BEFORE THE INDIAN CLAIMS COMMISSION

THE THREE AFFILIATED TRIBES OF THE FORT BERTHOLD RESERVATION, to wit, the Arikara, the Gros Ventre, and Mandan Tribes of Indians, an Indian Reorganization Act Corporation, in its own behalf and on behalf of the ARIKARA, MANDAN AND GROS VENTRE TRIBES OF INDIANS,	)	
Plaintiff,	)	
v.	)	Docket No. 350-G
THE UNITED STATES OF AMERICA,	)	
Defendant.	)	

Decided: February 17, 1977

Appearances:

Charles A. Hobbs, Attorney for Plaintiff; Wilkinson, Cragun & Barker, and Frances L. Horn and H. Michael Semler were on the briefs.

William F. Smith and James M. Upton, with whom was Assistant Attorney General Peter R. Taft, Attorneys for the Defendant.

OPINION OF THE COMMISSION

Yarborough, Commissioner, delivered the opinion of the Commission.

Plaintiff, the Three Affiliated Tribes of the Fort Berthold Reservation, filed a motion on February 27, 1976, for partial summary judgment and supplemental accounting as to supplemental exceptions 35 and 37 in this accounting claim. Defendant has not responded to plaintiff's motion, and apparently relies on its answer of January 27, 1976, to the supplemental exceptions.

I. Supplemental Exception 35

Plaintiff's supplemental exception 35 is as follows:

> 35. Defendant failed to account for lands and payments forfeited to the tribes under the provisions of § 9 of the Act of June 1, 1910, 36 Stat. 455, 3 Kappler 462, 465, which provides:
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> > In case any entryman fails to make the annual payments, or any of them, when due, all rights in and to the land covered by his entry shall cease, and any payments theretofore made shall be forfeited and the entry canceled, and the lands shall be again subject to entry under the provisions of the homestead law at the appraised price thereof.

The quoted material in the exception is a portion of section 9 of the 1910 act. Previous language in this section provided for sale of plaintiff's surplus agricultural lands in the Fort Berthold Reservation under terms of one-fifth of the purchase price down at the time of entry, with the balance of the price due in installments two, three, four, five, and six years, respectively, after the date of entry.

Plaintiff in its supporting statement goes beyond the language of the exception, which is concerned only with payments actually forfeited. In the supporting statement, plaintiff argues that it is evident that certain land opened for sale under the 1910 act should have been declared forfeited under the foregoing provision. The evidence plaintiff cites in support of this contention is the passage of legislation for the relief of settlers on the Fort Berthold and other reservations. The acts that plaintiff cites are the Act of May 28, 1914, 38 Stat. 383, the Act of May 24, 1924, 43 Stat. 139, and the Act of May 21, 1934, 48 Stat. 787. The acts all allowed extensions in the payments due, and provided for

payment of interest on past due installment payments. Plaintiff argues that the fact of passage of these acts demonstrates that default in annual payments was widespread among settlers.

Plaintiff's motion of February 27 asks that we order that defendant submit a supplemental accounting furnishing information adequate to allow it to determine when forfeitures should have been made and how much should have been forfeited. Specifically, plaintiff asks that the accounting be in the following form:

> The accounting should be in the form of lists or schedules, listing in chronological order the contracts for land which were affected by extensions of time. The identification number of the contract, if any, should be shown as well as the date, the grantee, a description of the land involved, the stipulated consideration with due dates and payment dates. The schedule should clearly show the amount paid in on each contract as of the various dates when purchasers were granted extensions of time, and if defendant does not supply a copy, a reference to where the original of the contract is available for plaintiff's inspection and copying.

In previous cases we have ruled that plaintiffs in accounting actions are entitled to information such as that which is requested here. See Blackfeet and Gros Ventre Tribes v. United States, 32 Ind. Cl. Comm. 65, 82 (1973); see also our decision in this docket at 36 Ind. Cl. Comm. 116 (1975).

Although defendant has not responded to plaintiff's motion, we take defendant's answer to plaintiff's supplemental exception to state the reason why it feels that it is not obliged in this case to furnish the requested information.

Defendant's first argument in answer to this exception is that it does not have to account for forfeitures, if any, because any forfeitures were in exercise of defendant's discretion under its plenary power over Indian property.

While there is no question that Congress has plenary power to deal with funds of Indian tribes, existence of this power does not answer challenges to the propriety with which it is used. E.g., United States v. Klamath and Modoc Tribes, 304 U. S. 119, 123 (1938).

Another argument raised by defendant is that it is not an ordinary trustee, and that trustees must be accorded broad discretion in matters of judgment. While these points are valid, they do not preclude challenges asserting abuse of discretion by defendant in disposing of plaintiff's lands. Fort Peck Indians v. United States, 132 Ct. Cl. 373 (1955), aff'g Docket 183, 3 Ind. Cl. Comm. 78, 133 (1954).

Defendant next argues that Fort Peck, supra, dealt with claims identical to those asserted herein, and affirmed a decision of this Commission against the Indians' claims. Plaintiff disputes defendant's application of Fort Peck.

In Fort Peck, plaintiff charged that defendant violated its duty under the Act of May 30, 1908, 35 Stat. 558. The 1908 statute in Fort Peck was similar to the 1910 act herein. The Commission made extensive and detailed findings of fact concerning the extensions allowed to entrymen in making their payments for plaintiff's lands, and concluded that the Indians were not harmed by the action of defendant in allowing extensions.

The court concluded on appeal that it could not say that this determination of the Commission was wrong. Fort Peck, supra, at 375.

There are two points to be made concerning Fort Peck. First, there were evidence and findings of fact concerning the extensions allowed entrymen in making payments. Defendant would preclude us from obtaining the evidence which would allow us to make comparable findings of fact in this proceeding.

Second, defendant's assertion that the 1910 act herein is "precisely the same type of statute" as the 1908 act under consideration in Fort Peck is inaccurate. While it can be said that the statutes are of the same type, they are not identical, and the differences between the two acts are significant, as plaintiff points out.

Under either act, failure to make required payments would result in forfeiture. However, according to Fort Peck, under the 1908 act forfeiture had the consequence of resale of the property at public auction. Any surplus funds remaining out of the proceeds of resales after payment of the balance due to the Indians were to be refunded to the defaulting entrymen, or their heirs. If resale brought less than the unpaid purchase price, the Indians suffered the loss. On the other hand, under default provisions of the 1910 act the Indians were entitled to keep not only all payments theretofore made, but were entitled to the full purchase price on the second sale as well. Moreover, there was no requirement of resale at public auction.

In short, under the 1910 statute, in event of default the resale provisions were such that the Indians had the possibility of ultimately receiving more than the appraised value of the lots. Under the 1908 statute there was no such possibility, and in fact in the event of default there was the possibility that the Indians might receive less than the appraised value of the lots.

Therefore, in contrast to Fort Peck, it may have been in the instant plaintiff Indians' interest, because of the difference in the respective statutes, to have the entrymen default, and have the lots resold. Although at this point there is no evidence that plaintiff was damaged or that defendant abused its discretion in allowing extensions to entrymen purchasing plaintiff's lands,* final determination would have to be based on an examination and evaluation of the evidence.

We conclude that defendant's objections to furnishing the requested information are without foundation. Plaintiff is entitled to the requested information concerning implementation of the 1910 act. We will therefore grant plaintiff's motion as to supplemental exception 35. In addition to the information specified by plaintiff concerning the extensions granted to entrymen, defendant should supply information in justification of the extensions that were granted.

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* We have concluded in Docket 350-F involving sales of these lands that defendant was grossly negligent in disposing of the lands for less than half their true market value. See 28 Ind. Cl. Comm. 264, 279 (1972).

II. Supplemental Exception 37

In supplemental exception 37, plaintiff alleged that the 1961 accounting report revealed that defendant wrongfully returned to certain purchasers of Fort Berthold townsite lands $1,678.75 of tribal funds, and reappraised plaintiff's land to plaintiff's detriment. Plaintiff asks for summary judgment in the amount of $1,678.75, plus three percent interest from the date of wrongful payment inasmuch as the funds were diverted from an interest-earning fund. Plaintiff further asks for additional information concerning sales involving reappraisals so that a determination may be made of any losses by reason of a reduction of the purchase price because of reappraisal, without an actual rebate of the funds to the purchaser.

Thus there are two issues to be considered in connection with this exception, refunds made to settlers from Indian trust funds, and reappraisals of plaintiff's townsite lands which reduced the funds ultimately received for the lands by plaintiff. We will consider first plaintiff's claim that refunds made by defendant from Indian trust funds were improper.

In support of its claim that $1,678.75 in refunds were improper, plaintiff relies on a dictum in Fort Peck. There the Court of Claims said that if the proof in that case had shown that as a result of reappraisals refunds had been made to purchasers who had paid in full for their entries, it would have held the government liable for the amounts lost thereby.

In the instant case there is proof that refunds were made to purchasers who had paid in full. The 1961 accounting report shows that refunds were made under the Act of February 9, 1925, 43 Stat. 817. The House report supporting the passage of the 1925 act contains information

clearly indicating that the act was passed to give relief to purchasers who had paid in full for their town lots in the town site of Sanish. See H.R. Rep. No. 824, 68th Congress, 1st Sess. 1, 4 (1924).

Although the accounting report does not indicate how much of the refunds were to purchasers who had paid in full, and how much (if any) to purchasers who may have only made partial payments, in our view, that distinction is not significant. We see no basis for a distinction between refunds to purchasers who have paid in full and those who have made partial payments, nor does Fort Peck provide any such basis.

We conclude that any refunds to purchasers of Indian lands out of trust funds are improper unless a reasonable justification is shown for making them. Defendant has the burden of showing reasonable justification. Defendant has offered no justification herein, in response to plaintiff's motion, for refunding to settlers money paid in good faith for the Sanish town lots while acting in its capacity as trustee for the Indians. We therefore conclude that plaintiff is entitled to summary judgment for the sum of $1,678.75 which it objects to in supplemental exception 37. Plaintiff is also entitled to 3 percent interest on this sum to date of payment, because defendant made the refunds out of plaintiff's three percent fund.

We now turn to plaintiff's request for information concerning alleged losses which resulted from reappraisals reducing the prices ultimately paid to the Indians for town lots.

Plaintiff in its supporting statement relies on the following argument:

> The Tribes had a contractual right to the full original appraised price, and it would have been to their best interest if the defendant had allowed the land to be forfeited and held for resale when the market should have improved. [P. 7, plaintiff's supplemental exceptions, May 4, 1973.]

Plaintiff's argument assumes that section 9 of the 1910 act, which we discussed above as it relates to exception 35, governs the sale of town lots which are the subject of exception 37. This assumption is in error.

The 1910 act did not provide for defendant to use the section 9 forfeiture provision with regard to town lots. The forfeiture provision of section 9 referred to sales of agricultural lands, not town lots. Section 6 of the 1910 act provided the method of disposing of town lots, and gave defendant broad authority in that regard. It provided, inter alia, that town lots were to be disposed of under such regulations as defendant might prescribe, and that the purchase price of all town lots was to be paid at such time and in such installments as defendant directed.

Moreover, the last sentence of section 9 in the 1910 act provided that surplus lands remaining undisposed of at the expiration of four years from the opening of said lands to entry might be reappraised in the discretion of defendant, and (by implication) be resold as elsewhere provided in the act for the type of land involved. In the case of town lots, this would mean they could be resold according to the provisions of section 6 which gave defendant broad discretion.

Plaintiff's argument that reappraisals were improper as a matter of law, based as it is on an erroneous reading of the 1910 statute, is therefore rejected. Reappraisal in itself in these circumstances is not improper. Fort Peck, supra. Accordingly, plaintiff's motion for a supplemental accounting will be denied.

Furthermore, we doubt there is any need for such a motion in any case, since the evidence that plaintiff seeks appears to be on record and available to it. Defendant's exhibit 71 in Docket 350-F lists sales of town lots, and gives original appraisal prices and reappraisals, and original sales prices and adjusted sales prices.

Richard W. Yarborough, Commissioner

We concur:

Jerome K. Kuykendall, Chairman

John T. Vance, Commissioner

Margaret H. Pierce, Commissioner

Brantley Blue, Commissioner