BEFORE THE INDIAN CLAIMS COMMISSION

THE FORT BELKNAP INDIAN COMMUNITY, THE BLACKFEET AND GROS VENTRE TRIBES OF INDIANS, THE BLACKFEET TRIBE OF INDIANS,	)	
Plaintiffs,	)	Docket Nos. 250-A, 279-C and 279-D
v.	)	
THE UNITED STATES OF AMERICA,	)	
Defendant.	)	

Decided: October 15, 1976

Appearances:

John M. Schiltz, Attorney for Plaintiff, Assiniboine Tribe of Fort Belknap Indians.

Jerry C. Straus, Attorney for Plaintiff, Blackfeet and Gros Ventre Tribes, Wilkinson Cragun and Barker, Patricia L. Brown, and Joseph P. Markoski were on the briefs.

Marvin L. Schneck, Bernard M. Sisson, James M. Upton, with whom was Assistant Attorney General Peter R. Taft, Attorneys for the Defendant.

OPINION ON PENDING MOTIONS

PER CURIAM:

Upon request of the plaintiffs, a conference of attorneys was held before Commissioner Blue on September 17, 1976, for discussion and argument on pending matters in these cases. The plaintiffs' request was precipitated by a motion filed by defendant on September 7, 1976, for leave to file plats of certain highways across the Fort Belknap Reservation. Plaintiffs claim the mere filing of this motion has upset their briefing, printing, and

secretarial schedule and cite this as a reason why they should be granted an extension of time to file their proposed findings and brief. We will discuss the defendant's motion for leave to file the highway plats first, then other pending motions in reverse chronological order, and finally the briefing schedule.

1. Defendant's "Motion for Leave to File Exhibits Identified as Defendant's Exhibit Nos. L-4 and L-5" (i.e., the highway plats), filed September 7, 1976. The highways in question were known to exist by both parties, but official descriptions of them were not discovered prior to trial. Appraisers for both parties estimated their location and length from secondary sources; and attorneys at the conference on September 17 agreed that the estimates were substantially accurate. Defendant's lawyers stated that although the plats established the widths of the rights of way for the first time, the most important fact to be proved by their admission into evidence is that most of the land traversed is allotted rather than tribal. They stated that the defendant had conducted a diligent search for these plats prior to trial, but had not found them. One of the attorneys stated, "Diligence is not a guarantee of success."

We find the plats to be relevant and material, and cannot imagine how their admission at this time would be as disruptive as plaintiffs assert. We agree that in a case like this where hundreds of file drawers have to be searched, even with a high degree of diligence, some pertinent papers will probably be overlooked. We would let the plats in if the only argument against them were that they came late.

Plaintiffs, however, have objected to the authenticity of the plats, which are copies, not originals, and which are not sealed or attested in any way. We have examined the plats and have another objection of our own: The plats appear to bear endorsements which are illegible, and the date of approval by the reservation Superintendent of one is missing.

We will admit the right of way plats into evidence if, but only if, within ten days from the date of the accompanying order, defendant furnishes fully legible copies authenticated and certified pursuant to 25 U.S.C. § 6, accompanied by the digest required by Sec. 23(e)(4) of the Indian Claims Commission General Rules of Procedure.

To avoid misunderstanding, we add that we will not regard the names of private individuals appearing on certain subdivisions on the highway plats as proof that those areas were not tribal land at the time of the grant unless other evidence already in the record shows that such areas were already included in perfected allotments.

2. Defendant's "Motions for Summary Judgment as to Disbursements Under the Treaty of October 17, 1855 and Motion for Leave to File for Rehearing," filed June 30, 1976. Defendant asks us to rule in its favor in regard to the propriety of disbursements under the 1855 treaty (11 Stat. 657), and to reconsider the summary judgment we made disallowing some of them, on the ground that the matter is res judicata. Defendant refers to Case No. E-427, 81 Ct. Cl. 101 (1935), a land claim under a special jurisdictional act, in which the Court of Claims found an overpayment

of $58,535.29 under the 1855 treaty, and set this sum off as a gratuity.

The Commission ruled against the defense of res judicata in this case 24 years ago. See 2 Ind. Cl. Comm. 302, 322. Nothing in the present motion has caused us to change our mind. Case E-427 was decided at a time when the Court of Claims considered administrative expenses of the United States offsettable as benefits to the Indians--a position the Court later repudiated, in Sioux Tribe v. United States, 105 Ct. Cl. 725, 793 (1946), and which Congress expressly rejected in the Indian Claims Commission Act, 25 U.S.C. § 70a. The findings in Case E-427 fail even to specify which items of expenditure under the 1855 treaty made up the assumed overpayment. Such a practice was later condemned by the Supreme Court because of its potential for injustice. See Seminole Nation v. United States, 316 U.S. 286, 309 (1942); Seminole Nation v. United States, 316 U.S. 310, 315-316 (1942). The defendant's present contention amounts to this: that we deny the plaintiff all accounting under the 1855 treaty because the Court of Claims, under very different legal standards, held that unspecified expenditures thereunder, perhaps consisting wholly of administrative expenses, were in excess of the treaty obligation. We adhere to our ruling of 24 years ago rejecting the defense of res judicata and deny defendant leave to file for rehearing of the prior motion for summary judgment against it.

3. Defendant's "Motion for Summary Judgment as to Disbursements Under the Act of May 1, 1888, 25 Stat. 113, and Motion for Leave to File for Rehearing," filed June 30, 1976. This motion is similar to the one just discussed, except that it refers to the agreement ratified by the 1888 act, is confined to the Assiniboine plaintiff, and relies upon the

adjudication in Assiniboine Indian Tribe v. United States, (Case No. J-31), 77 Ct. Cl. 347 (1933), for res judicata.

It appears that in Assiniboine, the Court of Claims decided that the Government took land worth $3,238,970 guaranteed to the Indians by the Treaty of Fort Laramie, 2 Kappler 594, but was entitled to offsets totalling $4,227,474.56. There was no clearcut finding of liability against the Government. The defendant in that case argued that the Assiniboines had abandoned the treaty lands before the Government retook them. The Court stated (77 Ct. Cl. at 372):

> . . . It is not necessary, however, that we should determine whether the plaintiff tribe had abandoned these Fort Laramie lands. For reasons hereinafter set forth, we conclude that even if plaintiff is allowed the value of these lands at the time they were taken, the defendant is entitled to set off against the allowance a greater sum.

The $4,227,474.56 "offsets" did not include the following disputed items (77 Ct. Cl. at 361-362):

Agency buildings and repairs ----------	$ 73,912.79
Miscellaneous agency expenses ----------	61,988.91
Pay of miscellaneous employees ---------	434,503.08
Pay of superintendents and agents ------	29,101.21
Expenses of delegations ----------	3,170.28
Pay of interpreters ----------	10,685.98
Indian police ----------	75,268.89
Total	$688,631.14

What the Supreme Court said about the Court of Claims' action in the second Seminole case, supra, 316 U.S. 315, 316, is particularly applicable to the Assiniboine decision:

> In allowing the gratuity offset here, the Court of Claims fell short of complying with the requirements of the offset statute. There was no

> finding that the United States was under any liability to the Seminole Nation; the Court stated only that the value of the 175,000 acre tract was "far in excess of the value of whatever deficit there may have been." The shortcomings of this approach are evident. As we said in Seminole Nation v. United States, No. 348, ante, p. 286, gratuity offsets resemble a fund in a bank, to be drawn on by the Government as needed. If the Government owes nothing, it is entitled to a dismissal on that ground, and should not be compelled to use its gratuity offsets. If liability exists on the Government's part, the exact amount of gratuitous expenditures utilized to extinguish that liability, in whole or in part, should be precisely found and designated. The Government should not be held to satisfy its liability by the use of gratuity expenditures in excess of the liability. Conversely, the Indian tribe is entitled to have an exact determination of the amount owed it by the United States in order that an amount of gratuity expenditures equal to the liability may be exhausted, or that, if the available offsets are insufficient, it receive a money judgment for the difference. Otherwise, confusion and the possibility of a double credit for a single offset arise, as this case and No. 348 abundantly demonstrate. In the latter case, a gratuity offset in the amount of $165,847.17 on account of the purchase of the 175,000 acre tract from the Creeks was allowed, and here the assumed value of that tract is the offset employed by the Court of Claims.

The offset in Assiniboine, in addition to being unitemized, was $988,504.56 in excess of the primary liability, assuming what is not clear in the opinion, that there was any holding of liability against the defendant. Since no affirmative judgment could be given for the excess, the Government was not precluded under the doctrine of res judicata from maintaining a subsequent action for it. Restatement of Judgments § 57 (1942). By the rule of mutuality, the Indians would likewise not be precluded from defending, or independently asking for an accounting

of the excess. Cf. 46 Am. Jur. 2d, Judgments § 521 (1969). Res judicata, therefore, could not be invoked against the present accounting under the 1888 act until the disallowances total $988,504.56 plus the $688,631.14 in items expressly excluded from the prior adjudication, or a grand total of $1,677,135.70. According to the GAO Report of April 28, 1928 (page 73), the total expenditures under the 1888 agreement at the Fort Belknap Agency were only $944,189.69.

In Lower Sioux Indian Community v. United States, Docket 363 (Accounting), 36 Ind. Cl. Comm. 295, 325-329, 339-341, 388-391, 393-397 (1975), we gave extended consideration to the circumstances in which prior adjudications would and would not be res judicata in accounting cases under the Indian Claims Commission Act. The Assiniboine case of 1933 clearly is not res judicata.

We have no hesitation in denying the defendant's motion for summary judgment as to disbursements under the 1888 act and denying it leave to file for rehearing of our prior summary judgment disallowing some of them.

4. "Plaintiffs' Motion to Compel an Accounting" as to tribal IIM, Special Deposits, and Suspense Accounts, filed June 28, 1976. Plaintiffs moved for an accounting of such funds on July 10, 1975. The motion was not ruled upon, but in the pretrial order of July 22, 1975, the presiding Commissioner ordered as follows:

> The Defendant will not have to answer the Request for Admission of Facts or the Plaintiffs' Interrogatories concerning tribal IIM accounts. Both plaintiffs and defendant will introduce at the trial evidence relating to the nature of the

> plaintiffs' tribal IIM accounts and the duty, if any, of the defendant to account for, or pay interest on, the same. This issue shall be presented by the parties in their post-trial briefs. The defendant will not be required to otherwise respond to Plaintiffs' Motion for an Accounting or, in the alternative, to Compel Discovery. Either party may contest or appeal from the opinion or ruling of the Commission relating to the Government's liability to account for or pay interest on tribal IIM accounts. If after all contests and appeals, the Government is held responsible to account for the tribal IIM accounts, the issues which would be raised by the supplemental accounting will be resolved at a subsequent hearing.

The plaintiff now asserts that subsequent decisions of this Commission have established the Government's accountability for IIM funds, and asks that the pretrial order be modified and the defendant ordered to render its account.

In Gila River Pima-Maricopa Indian Community v. United States, Docket 236-E, 38 Ind. Cl. Comm. 1, 20-23 (1976), we held tribal IIM accounts to be trust funds. We repeated this holding in Navajo Tribe v. United States, Dockets 69, 299, and 353 (Accounting Claims), 39 Ind. Cl. Comm. 10 (1976), and ordered the Government to account. It would, therefore, be a waste of time for the parties to again brief this settled question.

We held the Government liable for interest on a "Special Deposit," i.e., suspense account, in Gila River, because, in our opinion, the money was illegally held in such an account and should have been deposited in the U.S. Treasury in a Proceeds of Labor account. The question of whether a "Special Deposit" in the abstract is a trust fund was not reached and probably never will be reached, because a suspense account by its definition

in an account in which money is temporarily held while the question of who is entitled to it remains unsettled.

We believe that our decisions establish that the Government is obliged to account for all tribal funds held outside the treasury by its officers and agents, regardless of whether they are called "Individual Indian Moneys," or by some other and perhaps more accurate name. The defendant, better than anyone else, can determine what these funds were for. We are ordering the defendant to account for such funds in the instant cases. The defendant has opposed the present motion because of the added burden on its counsel while the case is being briefed. By allowing six months for the completion of the accounting, we believe the burden will be avoided. No briefing on whether interest is due or any other question concerning the accounts will be expected until after they are rendered.

By ruling that local funds are accountable we are not defining the extent of the defendant's fiduciary responsibility for them. In our opinion denying defendant's motion for rehearing of our earlier summary judgment, we stated (34 Ind. Cl. Comm. 122, 150):

> Under List 8 (32 Ind. Cl. Comm. at 119-121) we indicated our respect for tribal autonomy under the Indian Reorganization (Wheeler-Howard) Act, 25 U.S.C. § § 461-479, and did not hold the Government to the same strict standard of accountability for expenditures of trust funds made pursuant to the tribal constitution as for those made by the Government's unilateral action.

Today's ruling is that the Government must present accurate statements of the IIM and other local accounts it held for the plaintiffs. Questions concerning its duty to pursue withdrawals from such accounts,

and whether it owes interest on balances from time to time in them, remain open.

5. Defendant's "Motion to File Documentation Supporting Disbursements Under Treaty of 1855 and Agreement of 1888," filed January 2, 1976. The documents defendant wishes to file would consist of the vouchers, claim settlements, letters of authority, and other documentation contained in the disbursing officers' or agents' accounts that reflect disbursements under the treaty or agreement. They were not filed before trial, as required by Sec. 23 (e)(2) of the Indian Claims Commission General Rules of Procedure. So far as we are aware, they have not been reproduced. */

Sec. 23 (e)(5) of our General Rules of Procedure states:

> (5) Documentary evidence not filed and delivered in advance in accordance with subparagraphs (2) and (3) of this paragraph shall not be received in evidence in the absence of a clear showing that the offering party had good cause for his failure to produce the evidence sooner.

The reason defendant assigns for not filing the 1855 and 1888 documentation at the proper time, as stated in the motion, is the following:

> 2. It is the defendant's position that the disbursement of tribal moneys pursuant to the Treaty of 1855 and the Agreement of 1888 is res judicata. Due to time limitations imposed by the preparation of other documentation on other disbursements involved in this case, the defendant was unable to reproduce the materials now sought to be entered into evidence.

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*/ The motions for summary judgment on the ground of res judicata, which we have disposed of above, were filed pursuant to our order of April 28, 1976, in which we stated that by reason of the mass of documents involved, and the time and expense of copying them, the claim of res judicata should be ruled upon before the documents were proffered. We were unaware of the earlier disposition of the defense of res judicata in 2 Ind. Cl. Comm. 302, 322, when we made our April order.

The transcript of the trial for November 3, 1975, reveals the following about the documentation in question (Vol. XXII, page 28):

> Q. [Mr. Schneck] Now, did your office prepare any documentation or schedules of disbursements for monies under the Treaty of 1855 or the Agreement of 1888?
>
> A. [Mr. Zimmerman] We did not.
>
> Q. [Mr. Schneck] Why?
>
> A. [Mr. Zimmerman] We were advised by the Department of Justice that those items were res judicata.

Some of the documentation now sought to be filed would have been relevant and material in answer to the plaintiffs' motions for summary judgment filed in 1971, which we partially granted in our 1973 decision (32 Ind. Cl. Comm. 65). It was not filed in answer to those motions; and we stated, in ruling upon defendant's motion for rehearing at 34 Ind. Cl. Comm. 122, that the reason it had been held back was deliberately chosen strategy.

Clearly, the defendant has not shown good cause here for its failure to make timely filing of the 1855 and 1888 documents. The case of these voluminous documents, which the defendant has had approximately 25 years to reproduce and has deliberately not done so, is readily distinguishable from the case of the highway plats which were overlooked in the course of a diligent search. There has been no due diligence here. There has been a bad strategic decision followed by inexcusable negligence and nothing more.

Even if defendant were able to show good cause why it could not have filed these exhibits prior to the trial, we could not grant its motion. Defendant's motion seeks to admit into evidence a large, undigested mass of documents without showing that any document is relevant to any specific issue pending in these cases. Admission of all these documents into evidence would greatly complicate the record and would inevitably delay the Commission's adjudication of these dockets. The motion for leave to file will be denied.

Plaintiffs shall have five days from the date of this order to file their proposed findings of fact and briefs on all subjects except rights of way. They shall have 30 days from this date to file proposed findings and brief on that subject.

Jerome K. Kuykendall, Chairman

John T. Vance, Commissioner

Richard W. Yarborough, Commissioner

Margaret H. Pierce, Commissioner

Brantley Blue, Commissioner