

BEFORE THE INDIAN CLAIMS COMMISSION

THE NAVAJO TRIBE)	
)	
Plaintiff,)	
)	
v.)	Docket Nos. 69, 299, and 353
)	(Accounting Claims)
THE UNITED STATES OF AMERICA,)	
)	
Defendant.)	

Decided: December 27, 1976

Appearances:

William C. Schaab, Attorney for the Plaintiff.

Dean K. Dunsmore, with whom was Wallace H. Johnson, Assistant Attorney General, Attorneys for the Defendant.

OPINION OF THE COMMISSION

Blue, Commissioner, delivered the opinion of the Commission.

In this accounting case, we have before us plaintiff's motion for an up-to-date accounting. By an order issued on July 25, 1973, the Commission determined that the amount of \$10,584.76 had been improperly expended by the defendant from plaintiff's tribal funds for "miscellaneous agency expenses," which expenses were the obligation of defendant and not the plaintiff. We granted partial summary judgment to plaintiff and against defendant for that sum. 31 Ind. Cl. Comm. 40, 50.

Defendant subsequently moved for an order vacating \$1,557.42 of the summary judgment. It was alleged that this sum consisted of six disbursements made by defendant after August 13, 1946, the date of approval

of the Indian Claims Commission Act, and that the Commission had no jurisdiction by virtue of section 2 of our act, 25 U.S.C. §70a.

After consideration of the parties' contentions, we concluded that the \$1,557.42 disbursed after the cut-off date was improperly included in the partial summary judgment. We noted that the proper procedure in an accounting case where a continuing wrong is disclosed is for plaintiff to allege specifically the continuing course of wrongful action by defendant, and support the allegations by reference to the exceptions to the accounting report, and on that basis, move for an up-to-date accounting. 36 Ind. Cl. Comm. 433 (1975).

We therefore partially vacated and reduced the partial summary judgment in the amount of \$1,557.42. We also deemed plaintiff's response of July 10, 1975, to the Government's motion to vacate the summary judgment, and its previous exception (h), requesting an up-to-date accounting, to be a motion for an up-to-date accounting as to "Miscellaneous agency expenses."

We allowed defendant a reasonable time to respond. Defendant has filed its response, and plaintiff has filed a reply thereto.

Defendant's 1961 Accounting Report shows the following disbursements for miscellaneous agency expenses up to August 13, 1946.

1911	7.50	1923	26.82
1913	7.75	1925	70.00
1914	1.50	1926	141.42
1917	165.31	1927	1,393.36
1919	4.05	1928	860.28
1922	17.50	1929	1,142.82

1930	3,680.04	1940	344.03
1931	249.43	1942	.47
1932	42.52	1943	393.62
1936	326.75	1944	147.93
1938	2.83	1945	.93
1939	1.28		
Total			\$9,027.34

The accounting report further indicates the following disbursements for miscellaneous agency expenses after August 13, 1946.

1947	37.70	1950	295.64
1948	1,022.92	1951	61.80
1949	139.36		
Total			\$1,557.42

Plaintiff maintains that this evidence demonstrates a continuing administrative practice of disbursing Indian moneys for governmental purposes and argues that, inasmuch as the Commission has determined that the practice was wrongful, a continuing course of wrongful conduct has occurred which justifies an up-to-date accounting.

Defendant asserts that the Commission has no jurisdiction whatsoever over any occurrence after August 13, 1946. This contention has previously been made in this case and was decided adversely to defendant, 36 Ind. Cl. Comm. at 435, on the authority of the decision of the Court of Claims in Gila River Pima-Maricopa Indians v. United States, 135 Ct. Cl. 180 (1956). We adhere to our former ruling herein on this point.

Defendant's second contention is that each miscellaneous agency disbursement is a single, distinct transaction, and that therefore all disbursements made after August 13, 1946, are outside the Commission's jurisdiction.

In Gila River, supra, the Court of Claims rejected a similar argument. The court there used the example of a "claim involving the recovery of periodic installments of compensation such as rent under a lease, and several of the installments fell due and were unpaid prior to the passage of the Indian Claims Commission Act while others fell due and were unpaid subsequent to that date . . ." The court ruled that the Commission, once having jurisdiction of the persons and subject matter of the suit, retained jurisdiction "for all purposes including the awarding of all damages accruing up to the date of judgment." Id at 186.

See also United States v. Southern Ute Tribe, 191 Ct. Cl. 1, 31 (1970), aff'g Docket 328, 17 Ind. Cl. Comm. 42 (1966), rev'd on other grounds, 402 U.S. 159 (1971); ^{*/} Blackfeet and Gros Ventre Tribes v. United States, Dockets 279-C and 250-A, 32 Ind. Cl. Comm. 65, 71-76 (1973).

*/ In Southern Ute, which was also an accounting claim, the court approved our order that defendant bring its accounting up to date in the following language:

Defendant's third procedural contention is that the Commission's order for an up-to-date accounting report is beyond its jurisdiction. 25 U.S.C. 70a (1964) on its face bars the Commission from considering any claims accruing after August 13, 1946. In a previous interpretation of this section, however, we have said that where the Government's initial wrongdoing giving rise to a claim accruing before August 13, 1946, but continued past this time, the Indian Claims Commission was free to determine the extent of its jurisdiction in framing an award. Gila River Pima-Maricopa Indians, et al. v. United States, 135 Ct. Cl. 180, 185 (1955), 157 Ct. Cl. 941 (1962). We expressed agreement in that case with the established principle that "a court once having obtained jurisdiction of the persons and subject matter of a suit, retains such jurisdiction for all purposes including the awarding of all damages accruing up to the date of judgment." We hereby reaffirm our adherence to this principle and hold the Commission correctly ordered an up-to-date accounting for continuing Government wrongdoings which predated and postdated the statutory time bar. [191 Ct. Cl. at 30-31.]

Defendant's accounting report in this case establishes a pattern of conduct whereby defendant's agents used plaintiff's funds for defendant's agency expenses. This pattern began in the early days of defendant's management of plaintiff's money and continued into the 1940's, with disbursements in 1940, 1942, 1943, 1944, and 1945. The accounting report indicates that this pattern continued after 1946 with misspending of plaintiff's funds in 1947, 1948, 1949, 1950, and 1951. This administrative practice constitutes a continuing wrong over which we retain jurisdiction after August 13, 1946.

The doctrine of continuing wrong does not require a formal lease or contractual arrangement crossing the 1946 date. Nor does it require that there be an instance of the wrongful conduct in each and every year. A uniform pattern of mismanagement spanning our jurisdictional cutoff is sufficient to establish a continuing wrong. Such a pattern exists in this case.


Plaintiff has established the existence of a continuing wrong over which we have jurisdiction. We shall grant plaintiff's motion for an up-to-date accounting of miscellaneous agency expense.


Brantley Blue, Commissioner

We concur:


John T. Vance, Commissioner


Richard W. Yarborough, Commissioner


Margaret H. Pierce, Commissioner

Kuykendall, Chairman, dissenting:

Defendant's accounting report shows that certain expenditures made by defendant, categorized in the report as "miscellaneous agency expenses," were charged against plaintiff in varying years and amounts.

The Commission has now ruled that the report establishes a "pattern of conduct" or "uniform pattern of mismanagement" which continued through the jurisdictional cut-off date of 1946, and on at least to 1951, when the accounting report terminated. The Commission denotes this so-called pattern as an "administrative practice" which constitutes a continuing wrong over which we retain jurisdiction, and has ordered an up-to-date accounting.

The origin of Commission jurisdiction over continuing wrongs lies in the Gila River decision, 135 Ct. Cl. 180 (1956). The plaintiff Indians had filed a claim before the Commission for damages arising from United States diversion of Gila River waters belonging to plaintiffs, and related claims. Plaintiff then filed a claim in the Court of Claims for damages caused by the same actions by defendant, but which accrued after the Commission's jurisdictional cut-off date of August 14, 1946. The Court stated that:

The same questions arising out of the pleadings will be present in both the plaintiffs' suit before the Commission and their suit before this court, i.e., the precise nature of each cause of action, the time or times of its accrual, the nature and extent of the damages, and the jurisdiction of the judicial forum over the causes of action and the damages asked.

The Court concluded that in such instances it would leave jurisdiction with the Commission.

The present situation is not parallel. If the plaintiff had filed a claim in the Court of Claims for miscellaneous agency expenses improperly charged against the Indians during any period starting after our jurisdictional cut-off date, the Court could have determined the merits of that claim without going back into issues which were raised by plaintiff's accounting claim before the Commission.

Furthermore, the Commission cites no authority for the proposition that an administrative practice may constitute a continuing wrong. The cases cited by the majority* are not concerned with administrative practices, and concern factual situations which are not analogous to those under consideration in this docket.

We have suggested elsewhere, in a dictum, that a particular government policy might give rise to a continuing wrong. Gila River Pima-Maricopa Community v. United States, Docket 236-I, 25 Ind. Cl. Comm. 305 (1971). There we were concerned with a number of leases executed before and after August 13, 1946. We stated:

* * * Presumably, the plaintiff's basis for recovery is that the entire leasing policy as administered by the Government, of which the leases are evidence, gave rise to the initial wrongdoing accruing prior to 1946. The cause of action being a continuing one, as evidenced by the leases, gives this Commission jurisdiction to award damages, as measured by the leases. . . .

A policy is a definite course of action selected from among alternatives to guide and determine a party's present and future decisions. The word was used in this sense in Gila River. There is no evidence in this

* Gila River, Supra; United States v. Southern Ute Tribe, 191 Ct. Cl. 1, 31, (1970), aff'g Docket 328, 17 Ind. Cl. Comm. 42 (1966), rev'd on other grounds, 402 U.S. 159 (1971); Blackfeet and Gros Ventre Tribes v. United States, Dockets 279-C and 250-A, 32 Ind. Cl. Comm. 65, 71-76 (1973).

case to support the conclusion that charging miscellaneous agency expenses against the Indians was a policy of defendant.

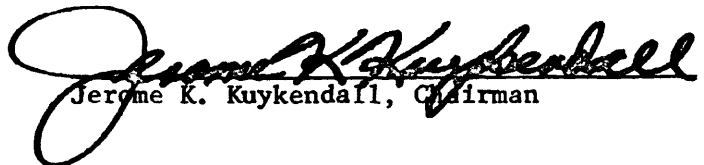
Moreover, there is no definition in the majority opinion of what constitutes an administrative practice, or a pattern of conduct. Nor does the majority explain how expenditures so amorphous as to be designated "miscellaneous" can properly be encompassed within such a definition.

The intermittent nature and varying amounts of the subject expenditure do not suggest a "pattern of conduct" or "administrative practice". Rather, these expenditures, which by definition were "miscellaneous", and therefore not of one type, appear to have been just that. They were irregular, unrelated and with no discernible pattern.

I believe that this decision goes far beyond the principle established in the cases upon which the Commission relies, and sets a precedent which may require virtually all our accounting cases to proceed beyond the cut-off date.

In my opinion the Commission has erred in failing to distinguish between isolated, random transactions and related coherent transactions which form one subject matter and one cause of action.

I dissent.


Jerome K. Kuykendall, Chairman