BEFORE THE INDIAN CLAIMS COMMISSION

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

Decided: January 21, 1977

Appearances:

John M. Schiltz, Attorney for Plaintiff Assiniboine Tribe of Fort Berthold 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 PLAINTIFFS' MOTION FOR THE ADMISSION OF EVIDENTIARY MATERIAL

Blue, Commissioner, delivered the opinion of the Commission.

Plaintiffs are asking us to admit into evidence in this consolidated case some 210 documents which are already in evidence in Docket No. 279-D, Blackfeet Tribe v. United States, but which have not previously been admitted here.

Because of their common history, this Commission in 1969 consolidated the Blackfeet-Gros Ventre case, Docket No. 279-C, for trial with the Fort Belknap case, Docket 250-A. Later, in 1974, Docket No.279-D

was severed out for separate trial of the claims of the Blackfeet Tribe not asserted jointly with any other plaintiff, that is, the Blackfeet claims relating to the period starting in 1888, when the Blackfeet were assigned a separate reservation from the Gros Ventre and Assiniboine.

The consolidated Docket Nos. 250-A and 279-C were tried between September 30 and November 3, 1975. Docket No. 279-D was tried between December 1, 1975, and January 29, 1976. Between the two trials, on November 19, 1975, attorneys for the defendant and the Blackfeet and Gros Ventre Tribes met in conference before Commissioner Blue and agreed, among other things, that, insofar as relevant, all evidence in the record of Dockets 279-C and 250-A might be considered part of the record in Docket 279-D; but the only evidence in the 279-D record which might be considered part of the 279-C--250-A record would be that relating to the period before 1888. By inadvertence the memorandum of the conference was placed in the Commissioner's office file, without being distributed to the attorneys or signed by the Commissioner; but the agreement is confirmed by the transcript for January 29, 1976.

On that same date, at the end of the second trial, defense counsel moved that the entire record in Docket No. 279-D, insofar as relevant, be admitted into evidence in the combined Docket Nos. 279-C, 250-A. Counsel for the Blackfeet Tribe opposed the motion, first on behalf of the absent counsel for the Fort Belknap Indian Community, who had not

participated in the 279-D trial, and then on his own behalf, stating as follows (Tr. XXII-4, 5):

> There is a massive record, a massive amount of material that has already been admitted in both dockets. And to have to review all of this material prior to the time we do our Belknap findings and brief would be unduly burdensome.

The Commissioner denied the motion, stating the general rules regarding when evidence in one case may be used in another would apply.

The 279-C and 250-A proposed findings and briefs are now on file, and it appears plaintiffs' counsel forgot their successful objection to the defendant's motion. They have cited evidence of record only in Blackfeet, Docket 279-D, in numerous places throughout their findings. The present motion, amended November 18, 1976, is an attempt to legalize what they have already done. We are not eager to reopen the record of this exhaustively tried case if we can keep it closed without injustice. Cf. our recent decision on the defendant's motion to file documentation, 39 Ind. Cl. Comm. 108, 118.

We have, nevertheless, carefully examined the 279-D exhibits plaintiffs wish us to admit here. Most of them relate to the 1855-1888 period. These are already in evidence by stipulation. Plaintiffs state they are enumerated in the motion in order to compile in one place those documents plaintiffs are relying upon in their case in chief. As to them the motion is clearly supererogatory.

The remaining exhibits, numbering 15, where relevant at all, appear to concern what Kenneth Culp Davis calls "legislative facts" in contrast to "adjudicative facts." That is, they bear on the standard

of care the defendant ought to have exercised as trustee, rather than showing any acts or omissions alleged to have violated that standard. To establish the standards against which the parties' conduct is measured, courts are not confined to evidence of record. See 2 K. Davis, Administrative Law Treatise § 15.03 (1958). The proposed exhibits are largely cumulative with other evidence already in the record. Some of them are cited for propositions of law instead of fact; and others prove matters which are self evident, for example, No. R-76, which warns that in setting fires great care must be taken to avoid useless burning. Plaintiffs' exhibits MF 3718 and MF 3777, correspondence relating to the Blackfeet Reservation, are clearly irrelevant.

We do not see how admitting the proferred exhibits could change the result in this case to any substantial extent. We do not see how keeping them out will work any real injustice to anyone. Most of them are published documents of the sort courts judicially notice. If, in the unlikely event that we should hereafter discover one of these is essential to an informed and fair decision, we can consult it without having it in evidence. After all, it will remain available in the adjacent filing case of Docket 279-D.

On the other hand, we do foresee that admitting the proferred exhibits may provoke a motion from the defendant, which we can hardly deny, for the admission of countervailing evidence and for additional briefing time.

With less than two years remaining to adjudicate the present massive case and the post-1888 Blackfeet case, we believe that post-trial motions to admit additional evidence should only be granted in extreme circumstances. We find none here, and deny the motion.

Brantley Blue
Brantley Blue, Commissioner

We concur:

Jerome K. Kuykendall, Chairman

John T. Vance, Commissioner

Yarborough, Commissioner, dissenting

I would grant the motion. The Commission has properly resisted admitting large masses of documents of uncertain relevance. Here, however, the party seeking admission has extracted relevant excerpts from a far larger mass, cited them in its brief, and presents them to the Commission for our study. I endorse the procedure and would recommend it to the opposing party if more evidence is needed, so long as no actual delay in briefing is thereby indulged.

As for the suggestion of the majority that this broad a range of documents can be brought under judicial notice and consulted, if necessary, without being in evidence, I become as apprehensive as the parties should be.

Richard W. Yarborough, Commissioner

I join in the foregoing dissent:

Margaret H. Pierce, Commissioner