BEFORE THE INDIAN CLAIMS COMMISSION

THE BLACKFEET AND GROS VENTRE TRIBES OF INDIANS, residing upon the Blackfeet and Fort Belknap Reservations in the State of Montana, Plaintiffs, v. THE UNITED STATES OF AMERICA, Defendant.	)	Docket No. 279-C
THE FORT BELKNAP INDIAN COMMUNITY sometimes referred to as the Gros Ventre Tribe and Assiniboine Tribe of Fort Belknap Indians, Plaintiff, v. THE UNITED STATES OF AMERICA, Defendant.	)	Docket No. 250-A

Decided: June 7, 1974

Appearances:

Jerry C. Straus and Patricia L. Brown, Attorneys for Plaintiffs in Docket 279-C. Wilkinson, Cragun and Barker were on the briefs.

John M. Schiltz, Attorney for Plaintiff in Docket 250-A. Hutton, Schiltz & Sheehy were on the briefs.

Marvin E. Schneck, with whom was Assistant Attorney General Wallace H. Johnson, Attorneys for Defendant.

OPINION

Vance, Commissioner, delivered the opinion of the Commission.

I. MOTION FOR REHEARING

The defendant moves that we vacate the summary judgment which we rendered in this case on October 18, 1973, disallowing numerous items in its accounting. See 32 Ind. Cl. Comm. 65. The summary judgment is discussed between pages 104 and 132 of that opinion. The present motion is not concerned with other parts of the decision. The defendant has filed copies of 132 vouchers with its motion. These, it contends, "prove that there are material issues of fact involved" in the disallowed items.

We deny the motion for a variety of reasons:

1. The vouchers at most furnish grounds for reducing the judgment, not vacating it.

The vouchers do not cover every item we disallowed, nor the full amount of each item they purport to cover. Several of our disallowances were based on express admissions of the defendant (see e.g., 32 Ind. Cl. Comm. at 129). These the vouchers do not repudiate. Even if the vouchers proved everything the defendant claims they prove, it is evident that no case is made out for vacating the judgment. At most, the vouchers show that the amount of the judgment should be reduced, not that it should be set aside.

2. A party confronted with a motion for summary judgment cannot hold back his evidence.

The defendant does not ask us to reduce the amount of the judgment. If we are not persuaded to vacate it, defendant says we should grant "a reasonable time" for defendant to submit further evidence.

No principle is more firmly established under the Federal Rules of Civil Procedure, from which our Rule 11(c)(1), (25 CFR 503.11(c)(1)) comes, than that a party confronted with a motion for summary judgment cannot hold back his evidence. If he contends a genuine issue of material fact exists, he must put his cards on the table. Engl v. Aetna Life Ins. Co., 139 F. 2d 469 (2d Cir. 1943); see also Berger v. Brannan, 172 F. 2d 241 (10th Cir.), cert. denied, 337 U.S. 941 (1949); Schreffler v. Bowles, 153 F. 2d 1 (10th Cir.), cert. denied, 328 U.S. 870 (1946). This rule applies to the Government as well as any other litigant. Radio City Music Hall Corp. v. United States, 135 F. 2d 715 (2d Cir. 1943).

If there is some good reason why the party opposing the motion for summary judgment cannot promptly disclose his evidence, he may file an affidavit explaining why. In such event the Commission will deny the motion, order a continuance, or make such other order as is just. Rule 11(c)(1)(vi). But the affidavit must be filed before, not after, the summary judgment is rendered. Surkin v. Charteris, 197 F.2d 77, 79 (5th Cir. 1952); Columbia Fire Ins. Co. v. Boykin & Tayloe, 185 F. 2d 771 (4th Cir. 1950). This rule, also, applies to the Government as well as to other litigants. United States v. Johns-Mansville Corp. 273 F. Supp. 893 (E.D. Pa. 1965).

No such affidavit was filed here. Instead, the defendant contended it had furnished all the evidence the law required. It insisted, contrary to all authority, on an absolute right to introduce, at some future trial, evidence which it had failed to produce at the first one, and refused to produce upon the motion for summary judgment.

Defendant states in the memorandum accompanying its motion for rehearing:

> It must be remembered that the Government's preparation was in the context of a motion for a summary judgment rather than in the context of a trial on the merits.

Apparently defendant has forgotten that the motion was filed after trial, during a period when the record was held open in announced contemplation of just such a motion. See transcript, April 28, 1971, at 366.

Clearly, we did not err, on the record then before us, in granting partial summary judgment.

In its present request for a "reasonable" additional time, the defendant drops the theoretical claim of a right to withhold evidence until another trial; but it is still asking us to deny the plaintiffs a summary judgment to which the record shows them entitled.

We proceed to consider whether the defendant shows good cause for us to reopen an adjudication which was correct at the time it was made.

3. No cause is shown why the vouchers could not have been produced before summary judgment.

Although the motion for rehearing cites the Indian Claims Commission rule on rehearings, Rule 33 (25 CFR 503.33), and is accompanied by what purports to be evidence not previously before the Commission, the defendant has not filed the affidavit required by subdivision (3) of the rule explaining why this material was not produced at the right time.

The belatedly submitted vouchers are all Government documents and purport to be some of those used in making up the accounting reports filed in this case. While perhaps unknown to its present attorneys, the vouchers were not unknown to the United States prior to the summary judgment. The defendant is chargeable with what the keepers of its records knew. Greenspahn v. Joseph E. Seagram & Sons, Inc., 186 F. 2d 616, 620 (2d Cir. 1951); Greenbaum v. United States, 360 F. Supp. 784 (E.D. Pa. 1973). It was the duty and responsibility of the United States to inform its counsel. Washington Farms, Inc. v. United States, 122 F. Supp. 31 (M.D. Ga. 1954). Clearly the vouchers were not newly discovered evidence. See Engelhard Industries, Inc. v. Research Instrumental Corp., 324 F. 2d 347, 352 (9th Cir. 1963), cert. denied, 377 U.S. 923 (1964); George P. Converse & Co. v. Polaroid Corp. 242 F. 2d 116, 121 (1st Cir. 1957); United States v. 72.71 Acres, 23 F.R.D. 635 (D. Md. 1959); In re Highwood Cemetery Ass'n, 132 F. Supp. 636 (W.D. Pa. 1955); Di Silvestro v. United States Veterans' Administration, 9 F.R.D. 435 (E.D. N.Y. 1949), aff'd, 181 F. 2d 502 (2d Cir.), cert. denied, 339 U.S. 989 (1950); cf. Caddo Tribe v. United States, 8 Ind. Cl. Comm. 354, 377-380 (1960).

Apparently, after being used in preparation of the accounting reports, the vouchers were dispersed to various repositories. Why this was done, while the litigation remained pending and the Government intended to use the vouchers as evidence, defies rational explanation.

In its brief, defendant attempts to explain its failure to produce the vouchers before the summary judgment by stating that it did not have the necessary personnel to "extract" them. It points out, as we noted in our October decision, that the Tribal Claims Section of the General Services Administration had dwindled to two employees. See 32 Ind. Cl. Comm. at 145. Disregarding the fact that only the defendant was responsible for this understaffing, it occurs to us that two men were enough to retrieve 132 documents from the archives between August 24, 1971, when the motion for summary judgment was filed, and November 16, 1971, when the motion came to hearing, and surely before October 18, 1973, when the motion was decided.

In fact, we do not believe lack of personnel was the reason exhibits were not produced prior to our granting summary judgment. Examination of the defendant's filings in this case from its answer to plaintiff's exceptions until our October decision leads to only one conclusion: the evidence was held back by deliberate strategic decision. See section 8 of this opinion, page 144 below.

Clearly, the defendant has failed to show due diligence in producing the vouchers which now accompany its motion for rehearing or to demonstrate that its neglect was excusable. See Greenspahn v. Joseph E. Seagram & Sons, Inc., supra; In re Highwood Cemetery Association, supra; cf. Greenbaum v. United States, supra.

A motion to set aside a partial summary judgment is addressed to the sound discretion of the Commission. 6 J. Moore, Federal Practice, § 56.20 [3.--4], at 2759-2762 (2d ed. 1972); cf. Confederated Tribes of Warm Springs Reservation v. United States, 177 Ct. Cl. 184, 190-193 (1966). While not, strictly speaking, governed by Rule 33, the motion must show grounds similar to those recited in Rule 33 and in F.R. Civ. P. 60(b), to justify vacating the order. None of them has been shown here.

4. Even accepted at face value, the vouchers show probable error in only a minor portion of the disallowed items they purport to explain.

We have examined every voucher the defendant submitted with its motion for rehearing. For reasons stated in the next section of this opinion, we cannot accept any as evidence; but if we did accept them at face value they would show probable error in the disallowance of only a minor portion of the items they purport to explain.

The vouchers are identified, somewhat cryptically, only in an accompanying digest. The first page of the digest is a summary showing the statements in the General Accounting Office and General Services Administration reports to which the various groups of vouchers respectively apply. The succeeding pages take these statements in order, and list the individual vouchers opposite the disallowed entries they are supposed to explain. For example, pages 2 to 4 of the digest cover Statement No. 1, which appears at pages 7 to 9 of the 1969 GAO report, and is a listing of disbursements from the Blackfeet IMPL fund. The disallowances we made on this statement in our October opinion are shown at 32 Ind. Cl. Comm. 116.

The first item we disallowed on Statement No. 1 was a $2,532.88 entry for "Agency buildings and repairs." Opposite this item, defendant lists on its digest exhibits numbered 1969-1 through 1969-8, which are copies of vouchers totalling $1,246.28. These, we assume, are intended to show that part of the total entry for "Agency buildings and repairs" was a proper expenditure of Indian trust funds and did not represent administrative expenses of the United States.

Exhibit 1969-1 consists of (1) an accepted bid in the amount of $1,119.50, for various building materials; and (2) the allowed claim in this amount of the successful bidder, containing the agent's certificate that the specified articles were used for "building farmers cottages and stables." The appropriation or fund from which the claim was paid is not shown on the exhibit.

Exhibit 1969-2 is an allowed claim (i.e., paid bill) for $24.27 for flooring, certified by the agent to be used for repairing floors at the Cut Bank Boarding School. The appropriation or fund from which this bill was paid is not shown.

Exhibits 1969-3 through 7 are allowed claims, totalling $59.51, for purchases from Indians of lumber, dirt, gravel, dirt, and sand, respectively. The blank following the word "Activity" on each form is filled in "Agency." The blank following the word "For" is filled in "Relief of needy Indians," except on Exhibit 1969-4 (for eleven loads of dirt), where it is filled in "Relief work." The interpretation that the materials were purchased for agency use from needy Indians seems more

probable than the alternative, that dirt was purchased for issue to needy Indians for relief purposes. The appropriation from which the claims were paid is identified on Exhibits 1969-3 through 7 as "Proceeds Labor Blackfeet Indians, Montana, Support 1932."

Exhibit 1969-8 is a paid bill in the amount of $43.00 for shingles, lime, and cement, certified to have been used in making repairs to school and agency buildings at the Blackfeet Agency. The proportions for agency and school use are not segregated. The appropriation or fund from which the claim was paid is not identified.

Bearing in mind the rule that the burden is on the defendant to make a proper accounting (see 32 Ind. Cl. Comm. at 85), it is evident that we would still have disallowed the entire $2,532.88 item for "Agency buildings and repairs" if Exhibits 1969-1 through 8 had been before us last October. While building farmers' cottages and repairing schools (Exhibits 1969-1 and 2) might be proper uses of trust funds, the vouchers for these expenditures do not tie them in to the IMPL fund. In 1969-1, the expenditure for farmers' cottages is commingled in the same item with the improper expenditure for agency stables; thus the entire voucher is subject to disallowance (see 32 Ind. Cl. Comm. at 108, 131). The "relief" vouchers, (Exhibits 1969-3 through 7) are not only ambiguous in themselves, but would seem as likely to support the entry "Indigent Indians" in Statement No. 1 of the 1969 GSA Report, which we did not disallow, as the disallowed entry "Agency buildings and repairs."

Exhibit 1969-8, again, shows a commingled expenditure for repairing buildings at school (proper) and agency (improper). Since there is no segregation, the item is subject to disallowance in full.

We have examined every voucher the defendant has submitted with its motion for rehearing. It would unduly prolong this opinion to discuss each one separately. What they would prove if taken at face value can be summarized as follows:

(1) A number of vouchers do not show the fund or appropriation charged. In addition to Exhibits 1969-1, 2, and 8, discussed above, Exhibits 1969-17, 23, 38 and 39, and 1929-17 and 18 fall in this class.

(2) A number of vouchers show on their face that they were charged to funds other than the ones defendant's digest states they apply to. For example, seven of the nine vouchers identified in defendant's digest as supporting expenditures under the Blackfeet Allotment Act of March 1, 1907, c. 2285, 34 Stat. 1035, bear notations that they were paid from the IMPL fund. See Exhibits 1929-19 through 22 and 1929-25 through 27. Exhibit 1969-23 indicates a charge to the appropriation "Support of Indians Blackfeet Agency, Montana 1929" -- an ambiguous designation which could refer either to public funds or unspecified trust funds. See Interior Department Appropriation Act of June 5, 1924, c. 264, 43 Stat. 390 at 408, 411. Only Exhibit 1929-24 among those listed under the 1907 Act shows that act as its authority for payment. Exhibit 1929-24 is the Superintendent's expense account for an investigation of stolen horses--a law enforcement expense of the United States and

clearly an improper charge against Blackfeet trust funds. See 32 Ind. Cl. Comm. at 110-111.

(3) One of the vouchers, Exhibit 1970-20, indicated by the digest as supporting an IMPL expenditure, shows on its face a charge to a public fund not involved in this accounting. The voucher, dated December 11, 1914, is for $18.00 for stove parts for the Harlem, Montana, boarding school, and is charged to "Indian Schools; Support, 1915," public moneys of the United States appropriated by the Act of August 1, 1914, c. 222, 38 Stat. 582, 584.

(4) A number of the vouchers are ambiguous as to purpose. Exhibits 1969-3 through 7, discussed above, are examples. In this connection, it is our opinion that expenditures of Indian trust money for purchases of articles for administrative use by the United States are no less disallowable when made from needy Indians than from other suppliers.

(5) A number of the exhibits indicate that parts of the disbursements we disallowed probably were used for legitimate purposes. None of the vouchers and no combination of the vouchers in this class cover the full amount of any item we disallowed. They thus fail to show error in the summary judgment when rendered, since items which mingle proper and improper charges are disallowable in toto.

The largest of the vouchers in this class (Exhibit 1969-50) is for $544.66. The digest indicates that this amount was included in the $3,778.35 disallowed item for "Automobiles, vehicles, maintenance and repairs" in Statement No. 10 at page 68 of the 1969 GSA report.

For the disallowance, see 32 Ind. Cl. Comm. at 125. According to Exhibit 1969-50, the $544.66 was actually used to refinance a truck for a Fort Belknap allottee, on a reimbursable agreement.

Most of the vouchers in this class, however, are quite small. Examples are:

> Exhibit 1969-25, in the amount of $2.55 for three 100-pound bags of asbestos cement for the boiler at the Blackfeet School, identified by the digest as included in the $2,130.92 item for "Hardware, glass, etc.," disallowed at 32 Ind. Cl. Comm. 116.
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> Exhibit 1929-30, showing a $12.00 entry for ten dozen fruit jars for canning clubs, among 23 other items on the same bill, such as 30 cents for glue and 20 cents for screw eyes, for which defendant does not claim credit against plaintiff.

All told, we have identified 65 vouchers which, if admissible in evidence, would show that parts of the expenditures we disallowed were probably proper. The amounts of these vouchers[1/] total $2,121.19.

1/	1969-11	$100.68	1969-53	$ 2.25	1970-8	$ 2.75
	12	1.50	54	3.10	9	.90
	13	3.00	55	1.00	10	7.85
	14	45.05	57	1.00	11	.19
	15	1.50	58	12.35	12	29.10
	19	9.60	60	85.09	15	13.20
	21	8.50	61	41.55	16	6.75
	22	2.05	62	111.12	17	1.67
	24	13.90	1929-6	20.00	18	10.50
	25	2.55	9	60.00	19	3.50
	26*	80.00	11	7.50	22	22.00

Continued

This represents approximately 2 percent of the $102,639.24 total of the 132 vouchers accompanying the motion for rehearing, and approximately .6 percent (six tenths of one percent) of the $355,079.57 principal amount of the summary judgment, that is, of the total expenditures disallowed by the judgment, without interest or damages for failure to invest.

(6) A number of the vouchers plainly support the summary judgment. The largest in amount among those accompanying the motion for rehearing (1929-31 and 32, 1928-1) fall in this category.

Exhibit 1929-31, in the amount of $35,000, is the construction contract for Fort Browning, dated August 20, 1868. The specifications for this work were as follows:

> No. 1. The fort to be a stockade, built of hewn logs not less than ten inches in thickness, to be at least twelve feet above the surface of the earth, and set in the ground three (3) feet, logs to be securely fastened by a plate at the top: stockade to be one hundred and eighty (180) feet square, with a gate or main entrance twelve feet

Continued

1/	1969-27	$ 5.41	1929-13	$ 58.61	1970-23	$ .54
	29	5.50	28	25.60	24	3.80
	30	26.78	29	19.81	26	2.30
	32	2.28	30*	12.00	27	2.63
	34	54.70	1970-1	15.12	28	13.28
	44	45.10	2	297.00	29	18.75
	45	75.18	3	4.00	30	3.75
	48	20.27	4	19.05	32	24.50
	49	4.75	5	30.83	33	18.45
	50	544.66	6	16.96	34	27.03
	51	4.80	7	6.05		$2,121.19

*In part.

> wide--to have double gate or door so constructed as to close and fasten itself; also one small gate or door, four feet wide, to be situated in most convenient place in stockade, to be bullet proof, and so constructed as to close and fasten. Bastions twelve (12) feet square and two stories high to be built at south west and north east corners of stockade, to be built of hewn logs not less than ten (10) inches in thickness, and to contain as many loop holes and port holes as may be necessary for the complete defence of the place.

Besides the fort, the contract provided for construction within the stockade of separate houses for the agent, physician, mechanics and interpreter, a schoolhouse, warehouse with bulletproof door, blacksmith and carpenter shops, three water closets, and flagpole with look-out platform at the thirty foot level. Outside, under the guns of the fort, two chief's houses and 28 Indian houses were to be constructed. The consideration of $35,000 was payable in a lump sum, without apportionment among the various structures. This sum, according to the endorsement on the contract, was charged to the appropriation, "Fulfilling Treaty with the Blackfeet Indians" (Agricultural and Mechanical Pursuits).

Exhibit 1929-32, in the amount of $37,000, is the construction contract for Fort W. T. Sherman, dated October 7, 1868. It differs from the contract for Fort Browning only in the higher price and in calling for six chief's houses and 24 Indian houses instead of two and 28 respectively. $25,207.49 of the contract price was charged to

the appropriation "Fulfilling treaty with Blackfeet Indians" (Agricultural and Mechanical pursuits).

The parenthetical phrase, "Agricultural and Mechanical pursuits," refers to Article 10 of the Treaty of October 17, 1855, 11 Stat. 659, which reads in pertinent part as follows:

> The United States further agree to expend annually, for the benefit of the aforesaid tribes of the Blackfoot nation, a sum not exceeding fifteen thousand dollars annually, for ten years, in establishing and instructing them in agricultural and mechanical pursuits, and in educating their children, and in any other respect promoting their civilization and christianization:

Expenditures such as those shown in Exhibits 1929-31 and 32 could be authorized only by a treaty clause providing for the Indians to pay the costs of military occupation of their country, and we correctly disallowed them at 32 Ind. Cl. Comm. 107.

Exhibit 1928-1 is a claim settlement admitted and certified by the acting Second Comptroller of the Treasury on December 21, 1889, and supporting documents. It shows that $34,459.27 was approved for payment from the appropriation "Fulfilling Treaties with Indians at Fort Belknap Agency" for the construction of 12 agency buildings, consisting of one agent's dwelling, four double residences for employees, two office buildings, a warehouse, a blacksmith shop, a carpenter shop, a barn, and a butcher shop. The sum approved for payment is not apportioned among the various structures.

Defendant argues that Exhibit 1928-1 shows we erred in disallowing the $36,921.90 item for "Agency buildings and repairs" shown as expended in fulfillment of an 1888 agreement with the Fort Belknap Indians on page 73

of the 1928 General Accounting Office report. We disallowed the item because it commingled the prima facie proper expenditure for new agency buildings with the improper expenditure for repairs. See 32 Ind. Cl. Comm. 131.

If Exhibit 1928-1 had been before us last October, we would not have disallowed the item for the reason stated. We would have disallowed it because it clearly shows that an undifferentiated part of the item was spent for administrative purposes of the United States.

Article III of the agreement ratified May 1, 1888, 25 Stat. 114, authorizes expenditure of the consideration for a land cession upon breeding cattle, subsistence, agricultural aid, education, and a number of other objects clearly beneficial to the Indians. In addition, it authorizes expenditures of the Indians' money for ". . . erection of such new agency and school buildings, mills, and blacksmith, carpenter, and wagon shops as may be necessary . . ." We interpreted this as meaning the Indians could be charged only for such buildings as might be necessary to carry out the specific beneficial purposes of the agreement. If an unexplained item for "New agency buildings" had been before us, we would not have disallowed it since it was within the literal language of the agreement, but we would have given the defendant an opportunity at the trial to show its connection with some specific beneficial purpose. See 32 Ind. Cl. Comm. 111, 130.

Exhibit 1928-1 proves that such a connection did not exist with respect to a large part of the $36,921.90 item for "Agency buildings and

and repairs." The agent's dwelling would clearly have been necessary to the Fort Belknap Agency whether or not the specific beneficial purposes of the 1888 agreement had ever been undertaken. To this extent the item represents purely and simply an administrative expense of the United States. The employees' residences, office buildings, warehouse, and barn would probably have been necessary, at least in part, regardless of the other beneficial purposes; the shops might or might not have been.

After we have considered Exhibit 1928-1, as before, the disallowed item for "Agency buildings and repairs," at 32 Ind. Cl. Comm. 129, remains one commingling clearly improper with arguably proper expenditures, and remains disallowable.

5. The vouchers are inadequately identified to be considered for any purpose.

The copies of vouchers accompanying the motion for rehearing are uncertified, and are identified, as we have stated, only in the defendant's digest, an unsigned document. With its reply to plaintiff's response to the motion for rehearing, defendant submitted a copy of an unsworn letter from the Director, Indian Claims Division, General Services Administration, to defendant's attorney, setting out in detail the steps taken by the present General Services Administration accountants to match the vouchers with the old GSA/GAO reports, but, in fact, not vouching for the accuracy of the digest.

Indian Claims Commission Rule 11 (c) (1) (v), relating to summary judgment states:

> Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. . . .

Rule 21 (25 C.F.R. 503.21) states, in part:

> (a) At any hearing held under the rules in this part, any official letter, paper, document, map or record in the possession of any officer or department or court of the United States, or committee of Congress (or a certified copy thereof) may be used in evidence insofar as the same is relevant or material.

Evidence in support of a motion for reconsideration of a summary judgment necessarily must be verified or certified to the same extent as evidence in support or opposition to an original motion for summary judgment. Cf. Rule 33(b)(3).

We ordinarily have no occasion to enforce our rules requiring verification or official certification of documentary evidence, because the opposing party usually concedes its genuineness. Cf. Rule 23 (e)(6) (25 C.F.R. 503.23(e)(6)). Here, however, the plaintiff objects.

But even if the plaintiff did not object, we would find it impossible to accept the exhibits accompanying the present motion for reconsideration. It is not that we seriously doubt they represent authentic Government documents. What we cannot accept is their relevancy to the items listed opposite them on the defendant's digest.

A number of them do not show the fund from which they were paid. Others show on their face payment from different appropriations from the

one defendant's digest assigns them to. Still others appear to apply to different items on the same statement from those listed opposite them--items we did not disallow. Exhibits 1969-3 through 7, discussed in the preceding section of this opinion, may fall in the last category.

Exhibit 1969-28 is a clearer example of the vouchers which appear to support a different entry from the one the digest says they do. The exhibit consists of documents showing the order, receipt, and payment of $425.00 from the IMPL fund for 125 blankets for the use of destitute Blackfeet Indians. The defendant's digest lists the exhibit opposite "Hardware & Misc.," referring to the item in Statement No. 1 at page 7 of the 1969 General Services Administration report entitled "Hardware, glass, oils, and paints." This item is in the amount of $2,130.92; and we disallowed it at 32 Ind. Cl. Comm. 116. The same Statement No. 1 contains entries for "Indigent Indians . . . clothing" in the amount of $2,377.63 and "Indigent Indians . . . Household equipment and supplies" in the amount of $717.88, which we did not disallow.

The defendant states that the vouchers explain and amplify but do not contradict the accounting reports. But the example just given shows that this statement is not true. Blankets issued to destitute Indians are not hardware.

Defendant denies that its accounting reports are pleadings. Therefore, it states, they cannot constitute admissions upon which plaintiffs may rely. Defendant points to Rule 6(a), Indian Claims Commission General Rules of Procedure (25 C.F.R. 503.6(a)), which states

that there shall be a petition and an answer, a reply to a counterclaim denominated as such, and no other pleadings, except that the Commission may order a reply to an answer. Since defendant filed an answer to the plaintiff's exceptions, defendant reasons that the reports cannot be a pleading. Hence, it concludes they have no binding force.

The argument is more ingenious than convincing. Defendant's "answer" to the exceptions, filed with the Commission on April 26, 1971, was actually entitled "Response." It stated, in part:

> In response to these claims [i.e., the plaintiffs' petitions],accounting reports were prepared and certified by the General Services Administration . . . The following is defendant's response to plaintiffs' exceptions.

The response to the exceptions in no way purported to supplant or disavow the accounting reports. Instead, it stated (at page 4):

> . . . Defendant has furnished plaintiffs with a full and complete accounting of the expenditure of plaintiffs' tribal funds, and defendant denies that its accounting is vague and indefinite.

If the response to the exceptions were the defendant's "answer," we might well hold that it incorporated the accounting reports by reference. But if we had to choose between the reports and the response to the exceptions as to which constituted the defendant's "answer," we should choose the reports. They were the only filing in direct response to the petition, they were filed first, and they have never been withdrawn or superseded.

Our rules, in any event, do not confine the answer to a single filing. Rule 12 requires counterclaims and set-offs, although technically part of the answer, to be presented in a separate document at a later time. Rule 9(c) permits incorporation in pleadings of written exhibits, but does not require that they be physically attached, which would be impractical in the case of bulky documents, like the thousand-page reports involved in accounting cases. Rule 13(a) permits amended pleadings, and states that in circumstances where leave to file is required, it "shall be freely given when justice so requires."

In fact, our Rule 6(a), and Fed. R. Civ. P. 7(a) from which it was taken, were drafted without accounting cases in mind. When we saw the procedural problem those cases presented, we solved it by case law, in Sioux Tribe v. United States, Dockets 114, et al., 12 Ind. Cl. Comm. 541 (1963). We held the accounting report was the answer to the petition, but that the issues were to be framed upon the exceptions and the answer thereto. We adhere to Sioux.

There was no ambiguity in our holding that accounting reports are pleadings. We wrote at 12 Ind. Cl. Comm. 546:

> . . . Petitioners . . . maintain that the General Accounting Office report does not constitute a pleading on the part of defendant and that an answer as such must be filed by defendant.
>
> With this the Commission does not agree. The filing of the General Accounting Office reports is a proper response to the petitions. . . .

This was written in 1963. Ever since, plaintiffs and defendant alike have followed the procedure laid down in Sioux in accounting cases

before this Commission. Clearly, the defendant had more than fair warning that we would give its reports the effect of pleadings.

> . . . Under familiar rules, the pleadings in a pending case are more than admissions. They are conclusive upon the parties filing them. 2 B. Jones, Law of Evidence § 370 (5th ed. 1958).

See also, White v. Mechanics Securities Corp., 269 U. S. 283 (1925).

The accounting reports are certified as true and accurate in all respects by appropriate officials of the General Accounting Office or General Services Administration under the seals of their agencies. To accept the exhibits proffered with the motion for rehearing, we would have to reject this solemn authentication in favor of the unsigned designations in the defendant's digest. Further, we would have to believe that the defendant's accountants who prepared the reports committed absurd blunders, like classifying blankets as hardware. We cannot do this.

7. The "genuine issue of material fact" which must exist to defeat a motion for summary judgment is an issue between opposing parties, not between shifting positions of the same party.

The defendant argues that the conflicts between the vouchers and the reports prove that "there are material issues of fact involved in those items upon which the Commission granted summary judgment" (Memorandum, page 10).

Such a contention deserves short shrift. The "genuine issue of material fact" referred to in Rule 11 (c)(1) is an issue between opposing parties, not between shifting positions of the same party. The summary

judgment procedure would be useless if reconsideration were available upon the loser's merely changing his story. Kahle v. Amtorg Trading Co., 13 F.R.D. 107 (D. N. J. 1952).

An ambiguity in a caption in the General Services Administration report certainly does not create a genuine issue of material fact. The defendant's duty in accounting cases is to reveal what it did with the plaintiff's money. As we said in our previous opinion in this case (32 Ind. Cl. Comm. at 85):

> The burden is on the defendant to make a proper accounting. Sioux Tribe v. United States, 105 Ct. Cl. 725, 802 (1946). Thus for a particular item to be exceptionable, the test is not whether the report shows it to be improper; it is enough if the report fails affirmatively to show that it was proper. When the plaintiff makes his exception, it then becomes incumbent upon the Government to satisfy the Commission as to the legality of the challenged item.

It follows that an ambiguous entry in the General Services Administration report, like any other unrevealing entry, is an exceptionable entry. When the plaintiff moves for summary judgment, the Government's proper defense is to clear up the ambiguity. If it fails to do this, it does not preserve an issue for trial; it invites immediate disallowance.

8. Change in the losing party's legal theory is insufficient ground for setting aside a summary judgment.

The Commission does not, as the defendant charges, view accounting reports as "final in form, incontrovertible and uncontradictable" (Memorandum, page 7). See 32 Ind. Cl. Comm. at 143. To this day, defendant has not moved to amend a single report. What the

Commission cannot admit is a right in the defendant to contradict its unamended reports. 2/

The defendant is still insisting on such a right; to that extent its position has not changed. What has changed is its willingness to disclose some of its evidence in advance of trial.

Defendant's failure to produce the vouchers prior to the summary judgment was not the result of inability to retrieve them from the archives, as defendant now states, but of a deliberately chosen strategy.

The plaintiffs' motion for summary judgment, filed August 24, 1971, formed part of the same document as their motion to compel supplemental accounting for disbursements. The defendant answered that the additional information sought by the latter motion was as available to plaintiffs as it was to the defendant, and if they wanted it, they could go to the archives and get it themselves. At the oral argument on November 16, 1971, defense counsel made the statement, quoted in our October opinion (32 Ind. Cl. Comm. at 84-85):

> ". . . we made our report . . . we'll defend it to the best of our ability, and the Commission can make a decision on it."

2/ We do not imply that the October summary judgment could be rendered moot by amendment of the accounting reports at this late date. The summary judgment is now the law of the case. A motion to amend the reports to conform to the exhibits accompanying the present motion would be equivalent to a second motion for rehearing, which is not favored. Rule 33(a). Motions for amendment of the pleadings filed after summary judgment are not favored. Freeman v. Continental Gin Co., 381 F.2d 459 (5th Cir. 1967), Annot. 4 A.L.R.F. 123 (1970); Carroll v. Pittsburgh Steel Co., 103 F. Supp. 788 (W.D. Pa. 1952).

Even earlier, on April 26, 1971, in its answer to plaintiffs' third exception, defendant had taken a similar position:

> Defendant has furnished plaintiff with a full and complete accounting of the expenditure of plaintiffs' tribal funds, and defendant denies that its accounting is vague and indefinite.

Defendant thus deliberately stood on its pleadings. It did not do so in ignorance of the law, but from informed choice. As authority for its position, defendant chose to rely on its own interpretation of Miami Tribe v. United States, Docket 76, 9 Ind. Cl. Comm. 580 (1961), an ambiguous early decision of this Commission. At the same time it admitted that our later case, Mescalero Apache Tribe v. United States, Docket 22-G, 23 Ind. Cl. Comm. 181 (1970), was "diametrically opposed" to its position. Defendant justified its reliance on a superseded case by stating that it did "not acquiesce" in Mescalero Apache. See Opposition to Plaintiff's Motion for Order for Supplemental Accounting and for Summary Judgment, filed November 2, 1971, at 13-15, and compare 32 Ind. Cl. Comm. at 86-87.

The rule of law requires any litigant, including the Department of Justice, to conform to the precedents of the tribunal before which it practices. Defendant has a right to seek reversal or overruling of any of our decisions; but until and unless they are set aside it defies them at its peril.

Defendant may not have anticipated that we would take it at its word, refuse to order a new accounting for disbursements, and render summary judgment against it for items improper on their face in the

existing reports. The fact that the defendant's deliberately chosen strategy was unsuccessful, however, is insufficient reason for granting a rehearing.

As the Court of Appeals stated in Freeman v. Continental Gin Co., 381 F. 2d 459, 470 (5th Cir. 1967):

> A busy district court need not allow itself to be imposed upon by the presentation of theories seriatim. . . Much of the value of summary judgment procedure in the cases for which it is appropriate--and we have held this to be such a case--would be dissipated if a party were free to rely on one theory in an attempt to defeat a motion for summary judgment and then, should that theory prove unsound, come back long thereafter and fight on the basis of some other theory.

See also In re Riedner, 94 F. Supp. 289 (E.D. Wisc. 1950); cf. Byrne v. United States, 218 F. 2d 327, 335 (1st Cir. 1955).

The motion for reconsideration of the order for summary judgment will be denied.

II. DELAY OF THE CASE; MISCELLANEOUS PENDING MOTIONS

We wrote in our October decision (32 Ind. Cl. Comm. at 146, 147):

> The most decisive action of which we are capable appears necessary to move our accounting cases on to adjudication. . . .
>
> The first step . . . is to fix definite time limits for compliance with our orders and not extend them. . . .

We preceeded to order the defendant within 120 days, that is, on or before February 15, 1974, to file the supplemental accounts required

by Parts II and V of the opinion and a report on the extent of its search for the records required by Parts III, 2, and VIII.

We further ordered the attorneys and accountants for all parties to confer and within 45 days advise us by joint statement on the form and manner in which the restatements and calculations required by Parts IV and XI should be supplied and what would be a reasonable deadline for filing them.

Since October 18, 1973, there have been six motions for extensions of time from the defendant, one from the plaintiff, and one joint motion.

The Joint Statement on Accounting Procedures filed January 18 causes us concern. It was filed 92 days instead of 45 days after our order (the Joint Statement filed December 4 was actually a joint motion for more time). But it is primarily the substantive content of the following two paragraphs which bothers us:

> With reference to Part XI concerning compound interest and the failure to invest plaintiffs' funds, the parties have failed to reach agreement as to the matter of proceedings with the work required by this portion of the Commission's decision. The parties are continuing their discussions in this area, however, it seems unlikely that the defendant will be able, at this time, to acquiesce in the principles enunciated by the Commission in Part XI. The plaintiffs reserve the right to submit a separate statement with regard to the appropriate procedures for compliance with the Commission's order in Part XI.
>
> At the present time the parties are unable to determine a reasonable deadline for filing the additional information required by Parts IV and XI.

We asked the parties to give us technical advice on the accounting problems involved in complying with Part XI of the October opinion. Presenting an estimate of the difficulty and expense of complying with a judicial decision--which is primarily what we desired from the joint statement--could in no way constitute a waiver of appeal from that decision. It would, indeed, facilitate informed consideration by the appellate court and foreclose possibilities of conscious or unconscious misrepresentation by zealous counsel of the decision's effect.

In any event, we see no connection between defendant's lack of acquiescence in our opinion and its duty to comply with our order. A party must obey a lawful order whether or not it agrees with the underlying legal principles.

Certain statements made at the calendar conference held before the Commission on Monday afternoon, January 28, 1974, also cause us concern.

Mr. Ralph A. Barney, head of the Indian Claims Section of the Department of Justice, who spoke for the United States at the calendar call, stated, for example (Tr. 53):

> . . . We are having a little difficulty, not too much, in getting tribal records. Under the Wheeler-Howard Act of 1934, much of the autonomy of the tribes was turned over to them and they have been keeping their own records.
>
> Yet this Commission has held that the obligation is on the part of the United States to furnish tribal records which are not in the possession of the United

> States, except technically, so we are having a little difficulty there.

In fact, we have not ordered the Government to produce tribal records. We were careful in our October opinion to limit the Government's duty to account for tribal property to those transactions in which its agents were involved or by law ought to have been involved. As to those, the Government should have kept its own records.

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.

It would be most unfortunate if the completion of these accounting cases, delayed so long by the defendant's not doing what we ordered, should now be further delayed by its doing what we have not ordered. 3/

3/ Our fear in this regard is heightened by the answer of Mr. Robert L. Auster, Chief of the Indian Claims Section of the General Services Administration, to a question from the bench in our January 28 conference (see Transcript, page 13):

> COMMISSIONER YARBOROUGH: Well, it might be one vehicle for reviving the discussion of the sampling procedure which is one possibility which our accountants have suggested as trying to simplify this mass of --
>
> MR. AUSTER: It is a technique which can be used to simplify responses to exceptions based on the old reports. Our present concept is to produce new reports. This could not be done under a sampling technique where you have to take every item and schedule it out. That's the approach we are taking in this case now. Now that accounting was ordered, we will be doing a complete accounting.

The defendant's report on its search for the records it is required to produce under Parts III, 2 (proof of delivery of goods, and services) and VIII (financial records of revolving loan funds and enterprises) of our October opinion was filed on March 7, 1974 -- twenty days late. It states that 1,523 man-hours were expended through January 15 of this year checking the records of the Billings, Montana, Area Office of the Bureau of Indian Affairs, the Blackfoot Agency, and the Fort Belknap Agency. An additional 1,364 man-hours were expended extracting, reviewing, and categorizing documents at the Federal Records Center at Suitland, Maryland, including documents shipped there from the Federal Records Center in Seattle, Washington.

From October 18, 1973, to January 15, 1974, is approximately a quarter of a year, and the total man-hours reported, 2,887, indicate that six people in the accounting section spent that period working full time on the instant case. This is encouraging news.

The defendant states it is reviewing approximately 1,900 boxes of records, each containing a cubic foot of records.

The defendant states that at first pertinent records discovered were Xeroxed, but it soon became apparent that the Xeroxing was so time-consuming as to be counterproductive. Accordingly, the defendant has not submitted copies of the documents with its report. It states

that it stands ready to make the originals available for inspection by the plaintiffs at any time.

Anticipating just such a problem, our order suggested the use of microfilm rather than Xerox (see 32 Ind. Cl. Comm. at 87). However, we shall be pleased if the plaintiffs are satisfied with inspecting the original records and thus obviate the necessity of filing copies in any form.

The defendant's report further states:

> Counsel for the respective parties have discussed the possibility of meeting with their respective accountants and reviewing the work performed to date by the GSA accountants to ascertain any areas of disagreement as to procedure or substance in the compilation of the accountings required by the October 18, 1973 order. The results of such future meetings would be reported by the parties to the Commission.

We believe a conference would be more helpful than additional reports; and, accordingly, the accompanying order schedules one before the Commissioner to which this case is assigned.

We also have before us a motion from the defendant for an extension of time until September 30, 1974, to file the supplemental accounts required by Parts II and V of the October opinion and a motion from the plaintiffs for setting of trial date and pretrial conference. We shall rule on such motions following the conference herewith ordered. 4/

4/ The attorney assigned to the defense of this case stated at the calendar conference of January 28, 1974 (transcript, p. 34), that it would take a year to complete the supplemental accounting we have ordered.

CONCLUSION

At oral argument defense counsel conceded we had a technical basis for granting summary judgment but urged us to exercise discretion to set it aside because of the importance and complexity of this case. Counsel cited Kennedy v. Silas Mason Co., 334 U.S. 249 (1948), for the proposition that a case of such dimensions should be decided only on the solid basis of findings arrived at through litigation.

We think Kennedy is not in point. It involved a complete summary judgment putting one of the parties out of court, not a partial summary judgment, as here, merely clearing away some of the factual underbrush. We did not use summary judgment to decide any questions in this case which might be novel or of public importance. The rulings between pages 104 and 132 of our October opinion, which is the only part decided by summary judgment, were based on old and unquestioned precedents, particularly Sioux Tribe v. United States, 105 Ct. Cl. 725, 64 F. Supp. 312 (1946).

When we say these accounting cases are complex, we mean they contain a myriad of little issues. For example: Was this $600 expenditure proper? Was that $12.50 item allowable? We do not mean that they concern immense transactions that can be understood only after protracted hearings.

Accounting cases are particularly suited to the use of partial summary judgment. We cannot possibly adjudicate 50 pending accounting cases by April 10, 1977, without progressively bringing them down to

manageable size by this and other pretrial procedures. As the life of the Commission approaches its end, we have simply run out of time to reopen adjudicated issues needlessly. Here, the defendant had a fair chance to defend against the motion for summary judgment, and lost. It has shown no good reason for us to give it another chance.

John T. Vance, Commissioner

We concur:

Jerome K. Kuykendall, Chairman

Richard W. Yarborough, Commissioner

Margaret A. Pierce, Commissioner

Brantley Blue, Commissioner