may direct, in whole or part, for the civilization and general improvement of said Indians, $42,841.47."

Very respectfully, your obedient servant,

GEO. W. MANYPENNY,
Commissioner

Hon. R. McClelland,
Secretary of the Interior

We therefore find the 1966 account under the 1837 treaty unacceptable. Our ruling as to the further action that will be required of the Government is set out on pages 359-361, below.

d. e. The treaties of 1851. The Commission found as follows in Sisseton and Wahpeton Bands, supra, 10 Ind. Cl. Comm. at 162-163:

> 39. On April 9, 1849, the Territory of Minnesota was officially organized. In the twelve years that had elapsed since the Sioux lands east of the Mississippi River were thrown open for settlement, a major portion of the white population of Minnesota had gravitaged [sic] to the towns of St. Paul, Stillwater, and St. Anthony. Neighboring Wisconsin had already attained statehood the year before. The tide of eastern emigration had grown stronger, as it moved steadily to the west. Thus it was that the vast expanse of Sioux country lying immediately west of the Mississippi was eagerly coveted. The demands for the extinguishment of the Indian title thereto were now being heard in Congress with a stronger voice. Under the Act of September 30, 1850, there was appropriated $15,000 "for expenses of treating with the Mississippi and St. Peter Sioux, for extinguishment of their title to lands in Minnesota territory. . ." In July of the following year preparations were made for the signing of the first of two Sioux treaties which would cede all their right, title, and interest to lands in Minnesota and Iowa.

On July 18, 1851, a treaty (10 Stat. 949) was negotiated with the Sisseton and Wahpeton at Traverse des Sioux, Minnesota, and on August 5, 1851, a separate treaty (10 Stat. 954) with the Medawakanton and Wahpakoota at Mendota, Minn. By these treaties the four bands ceded all their lands in Iowa and that part of Minnesota Territory which later became the State of Minnesota, plus a small part of present-day South Dakota. They retained, however, the two reservations on the Minnesota River, mentioned in the introduction to this opinion.

The treaties are almost identical. Article I of each stipulates perpetual peace between the United States and the signatory bands. Article II effects the land cession. Article III sets apart the reservation on the Minnesota River. Article IV provides further consideration, stated to total $1,665,000 in the Sisseton-Wahpeton treaty and $1,410,000 in the Medawakanton-Wahpakoota treaty.

Article V in the Sisseton-Wahpeton Treaty and Article VI in the Medawakanton-Wahpakoota Treaty provide that the laws prohibiting the introduction and sale of spirituous liquors in the Indian country should continue to apply to the ceded areas in Minnesota until otherwise directed by Congress or the President. Article V of the Medawakanton-Wahpakoota treaty provides that the entire annuity provided by Article 2d, section 1, of the 1837 treaty shall henceforth be paid in money. It had previously been required to be paid up to one-third in such form as the President might direct and the residue in specie or such form as the tribal authorities might direct.[12/] Article VI of the Sisseton-Wahpeton and Article VII of the Medawakanton-Wahpakoota treaty conferred power on the President or Congress to prescribe and enforce rules and regulations to protect the rights of persons and property among the Indians. Article VIII, appearing only

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12/ There appears to have been a shortage of some $30,000 in the payments under the direction of the President as of the date of negotiation of the 1851 treaty. See defendant's Exhibit A-2 (1 W. Folwell, History of Minnesota, 1956, at pages 285-287) and compare 1966 GAO Report, Disbursement Schedule No. 14 at pages 52-56.

in the latter treaty, which would have paid $150,000 to Santee half-breeds, failed of ratification.

Article IV, section 2, of both treaties provided for a portion of the recited consideration to remain in trust with the United States for 50 years at 5 percent interest. $1,360,000 was thus to be held in trust for the Sisseton and Wahpeton, and $1,160,000 for the Medawakanton and Wahpakoota. Annual interest, totalling $68,000 for the former two tribes and $58,000 for the latter two, was to be apportioned in fixed amounts among the objects named in sections 3-6 of the Article. The amounts and objects are shown on Table II on page 342, below. The "principals" of the trust funds were to revert to the Government after 50 years.

Article 3 of each treaty, establishing the Minnesota reservations, was stricken out by the Senate, which provided instead for payment into trust of 10 cents an acre for the lands designated for reservations and that the President might set apart substitute areas for the Indians outside the boundaries of the cessions. See 10 Stat. 951-952, 957. By a process not here material, the Minnesota Reservations were confirmed notwithstanding the striking of Articles III. The 10 cents per acre was not actually paid, but the annual appropriations for "interest" payment to the Sisseton and Wahpeton were raised from $68,000 to $73,600 and from $58,000 to $61,450 to the Medawakanton and Wahpakoota. See Sisseton and Wahpeton Indians v. United States, Case No. 22524, 42 Ct. Cl. 416, 420-421 (1907), aff'd with minor

correction, 208 U.S. 561 (1908); Medawakanton Indians, supra, 57 Ct. Cl. at 361-363.

(1) Defendant's contention that the 1851 treaty accounting is res judicata. As stated above, the 1851 treaties were abrogated in 1863. The Medawakanton-Wahpakoota annuities were restored by the Act of March 4, 1917, discussed above. The Sisseton-Wahpeton annuities were restored by the Act of June 21, 1906, c. 3504, 34 Stat. 372. The 1906 law gave the Court of Claims jurisdiction to determine what the annuities would have been if the Forfeiture Act of 1863 had never been passed, and against the sum so determined to set off "all payments or other provisions of every name or nature . . . which are properly chargeable against said unpaid annuities."

The defendant claims that the resultant litigation, Sisseton and Wahpeton Indians, Case No. 22524, supra, has made accounting under the 1851 Treaty of Traverse des Sioux res judicata.

We have examined the printed record of case No. 22524 in the Court of Claims library, as well as the published findings and opinion. An account is stated between the United States and the Sisseton and Wahpeton in Finding VIII at 42 Ct. Cl. 420-421. It is based on figures taken from Senate Document No. 68, 55th Congress, Second Session (1898),[13/] a report supplied to Congress by the Secretary of the

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13/ A copy of this document forms defendant's Exhibit 6 in Docket 142 of this Commission.

Interior in response to the Act of June 7, 1897, c. 3, 30 Stat. 62, 89. The same act required a similar report on the Medawakanton and Wahpakoota, which was also supplied, and printed as Senate Document 67, 55th Congress, 2d Session (1898).

The Senate Documents contain only the most rudimentary accounts. The "items" shown in Finding VIII in the Sisseton-Wahpeton case, and the additional claimed offsets rejected by the Court in its opinion, are not broken down at all in Document No. 68. Thus, for example, the entire amount appropriated for 12 years' interest on the trust fund provided by Article IV of the Treaty, as increased by the Senate amendment, forms a single item designated "interest-annuity" (see page 17). No information is given on the dates of payment or the manner, whether in cash or goods. The reports do not even record what proportions of the total were allocated among subsections 3, 4, 5, and 6 of Article IV.

None of the figures in this rudimentary account was challenged by the plaintiff. As in the Santee case of 1922, the only issues decided were those of law, viz., should this or that total category of expenditures be charged against the Indians? The amounts in each category were accepted from the Interior Department report without question.

Case No. 22524 was not an equitable accounting, and indeed there was insufficient information before the court to make equitable accounting possible.

We hold that the present general accounting is not barred by res judicata on the basis of the 1907 Sisseton-Wahpeton case. As to collateral estoppel, there is no issue now before us to which this doctrine might apply.

(2) Discrepancies between 1966 accounting under 1851 treaties and previous accountings. The plaintiffs point out in Exception 30d that the account stated between the defendant and the Sisseton and Wahpeton Bands in the 1907 case differs markedly from the totals given for the same transactions in Disbursement Schedule No. 16 at pages 74-77 of the 1966 GSA report.

In Exception 30e, plaintiffs point out that the account stated between the defendant and the Medwakanton and Wahpakoota Bands in the 1921 Court of Claims case differs markedly from the totals given for the same transactions in Disbursement Schedule No. 17 at pages 91-93 of the 1966 report.

Table II, below, shows the discrepancies between the various accounts the Government has presented under the 1851 treaties for the period ending with the Forfeiture Act of 1863.

TABLE II



Payments under Mississippi Sioux Treaties of 1851

| | | Sisseton-Wahpeton | | | | Medawakanton-Wahpakoota | | | |
|---|---|---|---|---|---|---|---|---|---|
| | | Due | 1966 GAO Report | S. Doc. 55-68 | | Due | 1966 GAO Report | 1922 Ct. Cl. Case | S. Doc. 55-67 |
| Art. IV: | | | | | Principal | | | | |
| Sec. 1. | To chiefs for settlement of affairs, removal & subsistence | $ 275,000.00 | $ 291,973.44 | $ 275,000.00 | | $ 220,000.00 | $ 215,563.54 | $ 220,000.00 | $ 220,000.00 |
| 2. | For manual labor schools mills, blacksmith shops, opening farms . . . other beneficial objects | 30,000.00 | 30,894.26 | 30,000.00 | | 30,000.00 | 30,866.10 | 30,000.00 | 30,000.00 |
| | In trust with U.S. for 50 years at five percent | 1,360,000.00 | --- | | | 1,160,000.00 | --- | --- | |
| | Subtotal | $1,665,000.00 | | | | $1,410,000.00 | | | |
| | Ten cents per acre for Minn. reservations | 112,000.00 | | [112,000.00] | | 69,000.00 | | | [69,000.00] |
| | TOTAL PRINCIPAL | $1,777,000.00 | $ 322,867.70 | $ 305,000.00 | | $1,479,000.00 | $ 246,449.64 | $ 250,000.00 | $ 250,000.00 |
| 3. | General ag. improvement & civilization ($12,000 a year) | (12 years) 144,000.00 | 124,536.10 | | Interest | (12 years) 144,000.00 | 149,111.88 | 152,588.52 | |
| 4. | Educational purposes ($6,000 a year) | 72,000.00 | 26,881.77 | | | 72,000.00 | 26,037.33 | 75,926.71 | |
| 5. | Goods & Provisions ($10,000 a year) | 120,000.00 | 199,987.72 | No Breakdown | | 120,000.00 | 193,081.19 | 126,608.72 | No Breakdown |
| 6. | Money annuity (S&W $40,000; M&W $30,000) | 480,000.00 | 440,696.46 | | | 360,000.00 | 199,313.29 | 384,937.24(c) | |
| | Interest on Minn. Res. (S&W $5,600; M&W $3,450) See Note (a) | 67,200.00 | --- | | | 41,400.00 | --- | 3,450.00(d) | |
| | Miscellaneous | --- | 20,639.37 | | | --- | 39,525.90 | --- | |
| | TOTAL INTEREST | $ 883,200.00 | $ 812,740.42 | 760,690.88(b) | | $ 737,400.00 | $ 607,069.59 | $ 743,511.19(e) | $ 653,950.80(f) |

Notes to Table II

(a) After the first installment, interest on the 10 cents per acre prices of the Minnesota reservations was apportioned, similarly to the interest provided by the original treaty, among the objects specified in sections 3-6 of Article IV. See Notes (c) and (d), below.

(b) Finding VIII in Sisseton and Wahpeton Indians v. United States, 42 Ct. Cl. 416, 420 (1907), erroneously states this sum as $760,586.22. The error occurred by twice subtracting the unexpended balance of $104.66 returned the treasury. See 208 U.S. 561, 566 (1908). As of the date of the Forfeiture Act, an additional $122,404.46 had been appropriated, but was unexpended. See 42 Ct. Cl. at 428. S. Doc. 68, 55th Cong., 2d Sess. 4 (1898) states that $67,404.46 of the latter sum:

> . . . was subsequently disbursed in the payment of indebtedness incurred for goods, supplies, and materials furnished for the use of the Indians prior to the outbreak, and for the salaries of agency and school employees prior and subsequent thereto.

(c) The excess over the obligation is made up of $19,629.28 transferred from interest on the 10 cents per acre paid for the Minnesota reservation, see Note (d) below, and $5,307.96 charged to the appropriation of $42,841.47 made by the Act of March 3, 1857, c. 90, 11 Stat. 183, for the express purpose of restoring "the legitimate balance found due the Medawa-kantoan and Wahpay-koo-tah Sioux, under the treaties of 1830 and 1837, for moneys heretofore carried to the surplus fund."

See Tables 29 and 35 of the 1920 account, in printed record of 1922 case, and compare footnote 11 to this opinion, above.

(d) The account of January 14, 1920, Table 36 on page 59, states $41,400 was appropriated to pay interest on the price of the Medawakanton-Wahpakoota reservation in Minnesota, and was disposed of as follows:

| | | |
|---|---|---|
| Total amount appropriated pursuant to Senate amendment striking Art. III, treaty of August 5, 1851. . . . . | | $41,400.00 |
| Amount transferred to sec. 3, Art. IV. . . | $ 7,851.69 | |
| Amount transferred to sec. 4, Art. IV. . . | 3,925.90 | |
| Amount transferred to sec. 5, Art. IV. . . | 6,543.13 | |
| Amount transferred to sec. 6, Art. IV. . . | 19,629.28 | |
| | | $37,950.00 |
| | | $ 3,450.00 |
| Less amount paid by disbursing agent . . . . . | | $ 3,450.00 |
| Unexpended balance | | -0- |

The amounts transferred are included in the figures given in the above table for sections 3, 4, 5 and 6 of Article IV.

(e) The total of $743,511.19 is taken from Table 28 at page 51 of the 1920 account. The Court of Claims account at 57 Ct. Cl. 371 uses the figure $742,707.96, having deducted $803.23 shown in Tables 32, 33 and 34 of the 1920 account as "transferred from miscellaneous items."

(f) The Senate Document (page 7) states an additional $83,449.20, appropriated but unspent, was on hand at the date of the Forfeiture Act, of which $28,149.20 was later expended

> . . . in the payment of indebtedness incurred for goods, supplies, and materials furnished for the use of the Indians prior to the outbreak, and for the salaries of the agency and school employees prior and subsequent thereto.

D. Joint disbursements under two or more treaties.

"Exception No. 31 - Failure to furnish an accounting of disbursements treaty by treaty and unauthorized expenditures of trust funds under various treaties (GSA, 6/28/66, pp. 94-108)."

Part II, Section H, of the 1966 report contains information about disbursements "under certain treaties jointly with other treaties." The GSA explains as follows (page 94):

> . . . The records of this Office fail to disclose the amounts applicable to any given treaty, and it could only be determined that they were applicable to two or more treaties in effect when the disbursements were made.

Statement No. 8 on pages 95-97 sets out purportedly joint expenditures, totalling $589,892.67, for various named purposes under (1) the treaties of 1830 and 1837, (2) the treaties of 1837 and August 5, 1851, (3) the treaties of 1837, July 23, 1851, and August 5, 1851, and (4) the two treaties of 1851. Five disbursement schedules appearing between pages 100 and 108 purport to show the joint expenditures for various purposes between 1839 and 1886.

The plaintiff comments:

> . . . Such a report does not constitute an acceptable accounting of treaty funds. The tribes are entitled to a treaty by treaty accounting in order that the validity of the disbursements may be tested by the terms and conditions of each treaty. Items proper under one treaty may not be proper under another.

As a general rule the foregoing statement is correct.

The 1966 GSA report shows expenditures in less than the promised amount under the 1830 and 1837 treaties, and under the 1851 treaties, in less than the promised total for the period before the Forfeiture Act but in excess of the promised amounts in several categories. For each treaty it shows "Miscellaneous items" not assigned to any specified authorized disbursement category; and, in the case of the two earlier treaties, it also shows "Unidentified disbursements." See pages 14, 47, 70, 71, 73, 76, 77, 84, 87, 89, 92, and 93 of report.

In Table III, below, we show the aggregate obligations of the United States through fiscal year 1863 under the 1830, 1837 and 1851 treaties and the aggregate expenditures shown by the 1966 GSA report:

TABLE III

| Treaty | Due | Paid, per 1966 report |
|---|---|---|
| 1830 | $ 62,132.00 (a) | $ 72,301.07 |
| 1837 | 1,081,000.00 | 830,844.70 |
| July 1851 | 1,188,200.00 (b) | 1,135,608.12 |
| Aug. 1851 | 987,400.00 (b) | 853,519.13 |
| | Joint Expenditures | |
| 1830-1837 | | 80,904.72 |
| 1837-Aug. 1851 | | 242,714.09 |
| 1837-July & Aug. '51 | | 1,570.63 |
| July & Aug. 1851 | | 264,703.23 |
| TOTALS | $3,318,732.00 | $3,482,165.69 |

Notes to Table III

(a) Plus obligations to provide a blacksmith and tools (Article IV) and to survey boundaries (Article VII), for which dollar amounts are not stated in the treaty.

(b) Omitting principals of trust funds, which treaty provided would revert to the Government.

It is evident that the GSA accountants who prepared the 1966 report did not overlook many expense items, but only failed to allocate them properly among the treaties and the various clauses of the treaties. These accountants, as we have stated earlier in this Part, used treasury ledgers as the starting point of their work. The accounts on the treasury ledgers were set up in accordance with the appropriation acts, not the treaties the appropriationswere made to fulfill. During the period between 1830 and 1863 it is possible in only two years to learn from the language of the appropriation act how much was appropriated for what particular object authorized by a Mississippi Sioux treaty. 14/ In all other years at least two classes of authorized expenditures were lumped together in the act; and from 1838 on, appropriations were made in bulk for two or more treaties.

Appropriations during the period in question were normally based on estimates made up by the heads of the various departments and forwarded annually to Congress by the Secretary of the Treasury as part of the Report on Finances required by the Act of March 10, 1800, c. 58, 2 Stat. 79. By section 14 of the Act of August 26, 1842, c. 202, 5 Stat. 519, the department heads were required to cite the laws and treaties authorizing the particular appropriations requested.

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14/ The Act of March 3, 1835, c. 50, 4 Stat. 784, and the Act of June 14, 1836, c. 88, 5 Stat. 40, each specified the appropriation for the Sioux of the Mississippi was made under the 1830 treaty, and segregated it as follows:

| | |
|---|---|
| For the limited annuity | $2,000 |
| For support of a blacksmith and assistant | 720 |
| For purchase of iron, steel, etc. | 220 |
| For agricultural implements | 700 |
| Total | $3,640 |

The Report on Finances was the 19th century version of the budget of the United States. The requests for appropriations, as compiled by the Treasury, were published as Congressional documents, and after 1846 were printed by the Treasury itself prior to submission to Congress. See Joint Res. No. 2 of January 7, 1846, 9 Stat. 108. They continued, nevertheless, to be included in the serial set of Congressional documents. Starting with the same year, it became customary to include the department heads' own estimates as an appendix in the printed volume. In the case of the Interior Department, the Secretary's estimate appended the separate estimates of the various bureaus, among them the Bureau of Indian Affairs; and these bureau estimates also formed part of the printed volume submitted to Congress.

We have reviewed a number of these printed estimates and find them quite specific as to how much was required under the individual clauses of the 1837 and 1851 treaties. To prepare such estimates, necessarily accounts must have been kept treaty by treaty showing the total obligation under each clause and how much had already been spent toward its fulfilment.

When a Congress made a bulk appropriation "for fulfilling treaty stipulations" in the total amount shown by the Bureau of Indian Affairs estimate, obviously it did not intend the money to be allocated haphazardly among the treaties. It intended the money to be expended in the proportions shown in the estimate, which presumably would fulfill the then outstanding treaty obligations.

The task of allocating the appropriations was not that of the treasury, which acted toward the appropriation only as banker and post-auditor. The allocation was the duty of the Commissioner of Indian Affairs, who was vested by law with the "direction and management of all Indian affairs, and of all matters arising out of Indian relations." Act of July 9, 1832, c. 174, 4 Stat. 564.

Therefore, the Bureau of Indian Affairs accounts, if available, rather than the treasury ledgers, should have formed the starting point for the General Services Administration's accounting under the early treaties. For without those accounts, as the 1966 report demonstrates, it is impossible to properly allocate the bulk appropriations. If the BIA accounts had been before the GSA accountants, there would perhaps have been no entries for "Miscellaneous items" or "Unidentified disbursements," and no "joint expenditures" under two or more treaties.

The BIA accounts are important for another reason. They are in themselves proof of the acts, transactions, and occurrances as a memorandum of which they were made or kept. 38 U.S.C. § 1733 (1948).

GSA accounting reports should, of course, be supported by the best available evidence. Normally this would be the original vouchers. Where they are missing, however, as in the case of E. A. Hitchcock's account No. 5070, mentioned above at page 333, the Government is not relieved of the duty to account. Rather it is put to a search for secondary evidence. Among such evidence would be the BIA accounts.

Section 3 of the Act of May 6, 1822, c. 58, 3 Stat. 682, provided in part as follows:

> . . . all persons whatsoever, charged or trusted with the disbursement or application of money, goods, or effects, of any kind, for the benefit of the Indians, shall settle their accounts, annually, at the War Department, on the first day of September; and copies of the same shall be laid, annually, before Congress at the commencement of the ensuing session, by the proper accounting officers, together with a list of the names of all persons to whom money, goods, or effects, had been delivered within said year, for the benefit of the Indians, specifying the amount and object for which it was intended, and showing who are delinquent, if any, in forwarding their accounts according to the provisions of this act.

The same language was reenacted in section 13 of the Act of June 30, 1834, c. 162, 4 Stat. 737, changing the settlement date from September 1 to October 1 of each year.

The "proper accounting officer" to lay the Indian accounts before Congress during the period of the treaties discussed in this opinion was the Second Auditor of the Treasury, who received and examined all unsettled accounts arising out of Indian affairs, except those appertaining to Indian trade, certified the balances, and forwarded them, with supporting vouchers, to the Second Comptroller for his decision thereon. Act of March 3, 1817, c. 45, 3 Stat. 366, as amended by Act of February 24, 1819, c. 43, id. 487.

Thus, even if the original accounts and vouchers are "missing from the files of this office," as the General Services Administration occasionally reports, there is no excuse for abandoning further work

on the report. The copies laid before Congress can be consulted. Indeed, the copies of the Indian accounts forwarded to Congress by the Second Auditor were in most instances published and can be found in the serial set of Congressional documents. 15/

15/ Accounts of disbursements for Indians between 1830 and 1863 were published in the following documents:

| F.Y. | Serial | Document Identification |
|---|---|---|
| 1830 | 208 | H. Doc. 101, 21st Cong., 2d Sess. |
| 1831 | 219 | H. Doc. 180, 22d Cong., 1st Sess. |
| 1832 | 235 | H. Doc. 137, 22d Cong., 2d Sess. |
| 1833 | 259 | H. Doc. 490, 23d Cong., 1st Sess. |
| 1834 | 274 | H. Doc. 150, 23d Cong., 2d Sess. |
| 1835 | | Not published in serial set. |
| 1836 | 303 | H. Doc. 137, 24th Cong., 2d Sess. |
| 1837 | 330 | H. Doc. 362, 25th Cong., 2d Sess. |
| 1838 | 347 | H. Doc. 174, 25th Cong., 3d Sess. |
| 1839 | 366 | H. Doc. 173, 26th Cong., 1st Sess. |
| 1840 | 384 | H. Doc. 108, 26th Cong., 2d Sess. |
| 1841 | 403 | H. Doc. 164, 27th Cong., 2d Sess. |
| 1842 | 422 | H. Doc. 162, 27th Cong., 3d Sess. |
| 1843 | 443 | H. Doc. 240, 28th Cong., 1st Sess. |
| 1844 | 465 | H. Doc. 139, 28th Cong., 2d Sess. |
| 1845 | 483 | H. Doc. 91, 29th Cong., 1st Sess. |
| 1846 | | Not published in serial set. |
| 1847 | 508 | S. Ex. Doc. 48, 30th Cong., 1st Sess. |
| 1848 | 572 | H. Ex. Doc. 11, 31st Cong., 1st Sess. |
| 1849-1850 | | Not published in serial set. |
| 1851 | 647 | H. Ex. Doc. 103, 32d Cong., 1st Sess. |
| 1852 | 695 | S. Ex. Doc. 25, 33d Cong., 1st Sess. |
| 1853 | 701 | S. Ex. Doc. 69, 33d Cong., 1st Sess. |
| " | 726 | H. Ex. Doc. 107, 33d Cong., 1st Sess. |
| 1854 | 790 | H. Ex. Doc. 87, 33d Cong., 2d Sess. |
| 1855 | 847 | H. Ex. Doc. 11, 34th Cong., 1st Sess. |
| 1856 | 899 | H. Ex. Doc. 31, 34th Cong., 3d Sess. |
| 1857 | 950 | H. Ex. Doc. 22, 35th Cong., 1st Sess. |
| 1858 | 981 | S. Ex. Doc. 15, 35th Cong., 2d Sess. |
| 1859 | 1046 | H. Ex. Doc. 10, 36th Cong., 1st Sess. |
| 1860 | | Not published in serial set. |
| 1861 | 1121 | S. Ex. Doc. 31, 37th Cong., 2d Sess. |
| 1862 | 1149 | S. Ex. Doc. 39, 37th Cong., 3d Sess. |
| 1863 | | Not published in serial set. |

The report for 1830 covers a fiscal year beginning September 1, 1829, and ending August 31, 1830. The reports beginning with 1831 and ending with 1848 cover fiscal years beginning October 1 and ending September 30. The reports for 1851 and later years cover fiscal years beginning July 1 and ending June 30.

An accurate account of financial transactions in which the Government was involved over a hundred years ago is not easy, but it is usually not impossible if a diligent search is made for the old records and the surviving secondary evidence of the content of those which are missing. More than any other, the "joint expenditure" section illustrates the inadequacy of the 1966 GSA report to form the basis for a fair adjudication of this accounting case. The "joint expenditure" section must be rejected; and the Government shall take the remedial action noted at the end of this part of the opinion.

E. Treaties of 1858.

"Exception No. 32. - Unauthorized expenditure of funds under the Treaties of June 19, 1858 and failure to furnish adequate facts. (GSA, 6/28/66, Part II, Section I, pp. 109-135)."

By two treaties made on June 19, 1858, those parts of the Mississippi Sioux reservations lying north of the Minnesota River were taken away from the Medawakanton-Wahpakoota Tribes and Sisseton-Wahpeton Tribes. See 12 Stat. 1031, 1037. Since the Indians' title was questionable, the treaty provided that the Senate should decide what compensation to make, if any. The Senate decided the Indians had good title and awarded them 30 cents an acre. See Resolution of June 27, 1860, 12 Stat. 1042. The consideration came to $96,000 in the case of the Medawakanton and Wahpakoota and to $170,880 in the

case of the Sisseton and Wahpeton, which sums were appropriated by the act of March 2, 1861. c. 85, 12 Stat. 221, 237.

Article III in both treaties provided that if the Senate should provide compensation for the area north of the river, "the chiefs and headmen of said bands may, in their discretion, in open council, authorize to be paid out of the proceeds of said tract such sum or sums as may be found necessary and proper, not exceeding seventy thousand dollars, to satisfy their just debts and obligations. . ." [Emphasis added.]

According to the 1966 GSA report, all of the Lower Bands' $96,000 was paid to creditors.

The Government's apparent disregard of the $70,000 limitation on payments to creditors was the basis for the Santees' claim in case No. C-531 (15), Sioux Tribe v. United States, 95 Ct. Cl. 592 (1942). The court did not reach the merits, but dismissed on the ground that the claim has been extinguished by the Forfeiture Act of 1863.

The Government pleaded the same defense in the instant case; but we held in the non-accounting phase of Docket 363 that the Indian Claims Commission Act empowers us to hear claims based on acts and transactions under the pre-1863 treaties despite the Forfeiture Act. See Sisseton and Wahpeton Bands v. United States, Dockets 142 et al., 10 Ind. Cl. Comm. 178, 194 (1962). We adhere to that decision.

Plaintiffs now contend (Exception 32, supporting statement, pages 70-71):

> Insofar as the money was used to pay creditors, it is unauthorized since there is no showing that the chiefs and head-men of the bands, in open council authorized such sums to be paid, as required by Articles 3 of the treaties.

The 1966 report states (at page 114) that its accounting of the moneys paid to the Medawakanton and Wahpakoota Tribes under their 1858 treaty is repeated from the report of the General Accounting Office in Court of Claims case No. C-531. The figures in the 1966 report are in fact taken from the earlier report, but most of the explanatory material is omitted. A description of the circumstances of payment of the entire $96,000 to creditors, quoted from House Report No. 73, 43d Congress, 1st Session, appears between pages 1355 and 1360 of volume III of the old GAO report. According to this quoted material, the matter of paying creditors was submitted to the Lower Sioux chiefs and headmen in council on December 3, 1860; and they directed all claims presented against them to be examined, and if found just, paid, even if the total should exceed $70,000. The Secretary of the Interior, however, authorized pro-rata payment only up to the $70,000 limit stated in the treaty, said payment to be in full satisfaction of the creditors' respective claims. Later, upon request of the Indians, the Secretary directed payment of their debts incurred between the date of the treaty and the 1860 council.

The above information should have been set out in the 1966 report; but since the old GAO report was retrieved from the archives and

filed with this Commission by plaintiffs' attorney, Marvin J. Sonosky, plaintiffsare hardly in position to claim ignorance.

Plaintiffs remain at liberty, of course, to offer proof that the above information is false, or to question its legal effect.

Concerning the Sisseton-Wahpeton consideration of $170,880.00, plaintiff asserts that the report shows that apparently $159,431.15 was paid to creditors, without showing that the chiefs and headmen authorized such payment in open council. As to the balance, plaintiffs write, "the recitations in the report are inadequate to permit a determination of whether such disbursements were authorized or appropriate."

The Sisseton and Wahpeton's $170,880.00, according to the 1966 GSA report, was distributed as follows (see Statement No. 12, p. 127, Schedule 26, p. 135):

| | |
|---|---|
| For dealings subsequent to treaty of June 19, 1858, and up to date of council held December 3, 1860. . . . . | $15,024.42 |
| Pro rata allowance of amount due for obligations incurred prior to treaty of June 19, 1858. . . . . | 72,224.55 |
| Depredations committed by Sioux. . . . . | 102.50 |
| Locating Sioux of Minnesota on new reservation. . . . . | 71,681.32 |
| Services as warehouse check under provisions of treaty of 1851. . . . . | 398.36 |

| | |
|---|---|
| Disbursed for the Medawakanton and Wahpakoota Bands of Sioux | $ 704.29 |
| Amount forgiven by compromise, approved by Secretary of the Treasury in letter of Solicitor of the Treasury, dated May 18, 1880 (see account No. 3093 of Clark W. Thompson) | 10.88 |
| Transferred to: | |
| "Fulfilling Treaties with Sioux of the Mississippi" | 10,000.00 |
| "Subsistence, Clothing, etc., of the Sisseton, Wahpeton, and Medawakanton Bands of Sioux | 733.68 |
| | $170,880.00 |

Plaintiffs are quite correct that the 1966 report is inadequate. We do not read it as showing more than $87,268.97 ($15,024.42 plus $72,224.55) as paid to creditors; but the authority for these payments as well as all the other payments listed is not shown. Besides the years of some of the disbursements, given in the disbursement schedules, the 1966 report contains no more information than that set out above. What really happened to the money is just not revealed.

What, for instance, does "dealings subsequent to treaty of June 19, 1858" mean? Who got the $15,024.42 and for what reason? Disbursement Schedule No. 26, at page 134 of the 1966 report, schedules payment of the item in fiscal year 1862. If the item represents payment of debt, how could it have been authorized, in view of the following recital at pages 1357-1358 of the old GAO report in case No. 531, quoted from House Report 75, 43d Congress, 1st Session:

> . . . On the amounts due from both bands prior to the treaty of 1858, there was actually paid to claimants on account of the Upper band the sum of $69,365.88 . . . leaving a balance . . . of $24,371.80 . . . The Upper bands not having made any request for the payment of their debts subsequent to the treaty of 1858, no action was at that time taken in regard to them; provision, however, was made by the fourteenth article of the treaty of 1867 [15 Stat. 508] for the payment of the amount, $24,371.80, due from them, but said article 14, with others, were stricken out by the Senate, and consequently no further action has been taken in the matter.

Enough should be stated in an accounting report to enable the Commission to determine prima facie whether or not the money was properly spent. The authority and object of the payment should be given specifically for each item in the tabulation. Where the authority is contained in an obscure unpublished document, like the Solicitor of the Treasury's letter forgiving Clark W. Thompson, a copy of the document should be provided. In the special case of the payments to creditors under the 1858 treaty, where the transactions are surrounded by suspicious circumstances, defendant should list the payees.

The 1966 report also contains an accounting of expenditure of the $70,000 appropriated by the Act of May 16, 1874, c. 181, 18 Stat. 47. This law authorized the Secretary of the Interior "to discharge all obligations of the United States to the creditors of the Upper and Lower Bands of Sioux Indians, arising under the treaty of June nineteenth, eighteen hundred and fifty-eight. . . and from the diversion

by the United States of the funds and assets of said Indians in their possession and control applicable to that purpose." Plaintiffs contend they are entitled to a fuller explanation of this $70,000 appropriation.

We think not. This money was public money of the United States and the obligation discharged, if any,[16/] was that of the United States.

Payments from this same appropriation have twice been urged before the Court of Claims as offsets against the Mississippi Sioux, and have been rejected both times. See Sisseton and Wahpeton Indians, supra, 42 Ct. Cl. at 431-432, and Medawakanton Indians, supra, 57 Ct. Cl. at 377. In the latter case, the Government briefed its position extensively, and the record as a whole, which we have examined, makes apparent that the Court's refusal to go behind the language of the appropriation act was deliberate and considered. The Court stated:

> . . . The $70,000 thus appropriated is not a charge against the Indians, in view of the statement in the act that their funds applicable to a stated purpose had been diverted, the Government assuming the obligation.

Offsets in the present case are barred by the compromise settlement heretofore approved in Sisseton and Wahpeton Bands, supra, 18 Ind. Cl. Comm. 477, 480. But in our opinion the Medawakanton case raises

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16/ The GAO report in Court of Claims Case No. C-531 points out, at page 1367, that the money available for paying creditors under the Medawakanton-Wahpakoota Treaty of 1858 was in fact not diverted, suggesting that Congress acted under a misapprehension in passing the 1874 appropriation.

a collateral estoppel against further consideration of the 1874 appropriation for any purpose.

All accounting under the 1874 act should be eliminated from further consideration.

F. Ruling on Exceptions 30, 31, and 32: the defendant must render a new account.

On four previous occasions the Government has accounted for various aspects of its financial relations with the Sioux of the Mississippi. Each account differed, and in some respects conflicted, with the others. The 1966 General Services Administration report is the most confused of all, but perhaps also the most candid. If nothing better were attainable, we could of course proceed to adjudication on that report, disallowing the inadequately identified disbursements.[17/] Such a course would subject the Government to heavy liability even though it may already have paid the Indians more than it was obliged to.

Though perhaps giving the plaintiffs more than they would get on an accurate account, such action, we believe, would not be in the best interest of either party. This is the "extreme case" foreseen in Blackfeet, supra, 32 Ind. Cl. Comm. at 86, where the defendant must be ordered to prepare a new account of disbursements. It was the

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17/ See Blackfeet (on rehearing), supra, 34 Ind. Cl. Comm. at 144.

intent of Congress that cases arising under the Indian Claims Commission Act should be decided on an adequate record. Cf. Pawnee Tribe v. United States, 124 Ct. Cl. 324, 336, 109 F. Supp. 860, 867 (1953), aff'g in part, rev'g in part, Docket 10, 1 Ind. Cl. Comm. 230 (1950).

Here history as well as the law demands adjudication or settlement on the basis of full and accurate disclosure. All detailed accounts heretofore presented agree that the annuities due to the Mississippi Sioux prior to their removal from Minnesota were not paid regularly or promptly. This situation doubtless contributed to forcing the Indians into debt with the traders and helped lead to the bitterness which erupted in the revolt of 1862.

The Forfeiture Act, passed shortly afterwards, served not only as an instrument of vengeance but of concealment of prior irregularities in the financial dealings between the United States and these plaintiffs. As recently as 1942, when the Court of Claims dismissed case No. C-531 (15), supra, the act was still serving the purpose of concealment.

To finally put to rest the animosities flowing from such a history, the facts of the Government's dealings with these plaintiffs' money and property must be adequately disclosed. A new report should be filed giving accurate details.

The Commission does not desire to put the defendant to needless work. It may be that the plaintiffs consider themselves sufficiently informed in some areas to make further accounting unnecessary. In other areas the amounts involved may be too small to justify the

delay of the case while defendant assembles information. For this reason we will not now make a detailed order for recasting the accounts under the pre-1863 treaties. Instead, we are calling a conference before Commissioner Vance and his advisers to obtain the views of the parties' attorneys and accountants on what accounting work needs to be done. The date is fixed in the accompanying order.

We believe, however, that nothing less than a settlement of these pre-Civil War accounts on the basis of adequate and accurate information, whether the settlement be reached by adjudication or compromise, will fulfill the purpose of the Indian Claims Commission Act to dispose justly as well as finally of ancient tribal grievances.

VIII

SIOUX REMOVAL ACT OF 1863 AND RELATED LEGISLATION

As part of the same legislative package as the Forfeiture Law, 18/ Congress passed the Sioux Removal Act of March 3, 1863, c. 119, 12 Stat. 819. The latter statute directed the President to set apart "a tract of unoccupied land outside of the limits of any state" for the Sisseton, Wahpeton, Medawakanton, and Wahpakoota Indians, and provided for the sale of the forfeited Minnesota reservations for the benefit of the Indians.

The Government has presented an account of its expenditures from the proceeds of the Minnesota reservations in Part II, Section A,

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18/ See H.R. Rept. 13, 37 Cong., 3d Sess. (1862); Congressional Globe, 37th Cong., 3d Sess. 303, 440, 515, 516 (1863).

between pages 7 and 30 of the 1967 GSA report. Plaintiffs take issue with this account in Exceptions 9 through 15.

Exception 9 - Failure to invest or pay interest on proceeds of Minnesota reservations.

Section 4 of the Removal Act provided:

> That the money arising from said sale shall be invested by the Secretary of the Interior for the benefit of said Indians in their new homes, in the establishing them [sic] in agricultural pursuits. . .

Plaintiff states that the 1967 report fails to show whether the proceeds of the Minnesota Reservations were invested, or if invested fails to report the increment on the investment.

We read the report as showing that these funds were not made productive of income from 1865, when the first proceeds of sale were received, until 1888, when $20,000 was placed in an interest-bearing account in the U.S Treasury.

"Invest" was defined in Webster's Unabridged Dictionary, New Pictorial Edition (1860), the authoritative American dictionary closest in time to the Removal Act, as follows:

> 7. To lay out money in the purchase of some species of property, usually of a permanent nature.

There is no doubt that the proceeds of the Minnesota Reservations were trust funds. 19/

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19/ See pages 371, 377.

The Act of September 11, 1841, required all funds held in trust by the United States to be invested in Government securities. See 31 U.S.C. § 547a. This was the only lawful method of making Indian trust moneys productive provided by general law prior to adoption of the Act of April 1, 1880, discussed below under Exception No. 11. The Court of Claims has held the 1841 act applicable only where some other law or contract requires a trust fund to be made productive. United States v. Mescalero Apache Tribe, Appeal No. 2-74 (July 11, 1975), at page 33 of slip opinion. Here, section 4 of the Removal Act so required. The Removal Act as subsequent special legislation, broadened the field of investment in regard to proceeds of the forfeited reservations to allow purchase of property to establish the exiled Indians in agricultural pursuits; but neither the 1841 act nor the Removal Act authorized the holding of idle balances beyond the period necessary to make investment practicable. Cf. Te-Moak, supra, 31 Ind. Cl. Comm. at 449.

It is apparent from comparing Disbursement Schedule No. 1, at pages 20-28 of the 1967 GSA report, with the list of warrants for amounts credited to the fund, on pages 261-265, that large uninvested balances of the proceeds from the Minnesota reservations were on hand for fairly long intervals during the period 1865-1880 and thereafter.

Our ruling of law is that the defendant must respond in damages for its failure to make the unexpended balances productive of income. During the period from the first sale until April 1, 1880, the measure of damages is 5 percent simple interest. See Mescalero Apache, supra, at 36. At the appropriate time, the parties may submit their calculations of damages in proposed findings. We deal with the period after April 1, 1880, under Exception No. 11, below.

Exception 10

A. Failure to account for disbursement of Sisseton and Wahpeton and Flandreau shares of proceeds of Minnesota reservations.

Statement No. 2 at page 15 of the 1967 GSA report states that the proceeds of sale of the Minnesota reservations totalled $950,063.71. Miscellaneous receipts amounting to $1,843.71 were mingled in the same fund, making the grand total $951,907.42. This money was allocated among the several Mississippi Sioux groups, and disbursed, as follows:

| | | |
|---|---|---|
| (1) | Santee of Santee Reservation, Neb. | $303,791.16 |
| (2) | Santee of Santee Reservation, jointly with Sioux of Devil's Lake and Lake Traverse | 19,143.69 |
| (3) | Sioux of Lake Traverse Reservation | 334,388.46 |
| (4) | Sioux of Devil's Lake Reservation | 224,582.31 |
| (5) | Flandreau Band of Santee Sioux | 48,458.54 |
| | Subtotal | $930,369.16 |
| | Transferred to "Santee Sioux Fund" by transfer warrant No. 7, dated August 29, 1888 | 20,000.00 |
| | Carried to the surplus fund by warrant No. 62, dated March 19, 1929 | 1,543.26 |
| | Total | $951,907.42 |

Disbursement schedules give details only of the expenditures for the Santee of the Santee Reservation and for the Santee jointly with the Devils Lake and Lake Traverse Sioux. There is no breakdown of the expenditures for the sole benefit of the latter two groups or for the Flandreau Santee.[20/] Plaintiffs state that this deficiency makes it

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20/ This is a group of farmer Sioux who left the Santee agency in 1869 to take up homesteads on the public domain in the valley of the Big Sioux River above Sioux Falls, near the eastern boundary of South Dakota. See Commissioner of Indian Affairs, Annual Report 203-204 (1870).

impossible to determine whether that portion of the proceeds expended after July 15, 1870, was "distributed and paid equitably to the said Indians in proportion to their numbers" as required by section 8 of the act of that date, c. 296, 16 Stat. 361.

Indeed, the defendant's failure to give details of the expenditures for the Sisseton and Wahpeton makes impossible any equitable accounting of the Government's management of those bands' share of the Minnesota reservation proceeds. The Government will be ordered to supply appropriate schedules at the earliest possible date.[21/]

The Commission urges the accountants for the parties to meet at once and discuss the categories to be used in the new schedules, so as to forestall future dispute about their meanings, or complaint that they are too broad, vague, or ambiguous.

B. Interpretation of the Act of July 15, 1870.

Sections 7 and 8 of the Indian Department Appropriation Act of July 15, 1870, c. 296, 16 Stat. 335, 361, provide as follows:

> Sec. [7.] And be it further enacted, That the act approved March three, eighteen hundred and sixty-three, entitled "An act for the removal of the Sisseton, Wahpeton, Medawakanton, and Wapakoota bands of Sioux or Dakota Indians, and for the disposition of their lands in Minnesota and Dakota," be so amended as to make the proceeds of the sale

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21/ The introduction to the 1967 GSA report (page 2) states that its accounting under the 1863 act is repeated from the GAO report of April 12, 1932 (prepared for case No. C-531 in the Court of Claims) and extended to June 30, 1951. The Sisseton and Wahpeton were not parties to case No. C-531, but are parties here.

> of the reservations in said act ordered to be sold applicable alike to all the reservations upon which Medawakanton, and Wakapoota [sic] and Sisseton and Wahpeton have been or may hereafter be located.
>
> Sec. [8.] And be it further enacted, That said proceeds shall be distributed and paid equitably to the said Indians in proportion to their numbers, under the direction of the Secretary of the Interior, and in accordance with existing laws: Provided, That this provision shall apply only to the funds to be hereafter distributed.

Defendant answers Exception 10 by stating that the distribution "to the said Indians in proportion to their numbers" of the proceeds from the sale of the Minnesota reservations required by the 1870 act is contained at pages 1386-1393 of the GAO report in Court of Claims case No. C-531.

The relevant part of the cited GAO report states:

> . . . The following proportions were used by the Indian Office in the division of the proceeds of sale of said lands:

| | Periods | | |
|---|---|---|---|
| | July 15, 1870, to June 30, 1871 | July 1, 1871, to June 30, 1872 | July 1, 1872, to June 30, 1907 |
| Santee Sioux | 974/3012 | 987/3145 | 2/7 |
| Sioux of Lake Traverse and Devils Lake | 2038/3012 | | |
| Sioux of Lake Traverse | | 1426/3145 | 3/7 |
| Sioux of Devils Lake | | 732/3145 | 2/7 |

The apportionment was strictly on the basis of population until June 30, 1872. The basis for the apportionment after that date is said

still to be population, but evidently used only roughly. See Sioux Tribe v. United States, 95 Ct. Cl. 603, 605-606.[22/]

The 1870 amendment does not require apportionment strictly on the basis of population. Sections 7 and 8 of the Act of July 15, 1870, were added in the Senate as floor amendments proposed by the Committee on Indian Affairs. Immediately after its Chairman, James Harlan of Iowa, offered them on June 6, 1870, the following colloquy took place (Cong. Globe, 41st Cong., 2d Sess. 4133):

> Mr. RAMSEY. I suggest to the Senator who offers this amendment that he modify the concluding paragraph of it so as to read:
>
> That said proceeds shall be distributed and paid equitably to the said Indians in proportion to their numbers, under the direction of the Secretary of the Interior, and in accordance with existing laws.
>
> I think that would answer the purpose much better than the phraseology of the amendment as offered.
>
> Mr. HARLAN. That is a substitute for the latter clause.
>
> Mr. RAMSEY. The final clause.
>
> Mr. HARLAN. I have no objection to that.
>
> Mr. POMEROY. It says "paid equitably." That gives a discretion to pay one more and one less. Why not say "Paid equally?"

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22/ This case was designated No. C-531 (16) in the Court of Claims. The Santee Sioux claimed to be entitled to a larger share of the Minnesota Reservation proceeds than had been distributed to them; but the Court upheld the apportionment shown above. The Sisseton and Wahpeton Sioux were not before the Court of Claims in case No. C-531 (16), or in case No. C-531, the original suit out of which it was severed.

> Mr. HARLAN. There are four bands of these Indians. Heretofore two or three of those bands have been provided for by special acts from year to year, and this is intended to make it permanent, so that the members of each band will draw from this time forward their proportion of the annuities. It makes no additional appropriation, but merely regulates the distribution of money to which the tribe is entitled to the different bands.
>
> Mr. RAMSEY. I should say to the Senator from Kansas that "equitably" means "equally," of course generally, but there may be some special reasons why the money ought not to be divided equally on every occasion; and hence the phrase "equitably" is better, under the discretion of the Secretary of the Interior. Suppose some one of the bands was to absent itself and engage in a foray, its distributive share might be withheld.

The proviso in section 8, deleted through a misunderstanding when Senator Ramsey offered his modification to the Indian Affairs Committee amendment, was restored the next day. Id. 4159.

We believe the burden of going forward on the issue of the equitability of the apportionment of the proceeds of the Minnesota reservations is on the plaintiffs. Something more must be shown than mere inequality. No action on the part of the defendant will be ordered in this connection, beyond the detailed accounting for Sisseton and Wahpeton and Flandreau disbursements discussed above.

Exception 14b (as amended September 15, 1969) also involves the interpretation of the 1870 act and will be discussed here.

Exception No. 14b (as amended)--1870 amendment does not restrict use of the proceeds of Minnesota reservations to per capita payment or require segregation of sums derived from Medawakanton-Wahpakoota

reservation from those derived from Sisseton-Wahpeton reservation.

Plaintiffs object to every disbursement from the proceeds of the Minnesota reservations after July 15, 1870, except the per capita payments. Quoting section 8 of the 1870 act, they write, at page 24 of their Memorandum on Legal Issues:

> Proceeds "distributed and paid equitably" means paid per capita.

The phrase does not mean that to us. The word "distributed" suggests goods. If only money were to be turned over to the Indians, the word "paid" would seem sufficient.

The 1870 amendment, in our opinion, regulates allocation of the Minnesota reservation proceeds, not the manner or purposes of their expenditure. Distribution and payment are to be "in accordance with existing laws." We think this continued in force the provision of the March, 1863, act providing that the proceeds "shall. . .be invested for the benefit of said Indians in their new homes, in the establishing them in agricultural pursuits." The trust money would go further toward setting the Indians up as farmers, if the Secretary of the Interior were free to use the mass purchasing power of the fund to obtain farm supplies at wholesale or manufacturers' prices rather than issuing cash to individual Indians to buy at retail. We find nothing in the 1870 act or its legislative history indicating that Congress placed the impediment of compulsory per capita payment in the way of its purpose to establish the Mississippi Sioux in agricultural pursuits.

If the 1870 act required per capita payout of the Minnesota reservation proceeds, moreover, section 8 of the Act of July 13, 1892, c. 164, 27 Stat. 120, would have been unnecessary. The 1892 act states:

> That the funds now in the treasury belonging to the Santee Sioux Indians in the State of Nebraska and at Flandreau in the State of South Dakota, resulting from the sale of lands in Minnesota, and thirty-two thousand dollars heretofore appropriated to purchase lands for the Santee Indians in Nebraska, who have not received allotments may in the discretion of the Secretary of the Interior, be paid in cash.

Plaintiffs continue, in their Memorandum on Legal Issues:

> . . . The money was derived from two separate reservations. The money derived from the Sisseton-Wahpeton reservation should have been paid to those Indians. The money derived from the Medawakanton and Wahpakoota reservation should have been paid to those Indians. Here the two reservations were sold "as one tract" . . . The Government intermixed the proceeds and has not disclosed (a) how much was derived from each reservation. . .

While ordinarily the proceeds of sale of an Indian reservation should go to the Indians it belonged to and no others, the plaintiffs' Minnesota reservations form a special case. They were not ceded in trust, but confiscated.

The act of February 16, 1863, was not an effort of Congress to transmute land to money for the Indians. Cf. Three Affiliated Tribes of the Fort Berthold Reservation v. United States, 182 Ct. Cl. 543, 555, 390 F. 2d 686, 692-693 (1968). It was an uncompensated seizure similar to other wartime enemy property laws. It extinguished all the Mississippi Sioux' beneficial interest in their Minnesota reservations. The act

of March 3, 1863, providing for investment of the proceeds for the benefit of the Indians, created a new trust.

The 1870 act supplied the rule for distribution of the new trust fund, left unclear in the March, 1863, legislation. That rule provided for allocation equitably in proportion to the numbers of the beneficiaries, not in accordance with which former reservation incoming moneys derived from. Cf. Sioux Tribe v. United States, No. C-531 (16), 95 Ct. Cl. 603 (1942).

Exception 14b is ill-taken and will be dismissed.

This does not mean that the plaintiffs are entitled to no further information about sales and receipts under the March, 1863, act. Having assumed the new trust, however gratuitously, the Government was bound to carry it out faithfully. Cf. Restatement (Second) of Trusts § 352. The plaintiffs can obtain desired information by discovery.

Exception No. 11 - Failure to earn interest on all proceeds of Minnesota reservations after 1880.

According to the GSA report, $20,000 of the proceeds of plaintiff's Minnesota reservations were on August 29, 1888, placed in an interest bearing account in the U.S. Treasury, entitled "Santee Sioux Fund." The Act of April 1, 1880, 25 U.S.C. § 161, is cited as authority for this action. Plaintiffs want to know why exactly $20,000 was deposited and why the Government waited from 1880 to 1888 to make the deposit.

The 1880 act was passed in response to falling interest rates, which had made it increasingly difficult to comply with the requirement

in the act of September 11, 1841, 31 U.S.C. § 547a, for a five percent minimum interest rate on securities purchased for trust investment. The 1880 act applied only to certain classes of trust funds. Among them are "all sums received on account of sales of Indian trust lands," the category in which the proceeds of the Minnesota Sioux Reservations clearly fall.[23/] The 1880 act gave the Secretary of the Interior the alternative of depositing such trust funds in the treasury at interest rather than buying Government bonds.

The recent decision of the Court of Claims in Mescalero Apache, supra, was not concerned with the 1880 act. Accordingly, we will continue to follow our own previous interpretation of this act.

Where the funds required to be invested by section 4 of the Removal Act were left idle after April 1, 1880, we hold that plaintiffs suffered a wrong actionable under the Indian Claims Commission Act, and their damages are to be measured by the five percent simple interest provided in the 1880 act. Blackfeet, supra, 32 Ind. Cl. Comm. at 141.

No additional data other than the disbursement schedules for the Sisseton and Wahpeton and Flandreau Santee, discussed above under Exception 10, will be necessary to enable the plaintiff to compute

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23/ See Blackfeet, supra, 32 Ind. Cl. Comm. at 140-141. The 1880 act is further discussed in Te-Moak, supra, 31 Ind. Cl. Comm. at 478-482, and Fort Peck Indians v. United States, Docket 184, 34 Ind. Cl. Comm. 24, 31-33 (1974). We think the fact that the Minnesota reservations were originally seized from the Indians rather than ceded by them does not prevent the 1880 act from applying, in view of the trust status reimposed on the lands by the act of March 3, 1863.

their losses, if any, from defendant's failure to make the proceeds of the Minnesota Reservations productive after 1880.

The questions of why the Government delayed from 1880 to 1888 to deposit the Santee's $20,000, and of why exactly $20,000 was deposited are immaterial and the defendant will not be required to furnish specific explanations. Insofar as Exception 11 charges the defendant which breach of duty to make the Minnesota Reservation proceeds productive, it is redundant with Exception 9. Accordingly, Exception 11 will be dismissed.

"Exception No. 12 (GSA, Statement No. 1, pp. 12-14 and Disbursement Schedule No. 1, pp. 20-28) - Conflicting and confusing data concerning disbursements."

Plaintiff alleges that Disbursement Schedule No. 1 in the 1967 GSA report conflicts with the summary of disbursements from the proceeds of the Minnesota reservations given in Statement No. 1 of that report.

As the defendant points out in its answer to the exception, plaintiffs are mistaken. Exception 12 will be dismissed.

We must add, however, that the confusing arrangement of Disbursement Schedule No. 1 makes the plaintiffs' mistake understandable.

Statement No. 1 purports to show disbursements for the Santee Sioux of the Santee Reservation, Nebraska. The disbursements are arranged in three columns, headed, respectively, "Direct," "Jointly with Devil Lake and Lake Traverse Sioux," and "Total." The "Total"

column contains the line by line totals of the various items listed in the first two columns. Each column is also footed up.

The columns in Disbursement Schedule No. 1, on the other hand, represent fiscal years. The "direct" and "joint" expenditures are identified as such, but appear in the same columns and are totalled together year by year. The "direct" and "joint" totals given in Statement No. 1 therefore, can be correlated with the disbursement schedule only by extracting and adding up individual items. To be readily understandable, the "direct" and "joint" expenditures should have been scheduled separately.

While we will not so order, we suggest that the defendant recast Disbursement Schedule No. 1 as above indicated and file the resultant two schedules with the schedules of Sisseton and Wahpeton and Flandreau disbursements we are ordering under Exception 10.

"Exception No. 13 (GSA, pp. 12, 21 and 27,'Pay of Physician') - Conflict in reported amounts."

Plaintiffs point out that Statement No. 1 shows items for "Pay of Physician" of $2,663.53 under the original Act of March 3, 1863, and of $237.00 under the amendatory Act of July 15, 1870; while Disbursement Schedule No. 1 shows $788.53 under the original act and $2,112.00 under the amended act. In both the Statement and the Schedule, the two items total $2,900.53.

The defendant states in its answer that the figures in Disbursement Schedule No. 1 are correct, and that Statement No. 1 should be changed

to conform. We have made the change on the Commission's file copy of the GSA report, and will dismiss the exception as having served its purpose.

Exceptions 14 and 15 - Proof of delivery of goods. Plaintiffs complain in both these exceptions, among other things, that defendant has failed to show "delivery for the exclusive and direct benefit of the Tribes" of the goods which it purchased out of the proceeds of the Minnesota reservations. In paragraph a(iv) of amended Exception 14, plaintiffs write:

> . . . Except as some captions are generally descriptive (e.g., "Clothing", "Provisions"), it cannot be determined whether the expenditures were for Indians, for Federal employees or for a combination of both, or were beneficial to the Indians.

In their supporting statement for Exception 15, plaintiffs write:

> On the reservations there were government-owned structures--agency headquarters, warehouse, barns, hospital, mills (flour, grist, saw), shops (blacksmiths, carpenter), schools, homes for Federal personnel, and granneries as well as other property owned by the United States, livestock, rolling stock (wagons, buggies, tractors, automobiles), etc. The report does not show that the goods and services purchased were consumed or used exclusively by the Tribes.

We do not agree with the plaintiffs' interpretation of the report. The heading of Disbursement Schedule No. 1 states, "Disbursement for the Santee Sioux Indians of the Santee Reservation, Nebraska. . ." This heading, and similar headings on the other schedules, in the absence of something in the body of the report casting doubt on their

applicability to particular items, mean to us that the goods listed were turned over to the Indians or used for their benefit.

Moreover, the Indian Claims Commission approaches GSA reports as a body having expertise in the history of Government-Indian relations. We know, for example, that items such as "Clothing" and "Provisions" were normally issued to Indians, not Government employees. They were not like "Automobiles, vehicles," where the opposite was normally true, or like "Miscellaneous agency expenses," where the term itself implies Government use.

Unless there is some indication to the contrary in the record, therefore, we must presume that items like "Clothing" and "Provisions" charged to the Indians were delivered to the Indians. Cf. Minnesota Chippewa Tribe v. United States, Docket 18-C, 32 Ind. Cl. Comm. 192, 194 (1973); Minnesota Chippewa Tribe v. United States, Docket 18-T, 28 Ind. Cl. Comm. 103, 105 (1972); Sioux Tribe v. United States, Dockets 114 et al., 12 Ind. Cl. Comm. 541, 549 (1963). Compare Confederated Tribes of the Goshute Reservation v. United States, Docket 326-B, 33 Ind. Cl. Comm. 130, 138 (1974), where the record indicated misappropriation.

Exception 14 - Challenged items of expenditure - prior to July 15, 1870.

A. Joint Expenditures.

According to the 1967 GSA report (pages 20 and 21), the following expenditures were made jointly for the four Mississippi Sioux

bands under authority of the act of March 3, 1863, prior to its amendment on July 15, 1870:

A. Expenses of surveying reservation

B. Salaries and expenses, appraising reservation

C. Salary of special agent

D. Income tax on salaries

| | Fiscal Year | | | | | | |
|---|---|---|---|---|---|---|---|
| | 1866 | 1867 | 1868 | 1869 | 1870 | 1871 | Totals |
| A. | $7,970.61 | $2,141.06 | $1,095.88 | | $125.50 | | $11,333.05 |
| B. | 2,184.00 | 2,044.40 | | $2,514.23 | | | 6,742.63 |
| C. | | 894.42 | | | | | 894.42 |
| D. | | | 134.63 | 3.05 | 33.20 | $2.71 | 173.59 |
| | $10,154.61 | $5,079.88 | $1,230.51 | $2,517.28 | $158.70 | $2.71 | $19,143.69 |

(1) Surveying and appraising Minnesota reservations. In subdivisions (a) (i) and (ii) under Exception 14, as amended, plaintiffs object to being charged for the expenses of surveying and appraising the Minnesota reservations.

(a) First they contend the Forfeiture Act of February 16, 1863, made the reservations Federal property, and the tribes may not be charged with the costs of preparing Federal property for sale. Defendant answers that beneficial or equitable title was revested in the Indians by the March 3, 1863, legislation. We agree. The plaintiffs were charged for preparing their own property for sale, not Government property.

(b) Plaintiffs also claim that where section 4 of the March act refers to ". . . the money arising from said sale" it means the gross receipts without deductions. Defendant responds that the phrase means the net proceeds of sale. The language of the statute could bear either interpretation.

The legislative history of the February and March 1863 acts contains no explanation of whether "the money arising from said sale" refers to the gross or the net. We note, however, that the bill which became the March act was first drafted in the Interior Department. 24/ In such circumstances, the contemporaneous administrative construction, under which the deductions were made, is particularly persuasive. 25/ Such deductions were, moreover, in accord with general trust law, which allows a trustee to reimburse himself for expenses necessary or

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24/ See H.R. Rep. No. 13, 37th Cong., 3d Sess.; Cong. Globe, 37th Cong., 3d Sess. 303.

25/ The classic statement to this effect is found in United States v. Moore, 95 U.S. 760, 763 (1877):

> The construction given to a statute by those charged with the duty of executing it is always entitled to the most respectful consideration, and ought not to be overruled without cogent reasons. . . The officers concerned are usually able men, and masters of the subject. Not infrequently they are the draftsmen of the laws they are afterwards called upon to interpret.

See also 2A Sutherland, Statutory Construction, § 49.03 (4th ed. C. Sands 1973). Compare Gila River Pima-Maricopa Indian Community v. United States, Docket No. 236-E, 33 Ind. Cl. Comm. 18 (1974), where the administrative construction was not contemporaneous and contradicted the language of the statute.

appropriate to carry out the purposes of the trust.[26] The 1863 legislation was conceived in a spirit of hostility to the Sioux and to Minnesota Indians in general.[27] In view of this hostility, the silence of Congress as to who was to bear the expenses of sale cannot be interpreted as showing an intention to vary the usual rule and cut off the Government's right of reimbursement.

The expenditures for survey and appraisal of the Minnesota Reservations will not be disallowed.

(2) Salary of special agent. The plaintiffs object to the item "salary of special agent." This entry is too vague for acceptable accounting. We can only guess what duties the special agent performed. Unless explained, his salary will be disallowed; but since satisfactory explanation is conceivable, it cannot be disallowed before the defendant has had an opportunity to supply one.

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26/ Restatement (Second) of Trusts §§ 188, 244 (1959); Cherokee Nation v. United States, 102 Ct. Cl. 720, 761 (1945). Cf. Winton v. Amos, 255 U.S. 373 (1921); Chickasaw Nation v. United States, 103 Ct. Cl. 1, 43 (14th claim) (1945). The law appears to have been substantially the same in 1863. See Taylor v. Mayo, 110 U.S. 330 (1884); Williams v. Gibbes, 61 U.S. (20 How.) 535 (1858).

27/ At its first meeting in the third session of the 37th Congress, the House of Representatives adopted a resolution instructing the Committee on Indian Affairs to "inquire as to the most speedy and economical mode of removing beyond the limits of the State of Minnesota all the Indian tribes within said State." Cong. Globe, 37th Cong., 3d Sess., 3 (1862). A bill for removal of the Winnebago Indians as well as the Sioux was actually enacted, although the former tribe took no part in the uprising of 1862. See Act of February 21, 1863, c. 53, 12 Stat. 658, and compare annual report of Secretary of Interior, November 29, 1862, at Cong. Globe, 37th Cong., 3d Sess., Appendix 6-7.

(3) Income tax on salaries. Plaintiffs also object to the charges for income tax on salaries. The applicable tax law in force at the dates of the questioned payments was section 123 of the Internal Revenue Act of 1864, c. 173, 13 Stat. 223, 285, as amended by the Act of March 2, 1867, c. 169, 14 Stat. 471, 480.

The pertinent part read as follows:

> . . . That there shall be levied, collected, and paid on all salaries of officers, or payments for services to persons in the civil, military, naval or other employment or service of the United States, including senators and representatives and delegates in Congress, when exceeding the rate of one thousand dollars per annum, a tax of five per centum on the excess above the said one thousand dollars; and it shall be the duty of all paymasters and all disbursing officers, under the government of the United States, or persons in the employ thereof, when making any payment to any officers or persons as aforesaid, whose compensation is determined by a fixed salary, or upon settling or adjusting the accounts of such officers or persons to deduct and withhold the aforesaid tax of five per centum. . .

The items designated "Income tax on salaries" probably represent the amounts withheld from the employees' salaries pursuant to the quoted language. If so, they were proper charges to the extent that the salaries were proper charges. The burden will be on defendant to show which salaries they correspond to. If, however, the income tax items represent a charge against the Indians in lieu of withholding from the salaries, they were improper. The burden of proof of such impropriety will be on plaintiffs, since we cannot presume misconduct on the part of the disbursing officers.

B. Santee expenditures.

In addition to the $19,143.69 expended prior to July 15, 1870, from the Minnesota reservation proceeds for the four bands jointly, the GSA report shows $138,713.42 as expended during the same period solely for the Santee Sioux of the Santee Reservation, Nebraska. The latter total should be reduced by $1,875.00, because the item for pay of physician, shown in the report as $2,663.53, has been corrected, by the defendant's answer to Exception 13, to read $788.53.

Plaintiffs had specific objections to the following items among those shown as expended for the Santee prior to July 15, 1870:

| | |
|---|---|
| Expenses of surveying reservation | $586.18 |
| Traveling expenses of employees | $221.70 |

Plaintiffs misstate the amount of the second item just listed as $178.65, overlooking $43.05 expended in fiscal year 1871. They state that the surveying and possibly the traveling expenses were incurred in connection with preparing the Minnesota reservations for sale. It seems more likely to us that these expenses were incurred on the Santee Reservation in Nebraska. Whichever place it was done, the surveying would seem proper. The item for traveling expenses, however, is impermissibly vague, and will be disallowed unless the defendant, prior to the close of the record, shows a proper purpose for the travel.

Exception 15

A. Challenged items of expenditure - after Act of July 15, 1870.

In addition to their more general complaints under this exception, discussed above in Part V A. of this opinion, plaintiffs take issue

with several specific entries on the 1967 GSA report's Schedule 1. They write as follows (Exceptions, page 31):

> With no more information than that, inferrable from the sparse captions GSA employs to identify classes of expenditures, it seems apparent that certain disbursements are contrary to law. For example, "Expenses of surveying reservation" (GSA does not identify the reservation); "Salaries and expenses, appraising reservation" (again no identification); "Salary of special agent" (no explanation of what duties were performed); "Income tax on salaries" (no explanation as to whose salaries or who owed the tax or to whom); "Traveling expenses of employees"; "Pay of physician"; "Legal services"; "Advertising" and others.
>
> There is nothing to show that disbursements under headings such as "Building materials" were for the Tribes and not the defendant or its employees, or that livestock under "Purchase of livestock" was given to the Tribes and not placed on a loan basis with provision for repayment as was frequently the case.

We have previously ruled on all the headings named except "Pay of physician," "Legal services," "Advertising," "Building materials" and "Purchase of livestock." These items are among those charged to the Santee Sioux and occurred after the 1870 amendment of the act of March 3, 1863. We discussed the effect of the amendment in an earlier section of this part. It is sufficient here to say that purchases of building materials and livestock appear contemplated by the clause of the 1863 act referring to "establishing them [the Indians] in agricultural pursuits." "Pay of physician" appears a humanitarian expense incidental to the foregoing purpose. The burden to show that

such entries should not be allowed will be on the plaintiffs. See Blackfeet, supra, 31 Ind. Cl. Comm. at 85, fn. 1. "Legal services" and "Advertising" could conceivably be related to establishing the Indians in agricultural pursuits; but since the connection is not apparent on the face of the captions, the burden of proving it will be on the defendant.

B. Labor performed for goods; returns and credits; repayments of loans.

Plaintiffs object that Disbursement Schedule No. 1 is silent:

(1) On whether the goods listed were payment for labor performed or produce delivered by the Indians.

(2) With one exception, on cash returns and credits arising from the sale of goods to Federal employees and contract employees and from refunds or credits from suppliers,

(3) On repayment of loans, as where livestock was issued on a loan basis.

There is nothing in the record to indicate that the plaintiffs have attempted to obtain any of the above information by discovery.

> We surely need not waste time for the briefing and arguing of motions to compel the defendant to supply information that plaintiff has never tried to obtain by discovery procedures. Blackfeet, supra, 32 Ind. Cl. Comm. at 147. See also id. at 95.

So much of Exception 15 as seeks the information listed above is ill-taken and will be dismissed.

IX

SISSETON-WAHPETON TREATY OF 1867, AGREEMENT OF 1872

The defendant made peace with the Sisseton and Wahpeton bands following the Minnesota War, by the treaty of February 19, 1867, 15 Stat. 505. By this treaty the Indians granted the United States the right to construct transportation and communication facilities on their unceded lands; and the United States in return set aside the Lake Traverse and Devil's Lake reservations. Article VI of the original treaty would have partially restored the bands' forfeited annuities, but was amended by the Senate to provide only that Congress, in consideration of the destitution of the Sisseton and Wahpeton, might make such appropriations as it deemed requisite.

On September 20, 1872, the defendant entered into a further agreement with the Sisseton and Wahpeton [28/] whereby the bands ceded all their lands outside the Lake Traverse and Devil's Lake reservations in return for $800,000. The manner of payment was prescribed in the second article of the agreement as follows:

> Second. That, in consideration of said cession and relinquishment, the United States shall advance and pay, annually, for the term of ten years from and after the acceptance by the United States of the proposition herein submitted, eighty thousand (80,000) dollars, to be expended under the direction of the President of the United States, on the plan and in accordance with the provisions of the treaty aforesaid,

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28/ 2 Kappler 1057. Amended, striking out all after third article by Act of February 14, 1873, c. 138, 17 Stat. 456; ratified, following Indians' acceptance of amendment, by Act of June 22, 1874, c. 389, 18 Stat. 146, 167.

> dated February 19, 1867, for goods and provisions, for the erection of manual-labor and public school-houses, and for the support of manual-labor and public schools, and in the erection of mills, blacksmith-shops and other work-shops, and to aid in opening farms, breaking land, and fencing the same, and in furnishing agricultural implements, oxen, and milch-cows, and such other beneficial objects as may be deemed most conducive to the prosperity and happiness of the Sisseton and Wahpeton bands of Dakota or Sioux Indians entitled thereto according to the said treaty of February 19, 1867. Such annual appropriation or consideration to be apportioned to the Sisseton and Devil's Lake agencies, in proportion to the number of Indians of the said bands located upon the Lake Traverse and Devil's Lake reservations respectively. Such apportionment to be made upon the basis of the annual reports or returns of the agents in charge. Said consideration, amounting, in the aggregate, to eight hundred thousand (800,000) dollars, payable as aforesaid, without interest.

Plaintiffs take issue with defendant's accounting under the 1872 agreement in Exception 17.

A. Goods issued in payment for Indian labor or produce. In the first part of Exception 17, plaintiffs object to the allowance of any expenditures under the 1872 agreement except for housing materials and articles to facilitate agriculture. As provided in the second article, quoted above, payment of the consideration was to be expended "on the plan and in accordance with the provisions of the treaty . . . dated February 19, 1867."

Article VIII of the 1867 treaty, as amended, readsas follows (15 Stat. 509-510):

> ARTICLE VIII. All expenditures under the provisions of this treaty shall be made for the agricultural improvement and civilization of the members of said bands authorized to locate upon the respective reservations, as hereinbefore specified, in such manner as may be directed by law; but no goods, provisions, groceries, or other articles -- except materials for the erection of houses and articles to facilitiate the operations of agriculture -- shall be issued to Indians or mixed-bloods on either reservation unless it be in payment for labor performed or for produce delivered: Provided, That when persons located on either reservation, by reason of age, sickness, or deformity, are unable to labor, the agent may issue clothing and subsistence to such persons from such supplies as may be provided for said bands. [Emphasis supplied]

Plaintiffs argue that since the $800,000 was the purchase price of tribal land, its use to pay for other value received by the United States, such as the labor or produce of individual Indians, would represent a diversion of the tribes' money to the Government's benefit.

In our view this is not necessarily so. Both the 1867 treaty and the 1872 agreement contemplated projects that would require intensive labor--subjugation and fencing of land and the erection of numerous buildings. These were to be paid for out of the $800,000 consideration. It would not have been a breach of trust to pay Sioux to do such labor in preference to bringing in outside workmen.

The agreement also contemplated furnishing provisions and groceries to the aged, ill, and deformed. These goods had to be obtained from someone, and we cannot see any breach of trust in obtaining such as might be produced locally from Sioux farmers in preference to goods

shipped in from outside the reservation. Cf. Sec. 17, Act of March 2, 1889, c. 405, 25 Stat. 888, 895. The work requirement, enforced in good faith, would have made the consideration money go further toward improving the Sisseton-Wahpeton reservations. It should be noted that only cash outlays from the appropriations are charged against the Indians in the GSA report. Thus, where an Indian did $100 worth of work in return for $100 worth of provisions, only $100 is charged against his tribe; for the Government's only cash outlay was for the provisions, although the tribe also got the benefit of $100 worth of labor.

This case is readily distinguishable from Rogue River Tribe v. United States, 105 Ct. Cl. 495, 64 F. Supp. 339 (1946). There, after payments had been unconditionally promised by treaty, Congress unilaterally provided that they were to be withheld until the Indians performed equivalent work. Here, the work requirement was part of the original bargain.

We interpret the 1872 agreement as requiring that work be done, and produce be used for a purpose specifically authorized in Article Second. Cf. Blackfeet, supra, 32 Ind. Cl. Comm. at 111. Only to the extent that work was done or produce used for unauthorized purposes would there be any breach of trust. But we cannot presume that this happened. The plaintiff has the burden of proof under the first part of Exception 17.

B. Administrative expenses of the United States.

As a supplemental reason for Exception 17, plaintiffs state that

the bare captions show certain disbursements were for agency or administrative purposes.

Expenditures under the 1872 agreement are shown in Part II, Section C, of the 1967 GSA report, in Statement No. 6 at page 64, and Disbursement Schedules No. 8 (Devil's Lake) and No. 9 (Lake Traverse) starting at pages 67 and 77 respectively.

In our opinion, the following captions indicate, prima facie, expenditures for administrative purposes of the United States:

| | Devil's Lake | Lake Traverse |
|---|---|---|
| Agency building and repairs | $2,466.85 | $2,438.18 |
| Miscellaneous agency expenses | 1,390.98 | 1,024.22 |
| Pay of: Agents | 258.10 | 90.00 |
| Clerks | 1,350.00 | 7,938.34 |
| Inspectors | 59.05 | 148.25 |
| Transportation of Indian supplies | 6,105.37 | 976.16 |

At this time we will disallow only the pay of agents, which seems to us impossible to justify. To avoid disallowance of the other items listed above, the burden is upon the defendant to show that they were expended wholly for purposes authorized by the 1872 agreement, or if not wholly so expended, to segregate out the portion properly expended.

X

SANTEE TREATY OF 1868; ACT OF 1877 (EXCEPTION 16)

The United States made a treaty with various bands of Sioux of the Missouri, the Arapahoes, and the Santee Sioux, at Fort Laramie on April 29, 1868. See 15 Stat. 635. By this treaty the Government undertook certain financial obligations and established the Great Sioux

Reservation, embracing the present state of South Dakota west of the Missouri River and other areas. Later when gold was discovered there, the Government took back the western part of the great reservation, by the Act of February 28, 1877, c. 72, 19 Stat. 254, "ratifying" a questionable agreement dated September 26, 1876. See Sioux Nation v. United States, Docket 74-B, 33 Ind. Cl. Comm. 151, 157-163, 251-257 (1974).

The 1967 GSA report accounts for expenditures under the 1868 treaty and 1877 act only for the period from February 20, 1921, to June 30, 1951. See Part II, Section B, pages 31-58. The Introduction to the report explains the omission of earlier data as follows (at page 2):

> . . . An accounting for the period prior to February 20, 1921, is not included in the reprot because the Court of Claims in its decision on case No. 33728 of the Medawakanton and Wahpakoota Bands of Indians, decided June 5, 1922, 57 Ct. Cls. 357, 371, charged the Indians with $1,903,023.22 for expenditures made out of annual appropriations during that period (see item 10, page 371).

Exception 16 challenges defendant's failure to furnish a complete report concerning the 1868 treaty and the 1877 act.

We have held in Part VII of this opinion that the Medawakanton case of 1922 is not res judicata against the instant claims for general accounting. It follows that the fact that $1,903,023.22 appropriated under the 1868 treaty were there set off against the plaintiffs' recovery does not excuse the defendant from rendering a full account here. The same $1,903,023.22 were again in litigation in Sioux Tribe v. United States, No. C-531(12), "The Santee Offset," 95 Ct. Cl. 72 (1941). In the latter case, brought under the special Sioux jurisdictional act of

June 3, 1920, c. 222, 41 Stat. 738, the plaintiffs contended that the 1922 offset was unjust, although legally required by the jurisdictional act applicable to that case. The 1941 court conceded that the offset was required by the jurisdictional act regardless of its justice, but decided for defendant on the merits.

In both the 1922 and 1941 cases the total payment under the 1868 treaty was in issue in bulk. We are collaterally estopped by those decisions from reconsidering whether that payment, whatever its amount, was properly offset against sums due and unpaid under the 1837 and 1851 treaties. Whether the total was exactly $1,903,023.22 or more or less;[29/] whether all the money actually got to the Indians; and whether the individual items of goods, services, and payments making up the $1,903,023.22 were in accordance with the treaty stipulations--in short, whether the Government's accounts were correct--are matters not decided in the previous cases. But these are precisely the questions we are concerned with in the present equitable accounting. As to them we are not estopped.

It is therefore essential that the Government present accounts here under the 1868 treaty, so that we can examine and adjudicate them.

This will not be the first time we have subjected to equitable accounting a sum used elsewhere as an offset. In Blackfeet Nations v. United States, 81 Ct. Cl. 101, 137 (1935), a supposed excess payment

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29/ The GAO report filed in the Santee Offset Case (Court of Claims No. C-531 (12), states that disbursements for the Santee Indians under the 1868 treaty during the period covered in the 1922 decision actually totalled $2,130,665.10 instead of the $1,903,023.22 figure used by the Court of Claims.

of $58,535.29 under the treaty of October 17, 1855, 11 Stat. 657, was set off against the Indians' recovery. In our Blackfeet decision of 1973, supra, we examined the accounts under that treaty and disallowed $64,698.64. We thus determined as a necessary incident, that there really had been no overpayment to use as an offset in 1935. Here our adjudication of the still to be presented complete account under the 1868 treaty may incidentally determine that the 1922 offset was in the wrong amount; but by making such a determination, we will not be reopening the 1922 and 1942 decisions that payments under the 1868 treaty are offsettable against amounts unpaid under the 1837 and 1851 treaties.

The situation in regard to the 1877 act differs from that in regard to the 1868 treaty. We are not aware that appropriations made pursuant to that statute have ever been used as offsets, either in the 1922 case or elsewhere. In Sioux Nation v. United States, Docket 74-B, supra, 33 Ind. Cl. Comm. at 222, we suggested the defendant present a new accounting of its disbursements under the 1877 act.

To avoid duplication of effort, the Government's account of payments on the Docket 74-B claim should first be adjudicated in the present equitable accounting. If necessary to avoid delaying Docket 74-B, we will give this matter priority over the other accounts under examination here. The parties may suggest a schedule at the conference we are calling by the order following this opinion.

XI

ACT OF MARCH 2, 1889 (AFFECTING THE SANTEE)

The Act of March 2, 1889, c. 405, 25 Stat. 888, set up a "permanent fund" and provided certain payments and benefits to a number of Sioux tribes, in return for their cession of those parts of the Great Sioux Reservation outside the boundaries of six diminished reservations. Only the Santee among the present plaintiffs were affected by this legislation. In Part II, Section D, on pages 86 through 116 of the 1967 GSA report, defendant has provided an accounting of its expenditures for the Santee under the act of 1889. Plaintiffs' Exceptions Nos. 18, 19, 20, and part of 21, are directed at this accounting.

Exception No. 18 alleges that expenditures for Ponca Indians from the Treasury account "Sioux Fund, Santee", and interest thereon, were unauthorized. This fund was a treasury account set up as a result of dividing the "permanent fund" provided by section 17 of the 1889 act "in proportion to the number of Indians entitled to receive rations and annuities upon the separate reservations created by the above act." Such division was required by section 3 of the Act of January 19, 1891, c. 77, 26 Stat. 720.

Exception No. 19 objects to the Government's failure to establish the fund "Proceeds of Sioux Reservations, North and South Dakota, act of March 2, 1889", before 1913, although such proceeds had been received over the period from 1891 to 1907.

Exception No. 20 objects to the Government's failure to pay interest on the latter fund.

The pertinent parts of Exception No. 21 read as follows:

> . . .The defendant improperly and unlawfully make transfers to itself from the tribal funds identified below:
>
> GSA [1967 report] Part II, Section D.
>
> a. p. 95. "Interest on Sioux Fund, Santee"
>
> (1) "Reimbursed to United States for like amounts disbursed under the appropriation "Advance Interest to Sioux Nation (Reimbursable)" $ 3,855.00
>
> (2) "Carried to the surplus fund by Warrant No. 110, dated April 24, 1931" 703.00
>
> * * * * *
>
> c. p. 100. "Proceeds of Sioux Reservations, North and South Dakota, act of March 2, 1889"
>
> (1) "Surveying and Allotting Sioux Reservations, North and South Dakota (Reimbursable)" 15,370.72
>
> (2) "Transferred to General Fund of the Treasury" 305,589.64

In the Sioux Tribe v. United States, 105 Ct. Cl. 658, 64 F. Supp. 303 (1946), Case No. C-531 (11), in which the Santee Sioux Tribe of the Santee Indian Reservation in the State of Nebraska was one of the plaintiffs, the Court of Claims determined and stated the account under the act of March 2, 1889. The court found that the Santee of the Santee Reservation had been overpaid $129,947.17 and the Flandreau Santee had been overpaid $1,366.18. See Finding 9(a), 105 Ct. Cl. 672.

Expenditures for the Ponca Indians (challenged by Exception 18) were expressly authorized by section 17 of the 1889 act, 25 Stat. at 894.

The Court separately stated the account between the Poncas and the Government in Case No. C-531 (11); and the overpayments to the two Santee groups are not affected by the Ponca payments.

In regard to the fund "Proceeds of Sioux Reservations, North and South Dakota, act of March 2, 1889," in which plaintiffs charge maladministration by Exceptions 19, 20 and 21c, the Court of Claims stated (105 Ct. Cl. 723):

> The net collection of $357,908.44 from Sioux lands under the 1889 agreement, and now held in the Treasury in a suspense account entitled "Proceeds of Sioux Reservation, North and South Dakota, act of March 2, 1889" (finding 11), do not belong to plaintiff and should by proper accounting be transferred to federal funds.

The balance in the account on June 30, 1925, after adjustments, was $305,589.64. See 105 Ct. Cl. 678. The 1967 GSA report refers to Case C-531 (11), in note (e) on page 101, as authority for the transfer of this sum to the general fund of the treasury.

The $15,370.72 item for surveying and allotting, also objected to in Exception 21c, was held an improper charge and adjustment made therefor. See 105 Ct. Cl. 677.

The Court of Claims also made an accounting of the fund involved in part a of Exception 21, the fund entitled "Interest on Sioux Fund, Santee." In Finding 12 (105 Ct. Cl. 578-79), the Court recited that the Act of August 19, 1890, c. 807, 26 Stat. 349, appropriated $150,000 for one year's advance interest on the permanent fund created by section 17 of the 1889 act, to be reimbursed as therein provided. From that appropriation, the court found, the following sums, among others, were paid out per capita to members of the indicated groups:

| | |
|---|---|
| Santee | $ 2,454.00 |
| Ponca | 597.00 |
| Flandreau | 804.00 |
| | $ 3,855.00 |

In Finding 13(b) (105 Ct. Cl. 680) the Court found that the **exact** same sums were reimbursed to the United States.

The Supreme Court vacated the judgment of the Court of Claims in Case No. C-531(11), supra, remanding for a determination of whether the Indian Claims Commission Act gave rise to any claims which the plaintiffs might assert to affect the judgment theretofore entered. See 329 U.S. 684 (1946).

The Court of Claims proceeded to reconsider its decision on the accounting, and expressly held that the Indian Claims Commission Act did "not give rise to any claim which plaintiffs are entitled to assert to affect the findings, judgment and opinion heretofore entered on February 4, 1946," which were thereupon reinstated. 112 Ct. Cl. 39, 78 F. Supp. 787 (1948). The Supreme Court denied certiorari, 337 U.S. 908 (1949). It is evident, therefore, that all issues raised by Exceptions 18, 19, 20, 21c, and 21a except for the $703.00 carried to surplus, have been "thoroughly explored and disposed of in prior litigation" under the same standards we are required to apply here. Cf. Creek Nation v. United States, 168 Ct. Cl. 512 (1964), affirming Docket 168, 12 Ind. Cl. Comm. 123 (1963).

We take judicial notice of the findings and opinions in Court of Claims Case No. C-531 (11). In doing so we are aware of the great weight of authority that a prior judgment cannot be noticed, but must be put in evidence. 50 C.J.S. Judgments §836 (1947); Annot., 96 ALR 944 (1934).

We believe the rule applies only to the unpublished judgments of trial courts. Its purpose is said to be to make the prior judgment available for appellate review. Divide Creek Irrigation District v. Hollingsworth, 72 F. 2d 859 (10th Cir. 1934). We do not think it operates to blindfold us to the detailed published findings of the very court which exercises appellate review over our decisions.

Later cases cast doubt on the survival of the rule even as to trial court judgments. Iacaponi v. New Amsterdam Casulty Company, 379 F. 2d 311 (3d Cir. 1967), affirmed dismissal of a claim as res judicata on the basis of judicial notice of state court proceedings between the plaintiffs and another defendant. In W. E. Hedger Transp. Corp. v. Ira S. Bushey and Sons, Inc., 186 F. 2d 236 (2d Cir. 1951), the court took judicial notice of its own records to dismiss a claim as res judicata. We believe that in lawsuits between Indian Tribes and the Federal Government, before this special tribunal, the Indian Claims Commission, the applicable law is stated in the old case of Post v. Beacon Vacuum Pump and Electrical Co., 89 Fed. 1, 4 (1st Cir. 1898):

> . . .However it may be in some of the state courts, Federal courts may consider defenses of this kind when assigned ore tenus under a general demurrer, and even sua sponte. This follows from the fact that matters of this character sometimes involve questions of public policy.

We do not mean that the Commission is duty-bound to search the Court of Claims reports to find prior adjudications not brought to our attention by the parties. What we mean is that we cannot close our eyes to published reports showing prior adjudication, like that in Case No. C-531, which

are cited in the accounting report and alluded to by the parties in their briefs, merely because a certified copy of the judgment is not before us.[30/]

Exceptions 18, 19, 20, 21a (1), and 21c will be dismissed.

The transfer to surplus of $703.00 from "Interest on Sioux Fund, Santee", objected to in 21a (2) occurred subsequent to the period covered by the accounting in Case C-531 (11). Although the court there held the Santee to have been overpaid under the 1889 act, it did not order the overpayment refunded. Administrative officers have no inherent power to recoup gratuities. The $703.00 item will be disallowed unless the United States, prior to the close of the record, cites proper authority for transferring this sum to its own account.

XII

AGREEMENT OF DECEMBER 12, 1889; ACT OF MARCH 3, 1891
(AFFECTING SISSETON AND WAHPETON OF LAKE TRAVERSE)

The agreement of December 12, 1889, reported in c. 543, 26 Stat. 989, 1035, provided for the allotment of the Lake Traverse Reservation and sale of the surplus land to the Government for $2.50 per acre. The purchase money was to be held in trust in the U.S. Treasury at 3 percent interest. In ratifying the agreement, by section 27 of the Act of March 3, 1891, c. 543, 26 Stat. 989, 1038, Congress raised the interest rate to 5 percent.

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30/ We have no pleading problem here. Our General Rules of Procedure (25 CFR Part 503) contain no equivalent to Fed. R. Civ. P. 8(c) requiring the defenses of estoppel and res judicata to be pleaded specially. Nor have we a rule against belated amendment of an answer to assert such defenses. See Sioux Tribe of Standing Rock Reservation v. United States, Docket No. 119, 34 Ind. Cl. Comm. 230 (1974). Cf. Sioux v. United States, Docket 74-B, 33 Ind. Cl. Comm. 151, 209, n. 12 (1974).

The defendant's accounting under the 1889 agreement appears in Part II, Section E, at pages 117-162 of the second volume of the 1967 GSA report. It covers the trust fund, entitled "Sisseton and Wahpeton Fund," consisting of the proceeds of the ceded land; the interest thereon; and a third fund entitled "Sisseton and Wahpeton Minors Fund" created by transfer from the Sisseton and Wahpeton Fund.

The 1889 agreement and ratifying legislation also provided certain per capita payments to Lake Traverse Sioux and to scouts and soldiers of the other Mississippi Sioux bands. These payments are not accounted for, because, the GSA states, at page 2 of the 1967 report, they were charged against the Indians in the Sisseton and Wahpeton case of 1907 and the Medawakanton case of 1922, both supra. The plaintiffs do not object to the omission.

Objections the plaintiffs do urge are found in Exceptions 21, 22, and 23. Exception 22 is aimed at the very key to a proper accounting under the 1889 agreement and will be discussed first.

A. Acreage of land ceded under 1889 agreement.

In exception 22 plaintiffs complain of defendant's failure to show the acreage ceded by the 1889 agreement. Since the price is expressed in the agreement only on a per-acre basis, such information is obviously an indispensable part of the accounting: without it one cannot tell whether the amount the Government paid fulfilled its obligation. The acreage should have been stated in the report. The defendant, however, has supplied the figure--608,865 acres--in its answer to the exception. Plaintiffs make

no mention of Exception 22 in their Motion for an Order Directing the Defendant to Furnish Data and Information, and state in their Memorandum on Legal Issues of September 15, 1969, that no legal issue is presented under Exception 22. We assume they are satisfied with the answer.

Exception 22 will be dismissed as having served its purpose.

B. Transfers out of tribal trust funds.

Exception 21 is a catch-all objection to various transactions by which, plaintiffs allege, the United States transferred tribal funds to its own account. Among the transfers objected to is one made June 30, 1898, whereby $177,635.85 was taken out of the Sisseton and Wahpeton Fund and carried to surplus, that is, restored to the mass of non-trust money in the U.S. Treasury. See 1967 report, page 130. The defendant has belatedly supplied the explanation lacking in the GSA report. The original appropriation of 1891 was based on an overestimate of the acreage ceded by the 1889 agreement; the transfer in question adjusted the price to the true acreage, thus:

| | | | |
|---|---|---|---|
| Estimated acreage | 679,920 | x $2.50 = | $1,699,800.00 |
| Actual acreage | 608,865 | x $2.50 = | $1,522,165.50 |
| Overage | 71,055 | x $2.50 = | $ 177,634.50 |

The defendant has not explained why $177,635.85, shown in the accounting, instead of the $177,634.50, shown in the calculation above, was carried to surplus; but this matter is de minimis.

Plaintiffs also object to the carrying to surplus of $58,412.88 out of interest on the Sisseton and Wahpeton fund. See 1967 GSA report,

page 127. This amount is less than the full interest at 5 percent on the excess payment of $177,635.85 for the period March 1, 1891 - June 30, 1898, when the excess was in the plaintiffs' trust accounts. The Government having taken back less than it was entitled to, plaintiffs are in no position to complain.

Plaintiffs object to the transfer of $200,602.14 from the Sisseton and Wahpeton fund to "Individual Indian Moneys." See 1967 GSA report, 130-131. This entry is impermissibly vague. "Individual Indian Moneys" is simply another account, sometimes used for tribal money. The entry reveals only a bookkeeping transaction, not the ultimate disposition of the money. The Government will be ordered to supply the missing information.

Plaintiffs object to the transfer during the fiscal year 1919 of $313.09 from interest on the Sisseton and Wahpeton Fund to "Increase of Compensation, Indian Service." The defendant has admitted this transfer was improper. See Memorandum of Points and Authorities, September 15, 1969, page 10. Accordingly, the $313.09 will be disallowed with simple interest thereon at 5 percent per annum from June 30, 1918, until paid.

The two remaining transfers of 1889 agreement moneys which plaintiffs object to in Exception 21 involve the Sisseton and Wahpeton Minors Fund and are discussed below.

C. Sisseton and Wahpeton Minors Fund.

The 1967 GSA report shows $81,202.24 as transferred from the Sisseton and Wahpeton Fund to the Sisseton and Wahpeton Minors Fund. See page 130,

item (f); page 132, item (a). The date of the transfer, and whether it was in a lump sum or installments, are not revealed. Authority for the transfer is stated to be the following paragraph from the Indian Department Appropriation Act of June 21, 1906, c. 3504, 34 Stat. 325, 327:

> That the shares of money due minor Indians as their proportion of the proceeds from the sale of ceded or tribal Indian lands, whenever such shares have been, or shall hereafter be, withheld from their parents, legal guardians, or others, and retained in the United States Treasury by direction of the Secretary of the Interior, shall draw interest at the rate of three per centum per annum, unless otherwise provided for, from the period when such proceeds have been or shall be distributed per capita among the members of the tribe of which such minor is a member.

Defendant has supplied no explanation for the transfer, either in its answer to the exceptions or subsequent briefs, except to insist that it was authorized by the quoted statute.

Plaintiffs object to the transfer in Exception 23, and write as follows in the Memorandum on Legal Issues of September 16, 1969:

> . . . The 1906 Act was a general statute designed to pay interest at 3% on minors' funds where none had been paid before. It was not designed to reduce interest on minors' funds from 5% to 3%. Congress ought not be charged with an absurd result. The statute should not be interpreted to say that the United States will pay 5% on minors' funds so long as held by the parents, but only 3% if the United States withholds the funds from the parent.

We believe the plaintiffs' point is well-taken. Section 27 of the Act of March 3, 1891, governing the Sisseton and Wahpeton Fund, states in pertinent part (26 Stat. at 1039):

> [The fund,] with interest thereof at five per centum per annum, shall be at all times subject to appropriation by Congress or to application by order of the President for the education and civilization of said bands of Indians or members thereof.

The GSA report cites no subsequent Congressional appropriation authorizing disbursements from the Sisseton and Wahpeton Fund; we presume the disbursements listed represent "application by order of the President. . . for education and civilization." We cannot conceive how segregating the minors' shares on the books of the treasury, whether at the time the adults' shares were paid out per capita or otherwise, had anything to do with education and civilization. Such action was neither an "appropriation" nor an "application" within the meaning of Section 27 quoted above. It was a mere bookkeeping operation, and in contemplation of law did not sever the minors' shares from the Sisseton and Wahpeton fund. Consequently, the 5 percent interest rate of the 1891 act rather than the 3 percent rate of the 1906 act applied; and the Government will be surcharged with 2 percent simple interest on the so-called Sisseton and Wahpeton Minors Fund.

In Exception 21 the plaintiffs object to the carrying to surplus on June 12, 1951, of $358.76 from the Minors Fund and of $1,236.26 from interest on the Minors Fund. These were the inactive residues in the accounts, which the surplusing closed out. The Government's continued maintaining of the Minors fund, established illegally, was, in our opinion, such a continuing wrong as to give us jurisdiction over these post-1946 transfers. Cf. Blackfeet, supra, 32 Ind. Cl. Comm. at 75. Since, in

contemplation of equity, the Minors Fund was never severed from the Sisseton and Wahpeton Fund, the final balances should have been restored to the Sisseton and Wahpeton Fund. The final balance in the interest fund should be increased by two thirds, representing what the balance would have been if interest had been paid at 5 percent instead of 3 percent. The defendant will be surcharged with $358.76 plus simple interest thereon at 5 percent from June 12, 1951, until paid, and with $1,236.26 plus $824.17 representing the 2% deficiency in interest.

XIII

ACT OF APRIL 27, 1904;
PROCEEDS OF DEVIL'S LAKE RESERVATION

By an agreement dated November 2, 1901, 33 Stat. 319, the Indians of Devil's Lake Reservation committed themselves to cede all their lands not allotted or needed for allotment and the United States in return proposed to pay them $345,000. The Congress, however, unilaterally amended the agreement by the Act of April 27, 1904, c. 1620, 33 Stat. 321, to provide that the Government would buy only the school sections and areas reserved for public purposes and would act as trustee to sell the rest under the homestead and townsite laws.

An accounting of the Government's receipts from sales of the Devil's Lake lands, including the $52,000 it paid out of public funds for the reserved areas, appears as Part II, Section F, at page 163-181 of the 1967 GSA report. Exceptions 24, 25, and 26 are taken against this accounting. We will treat exceptions 24 and 25 first.

Exception 24 faulted the GSA report for not disclosing the number of acres, dates of sale and prices of the lands disposed of under the 1904 act.

Exception 25 alleged disbursements totalling $2,344.49 from the proceeds of those lands were unauthorized. The plaintiffs contended only per capita payment was authorized, and this amount was expended for purposes other than per capita.

On March 25, 1970, this Commission accepted an amendment to the petition in the instant case alleging a Fifth Amendment taking of the Devil's Lake unallotted lands by the Government under the 1904 act. The amendment was in the form of additional paragraphs to the general accounting petition and did not delete any of the earlier paragraphs. We had a trial on the new allegation, held an expropriation did occur, and found fair market value of the various tracts involved. See 30 Ind. Cl. Comm. 463 (1973). Later, we determined the amount of prior payments on the claim, offset them against the value, calculated interest and entered a final award. See 33 Ind. Cl. Comm. 51, 389 (1974). This decision clearly disposes of Exception 24.

Total proceeds of the Devil's Lake ceded lands, according to the 1967 report, was $427,542.79. Prior to our 1974 decision, plaintiffs agreed that defendant should receive credit for this entire sum as a payment on the claim. By so doing, they necessarily abandoned the contention made in Exception 25, that defendant should not receive credit for $2,344.49 out of this sum.

This is a quite different situation from that involved in Part VII of this opinion, above, where certain large lump sums had been credited against a claim in prior litigation, but we nevertheless proceeded to equitable accounting of the constituent items of these sums. There, different cases, not equitable accountings, brought long ago under different jurisdictional acts, were involved. Here, our 1973 and 1974 decisions were made in this very same docket, and with the 1967 GSA report and the plaintiffs' exceptions before the parties and the Commission. It is apparent that in the interest of an early award, plaintiffs knowingly compromised and abandoned their Exception 25. The plaintiffs will be held to their agreement, as the defendants are held to the terms of the stipulation for settlement in Part VII of this opinion, above.

Exception 26, on the other hand, has not been disposed of by our prior decisions in this docket. In this exception plaintiffs object to defendant's failure to pay interest on the proceeds of the Devil's Lake Reservations. As payments on the ceded land came in over the period from 1904 to 1940, they were placed in an account in the U.S. Treasury. The fund at times had quite substantial balances, due to two causes: (1) each year the moneys came in several times, but were paid out only once; and (2) annual payments were frequently less than accumulated receipts. See 1967 GSA report, pp. 179-180, 258. According to the report, the Government paid nothing for its use of this money, most of which came from land purchasers rather than Congressional appropriation, until

following the Act of February 12, 1929, c. 178, 45 Stat. 1164, as amended, 25 U.S.C. § 161a-161d.

Our 1973 decision held the Government owed just compensation for the Devil's Lake lands and fixed the amount. Our 1974 decision credited the sums Exception 26 is concerned with against this amount, as of the taking dates. It awarded interest on the unpaid portion of the just compensation. Exception 26 seeks interest on the paid portion, which was placed in a trust fund. To be more exact, it seeks damages for the Government's failure to make the balances which were in the fund from time to time productive of income. The exception thus deals with a matter and with periods not in issue or adjudicated in our 1973 and 1974 decisions.

It is clear that the plaintiffs should have received income from this trust fund. The Act of April 1, 1880, 25 U.S.C. §161, applies to the proceeds of the lands sold to third parties and to the price of the school sections. The applicable rate for computing damages is 5 percent per year, simple interest until February 12, 1929, (when the defendant started paying 4 percent interest), and one percent thereafter until payment of the final judgment herein.[31/]

However, the 1880 act referred to the proceeds of sales to third parties only. We therefore can allow no interest on that part of the trust

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31/ Blackfeet, supra, 32 Ind. Cl. Comm. at 139-142. This part of the Blackfeet opinion has been vacated on motion of defendant with consent of the plaintiff, but we adhere to the views therein stated and adopt them here by reference.

fund made up of the price paid by defendant for the reserved areas, under the recent decision of the Court of Claims in Mescalero Apache, supra. The Court not only held the 1841 act inapplicable to cases where no contract, treaty, or other statute requires the payment of interest, but stated as follows (page 36 of slip opinion):

> The Indian Claims Commission Act nowhere authorizes the Commission to award any kind of interest against the Government.

It follows that the taking of an interest-free forced loan by the Government from its Indian wards, which is what occurred here when the price of the reserved areas was deposited in the U. S. Treasury, is not a violation of fair and honorable dealings under section 2, clause 5 of our act (25 U.S.C. § 70a), or at least not such a violation as we have jurisdiction to compensate.

XIV

THE IMPL FUNDS[32/]

Four accounts are involved in the instant case, those of the Devils Lake Indians (first receipt scheduled in 1913), the Santee Indians of Nebraska (first receipt 1894), the Sisseton and Wahpeton of the Sisseton Reservation (first receipt 1887), and the Medawakanton and Wahpakoota Indians of Minnesota (first receipt 1944).

Exceptions 7, 8, 28 and 29 are directed to the IMPL accounting.

A. Alleged failure to pay interest.

In the redundant exceptions numbered 7 and 28, plaintiffs charge

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32/ We prefer to refer to the fund consisting of miscellaneous reservation revenues not the result of labor by its initials rather than its misleading full name "Indian Moneys, Proceeds of Labor."

defendant failed to pay interest on the IMPL funds, both before and after July 1, 1930.

The GSA report clearly shows the payment of interest on all four accounts after 1930. The second part of the plaintiffs' objection, therefore is not meritorious.

We held in Te-Moak, supra, that the government had no obligation to pay interest on the IMPL fund before passage of the Act of June 13, 1930, 25 U.S.C. §§161a-161d; but that it did have an obligation, first imposed by the Act of September 4, 1841, 31 U.S.C. 547a, to invest the fund. As stated above, the Court of Claims has reversed Te-Moak.

The IMPL account for the Medawakanton and Wahpakoota Indians in Minnesota was not set up until 1944, so there could be no failure to invest it before 1930 in any event.

That leaves the Devils Lake, Sisseton, and Santee IMPL funds. None was large. Each one shows among its receipts an item for "Interest on official accounts." The Devil's Lake account also shows an item for "Repayments of reimbursable agreements," which may include interest. The deposits to each account according to the 1967 GSA report are as follows:

Devil's Lake (pp. 203-204):

| | |
|---|---|
| Interest on official accounts | $1,829.19 |
| Other miscellaneous receipts | 4,783.53 |
| Repayments of reimbursable agreements | 2,333.94 |
| Erroneous posting to ledger | 115.00 |
| Total receipts | $9,061.66 |

Sisseton (pp. 211-212):

| | |
|---|---|
| Interest on official accounts | $12,325.06 |
| Other miscellaneous receipts | 17,213.29 |
| Transferred from "IMPL, Sisseton School" | 3.40 |
| Total receipts | $29,541.75 |

Santee (pp. 208-209):

| | |
|---|---|
| Interest on official accounts | $2,465.47 |
| Other miscellaneous receipts | 2,191.31 |
| Erroneous posting | 208.20 |
| Transfers and adjustments | 418.67 |
| Total receipts | $5,283.65 |

If the money in the official accounts was IMPL money, which is not stated in the report one way or the other, the government would appear to have made these funds productive despite its lack of duty to do so.

B. Failure to show dates moneys in the IMPL fund were paid to defendant.

This is plaintiffs' 29th exception. It is accurate in that the GSA report shows only the dates the IMPL collections were deposited in the treasury in Washington, not when they were received in the field. This deficiency is part of the problem of funds held outside the treasury, discussed in Part III of this opinion, above.

The deficiencies of the report which most concern us here are its failures to reveal anything about the official accounts upon which interest was earned, and about the reimbursable agreements. Clearly, in the case of the official accounts at least, the defendant did make funds held outside the treasury productive; but it has precluded us

at this time from giving it credit for this good trust administration by failing to identify the funds involved or the periods they were on deposit.

The defendant will be permitted a reasonable time to file a supplemental accounting for the interest-bearing official accounts and reimbursable agreements.

We shall make no ruling on Exceptions 7, 28, and 29 until following the conference of attorneys and accountants we call in the accompanying order.

C. Alleged illegal expenditures.

In Exception 8, plaintiffs claim the following expenditures shown in the accounting for the IMPL funds, Statement No. 30 at pages 200-202 of the 1967 GAO report, were for "nontribal use":

| | Item | Devils Lake | Santee | Sisseton |
|---|---|---|---|---|
| 1. | Agency buildings and repairs | $ | $ | $ 424.57 |
| 2. | Automobiles, vehicles, maintenance and repairs | 116.91 | 125.40 | 2,697.74 |
| 3. | Fuel and light | 1,060.77 | 154.97 | 254.76 |
| 4. | Maintaining law and order | | | 79.35 |
| 5. | Miscellaneous agency expenses | | | 2,810.10 |
| 6. | Miscellaneous agency expenses: | | | |
| | a. Furniture for agency | 49.20 | | |
| | b. Office supplies | | 13.34 | |
| | c. Prints of reservation | 99.00 | | |
| | d. Telephone | 2.40 | 27.22 | |
| | e. Travel expenses of agent and clerk | 35.88 | | |
| | f. Travel expenses of school inspector | | 162.90 | |
| 7. | Pay and expenses of farmers | 14.88 | | 235.10 |
| 8. | Pay of clerks | | 300.00 | 7,955.36 |

| Item | Devils Lake | Santee | Sisseton |
|---|---|---|---|
| 9. Pay and expenses of field matrons | $ 115.59 | | |
| 10. Pay and expenses of physician | 3.20 | $ | $ |
| 11. Pay of other employees: | | | |
| a. Bricklayer | | 18.00 | |
| b. Laborers | | 81.58 | |
| c. School inspector | | 499.37 | |
| 12. Pay of carpenters | 83.25 | | |
| 13. Pay of laborers | 446.81 | | |
| 14. Pay of: | | | |
| a. Blacksmiths | | | 83.00 |
| b. Carpenters | | | 390.75 |
| c. Herders | | | 36.66 |
| d. Interpreters | | | 57.00 |
| e. Laborers | | | 309.00 |
| f. Mechanics | | | 110.00 |
| g. Painters | | | 44.05 |

Under Sioux Tribe v. United States, 105 Ct. Cl. 725, 780-797 (1946), all the listed expenditures, except those for the physician, school inspector, and farmers would be disallowable as administrative expenses of the United States, unless the defendant showed they were expended entirely on carrying out work for the exclusive or primary benefit of the Indians (id. at 787-788, 797, 802). Here, unlike Blackfeet, the defendant has not yet had an opportunity to make such a showing. Such items, therefore, cannot be disallowed at this time.

Pay and expenses of a physician are prima facie proper uses of trust money.

The items charged against the Santee Sioux for pay and expenses of the school inspector are illegal charges against their IMPL fund,

since the Government was bound to furnish schools and instruction to the Santee at its own expense. See Article VII, Treaty of April 29, 1868, 15 Stat. 637; Article 5, Agreement of September 26, 1876, made law by Act of February 28, 1877, c. 72, 19 Stat. 254; Section 17, Agreement approved March 2, 1889, c. 405, 25 Stat. 888. See Sioux Tribe v. United States, No. C-531 (11), 105 Ct. Cl. 658, 719 (1946). Necessarily, the Federal obligation extended to paying inspectors and other personnel to supervise the Sioux schools. Items 6. f. ($162.90) and 11. c. ($499.37) will be disallowed.

The Sisseton and Wahpeton were not parties to the treaty and agreements just cited; hence the items for pay and expenses of farmers are not disallowable in the absence of proof that those employees performed adminstrative rather than educational duties.

The distinction between the items in Statement 30 which we cannot disallow without giving the defendant an opportunity to show they were really for Indian benefit, and the disbursements for Santee education, which we must disallow out of hand, is this:

The captions "Agency buildings and repairs," "Automobiles, vehicles, maintenance and repairs," etc., while prima facie indicative of administrative use by the United States, contain an element of ambiguity. If given the opportunity, the defendant conceivably can show, for example, that an agency building was used exclusively as the tribal council chamber or that an automobile was placed at the sole disposal of the chief for use on tribal business.

With the items for the school inspector, on the other hand, the only way the Government could show that it was not using the Indians' trust money to discharge its own obligations would be by proving that the expenditures really had nothing to do with schools. This the defendant has no right to do; for such action would involve contradicting its own pleadings, which the law does not permit. See Blackfeet Tribes v. United States, Docket 279-C, et al. (on motion for rehearing), 34 Ind. Cl. Comm. 122, 143-145 (1974).

John T. Vance, Commissioner

We concur:

Jerome K. Kuykendall, Chairman

Richard W. Yarborough, Commissioner

Margaret H. Pierce, Commissioner

Brantley Blue, Commissioner