

BEFORE THE INDIAN CLAIMS COMMISSION

THE NATIVE VILLAGE OF UNALAKLEET,)
et al.,)
Plaintiffs,)

v.)

Docket No. 285

THE UNITED STATES,)
Defendant.)

THE ALEUT COMMUNITY OF ST. PAUL)
ISLAND,)
Plaintiff,)

v.)

Docket No. 352

THE UNITED STATES,)
Defendant.)

THE ALEUT TRIBE, et al.,)
Plaintiffs,)

v.)

Docket No. 369

THE UNITED STATES,)
Defendant.)

Decided: May 2, 1968

Appearances:

McCutcheon, Groh & Benkert, 430 C Street,
Anchorage, Alaska 99501, and John W. Hen-
drickson, 217 Central Building, Anchorage,
Alaska 99501; Counsel for Plaintiffs in
Docket No. 285.

Roger G. Connor of Connor & Engstrom, 201
National Bank of Alaska Building, Juneau,
Alaska 99801, and Donald H. Green of Wald,
Harkrader & Rockefeller, 1225 19th Street,
N. W., Washington, D. C. 20036; Counsel
for Plaintiffs in Docket Nos. 352 and 369.

Keith Browne, with whom was Mr. Assistant
Attorney General Clyde O. Martz; Counsel
for Defendant.

OPINION ON MOTIONS FOR SUMMARY JUDGMENT

Kuykendall, Commissioner, delivered the Opinion of the Commission.

INTRODUCTION

The above Dockets are consolidated for the limited purpose of ruling on the pending Motions. Docket No. 285 presents Eskimo plaintiffs; Dockets 352 and 369 present Aleut plaintiffs. All of the plaintiffs may be categorized as Alaskan aborigines and, to that limited extent, they now present a common issue:

The defendant contends chiefly, respecting Docket No. 285, that Eskimos cannot be included in the concept of "Indians" and therefore, on the plain wording of the Commission's basic jurisdictional statute (Act of August 13, 1946, §1, 2, 60 Stat. 1049), the Commission is without jurisdiction of those plaintiffs. Similarly, the defendant's chief contention respecting Dockets 352 and 369 is that Aleuts cannot be included in the concept of "Indians" and therefore the Commission is without jurisdiction of those plaintiffs. On these and other grounds, to be discussed infra, the defendant has moved for Summary Judgment. The plaintiffs in Dockets 352 and 369 have filed cross-motions for Partial Summary Judgment, petitioning the Commission to hold that those plaintiffs comprise an "Indian tribe, band, or other identifiable group of American Indians".

Argument on the pending motions in Dockets 352 and 369 was held before the Commission on February 21, 1968. No equivalent argument has been held with respect to Docket 285. Lack of such argument is not a bar to the Commission's decision on the defendant's pending motion in Docket 285.

JURISDICTION

The jurisdiction of the Indian Claims Commission is indeed restricted to claims "on behalf of any Indian tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska" (Act of August 13, 1946, supra).

The central issue is that of legislative intent. What was the intent of Congress when it spoke of "Indian" and "American Indians" in Section 2 of the Act (25 U.S.C. 70a)? Did Congress mean to include all aborigines of the United States of America wherever situated? Is "Indian" a specific word or a generic word as there used?

The parties have suggested several approaches to this question, and further examination of the problem suggests others. Arguments based on history and anthropology have been made. There are any number of pronouncements by the Executive Branch which might seem to provide cumulative weight on one side of the issue or the other. But all of these approaches are tangential and none of them are controlling. The Commission finds itself precluded from using any of these possible approaches because Congress has made its intent clear.

In 1946, the Department of Justice submitted its comments to Congress on H. R. 4497, the bill which later became the Indian Claims Commission Act. One of its suggestions was that the phrase "other identifiable group" be deleted from the categories of possible plaintiffs. The Acting Solicitor of the Department of Interior commented as follows on this suggestion:

"The omission of this phrase might very well be construed to exclude from the scope of the bill Pueblos and other town or village organizations, such as exist among the Creeks and among certain Alaskan Indian and Eskimo groups,

which cannot be brought within the definition of "tribe" or "band" without considerable straining. The exclusion of any native group from the scope of this bill would not only be an unfair discrimination, but would destroy the main objective of the bill, which is to achieve a final and comprehensive solution of the Indian claims problem."

The House, and ultimately Congress, rejected the deletion proposed by the Department of Justice and agreed with the Department of the Interior that the phrase "other identifiable group" should be retained.

In view of these facts we do not believe that Congress intended to exclude "any native group from the scope of the bill." The legislative history leads us inevitably to the conclusion that the word "Indian" and the phrase "American Indians" as used in the Indian Claims Commission Act are equivalents and that both are generic in nature, used to identify the aborigines of Continental United States and Alaska.

Furthermore, we have not been shown, nor have we found anything in the legislative history of the Act which discloses any reason why Congress would have intended, or even raises the slightest suggestion that it did intend to exclude Eskimos and Aleuts from the benefits of this legislation. When we consider the humanitarian and remedial purposes of the Act, together with the Act itself and its history, we are fortified in our conclusion that Congress did not intend to exclude the Aleuts and Eskimos and include only the other aboriginal inhabitants of our first forty-nine states.

The defendant contends, however, a court decision effectively precludes this Commission from concluding that it has jurisdiction over Eskimos or Aleuts. It relies on United States v. Booth, 161 F. Supp. 269 (D.C.Alaska,

1958). The issue there was whether Booth, a resident of a community of Indians, Eskimos, and Aleuts, was a resident of "Indian Country" as that phrase is used in Section 1151 of the Criminal Code relating to jurisdiction of federal District Courts. The Court, defining the community in these words:

"The present membership of the community includes a racial and national mixture of British Columbians, Alaska Haida Indians, Alaska Thlingit Indians, and non-Indian Aleuts and Eskimos ..."

held that Booth was not a resident in Indian Country and that the federal District Court had jurisdiction of his case (a criminal case). In so holding, the District Court stated that:

"Wherever Congress had intended the word "Indian" to include Aleuts and Eskimos, an express statement to that effect has been made, such as in 25 U.S.C.A. 479, wherein it is stated:

'For the purposes of said sections [the Wheeler-Howard Act], Eskimos and other aboriginal peoples of Alaska shall be considered Indians.'"

See also 48 U.S.C.A. 358a.

Let us see if this gratuitous generalization is tenable.

The Wheeler-Howard Act, also known as the Indian Reorganization Act, was passed on June 18, 1934, less than nine months before the first bill to create an Indian Claims Commission spoke of the claims of "any Indian tribe, band, or other communal group of American Indians residing within the territorial limits of the United States and Alaska" (H.R. 6655, 74th, 1st). Section 19 of the Wheeler-Howard Act is the Section 479 of Title 25, United States Code, quoted above, and probably is the source of the "territorial limits of the United States and Alaska" portion of H.R. 6655. While there is little in the legislative history of Section 19 to resolve the

merits of this argument, the legislative history of Section 13 of the same Act is productive.

Section 13 of the Wheeler-Howard Act (now Section 473 of Title 25, United States Code) provides in part that

"The provisions of sections 461, 462, 463, 464, 465, 466-470, 471-473, 474, 475, 476-478, and 479 of this title shall not apply to any of the territories, colonies, or insular possessions of the United States, except that sections 469, 470, 471, 472, and 476 of this title shall apply to the Territory of Alaska ..."

The exception in favor of Alaska, and Alaskan aborigines, was contrived by the Committee on Indian Affairs of the House of Representatives during the three months of hearings in 1934 on H.R. 7902 (73d, 2d) to reorganize the Indian Office and for other purposes. The question was first raised on February 21 of that year:

"Mr. Dimond. May I ask one general question first? Mr. Commissioner [John Collier, Commissioner of Indian Affairs], can you tell me how far if at all this bill will apply to Indians in Alaska?

"Mr. Collier. You will find it at the beginning of the first line of the first page: '... it is hereby declared to be the policy of Congress to grant to those Indians living under Federal tutelage and control the freedom to organize for the purpose of local self-government.' You can tell us whether the Alaska Indians live under Federal tutelage.

"Mr. Dimond. I see there are very few limitations.

"Mr. Peavy. Would there be any objection on the part of the Department to direct inclusion of Alaska?

"Mr. Collier. No. The principal cause that has held us back from including Alaska in titles I and II lies in this, that the jurisdiction over Indians up there is a scattered one. It has never been lodged in the Indian Office, and in the passing of a declared policy by Congress this would quite definitely extend the function of the Indian Office to Alaska, not only in health but in other matters.'" (Emphasis supplied)

On April 9 of the same year, Chairman Howard introduced the following amendment, which was endorsed by the Department of the Interior:

"Title V - Miscellaneous

* * *

Section 3. The provisions of this act shall not apply to any of the territories, colonies, or insular possessions of the United States, except that the provisions of Titles I and II of this act shall apply to Alaska, and for the purpose of these titles Eskimos and other aboriginal peoples shall be considered Indians."

Title I related to permissive self-government; Title II related to special education for Indians. When the Committee on Indian Affairs of the House of Representatives summarized its extensive amendments to the basic Wheeler-Howard bill, it hardly noticed its proposed "declared policy of Congress", remarking only that

"Title V: Section 3 provides that the Wheeler-Howard bill shall not extend outside of the United States, except that certain provisions may be applied to the natives of Alaska."

While the amendments as a whole occasioned extensive debate on the floor of the House, this particular provision produced no debate at all and only one remark:

"Mr. Dimond. It is my considered opinion that if the Indians of Alaska - and by Indians I include, of course, the Eskimos - were treated justly by the United States government, the amount due to them and that equitably would be required to be paid to them, would run in excess of \$100,000,000 ..."

As the Wheeler-Howard bill was finally resolved by conference, Section 19 was as quoted by the Court in United States v. Booth, supra.

This rather rambling discussion of the Alaskan aborigine exceptions to the Wheeler-Howard Act has, of course, no bearing on the legislative

intent with respect to Section 2 of the Indian Claims Commission Act of 1946. However, it does minimize the suggestion that the Federal Judiciary has preempted the possibility of ruling on whether the legislative intent of Congress in enacting the Indian Claims Commission Act of 1946 was or was not to use the word "Indian" and the phrase "American Indians" generically. We believe no such preemption can be supported when the Wheeler-Howard Act is even casually examined, as above.

Some argument has also been made, in the Booth decision above and elsewhere, that Congress in specifically including Aleuts and Eskimos in an amendment to a given piece of legislation is enlarging that legislation. The first such piece of "expanded" legislation that comes to hand is Section 443a of Title 25, United States Code, relating to conveyance to Indian tribes of federally owned buildings, improvements, or facilities (70 Stat. 1057, PL 991, 84th, 2d, approved August 6, 1956). The second paragraph thereof, seemingly tacked on almost as an afterthought, reads:

"For the purpose of this Act, the term 'Indian' shall include Eskimos and Aleuts."

It does seem to "expand" the legislation. But when we look at House Report No. 2593 to accompany the Bill which culminated in the said Section 443a, we find:

"The bill was amended by the committee to make its provisions applicable to Eskimos and Aleuts. This is a clarifying amendment to remove any doubt as to the bill's application to Eskimos and Aleuts ..."

A clarifying amendment, not a vast expansion of legislation.

There seems to be little point in examining all the rest of the statutes cited for and against the proposition that inclusion of Eskimos

and Aleuts is always explicit, always expansive, always experimental. The generalization in the United States v. Booth, supra, remains just that: a mistaken generalization.

In summary, it is the position of this Commission that the question of whether Congress intended the Indian Claims Commission Act of 1946 to comprehend all pre-1946 claims of American aborigines wherever situated must be answered affirmatively. It follows that the defendant's first ground for Summary Judgment and dismissal of each of these claims must be rejected. Further, in view of this position, it is apparent that this Commission cannot, and does not, reach the anthropological arguments with all their physiological ramifications. Therefore, the Docket 352 and 369 Plaintiffs' Motions for Partial Summary Judgment are denied and this Commission makes no finding as to whether they might be categorized as "Indians" if Congress had used that term specifically instead of generically in the Indian Claims Commission Act of 1946.

OTHER GROUNDS

The discussion set out above effectively disposes of the defendant's second and final ground for Summary Judgment in Docket 285, that under its own rules the Commission is required to dismiss an action if it lacks jurisdiction of the claim. While we are on the subject of Docket 285, it is an appropriate time to rule on the defendant's other Motion to Dismiss, this one filed on March 11, 1968, and predicated upon a long history of lack of prosecution. The lack-of-prosecution ground was obviated when this Commission was advised, also in March of 1968, of the Eskimos' retention of counsel. It follows that the defendant's motion of March 11, 1968, must be

and is overruled. The remarks herein are not to be taken as a general order that where there is a lack of prosecution, the only possible saving circumstance is a prior absence of counsel coupled with a present retention of counsel.

In Dockets 352 and 369, the second ground in support of the Defendant's Motions for Summary Judgment is that the Aleuts have pressed no claim for which relief can be granted. In ruling on a defendant's Motion for Summary Judgment, this Commission is obliged to view the facts alleged by the plaintiff in the light most favorable to the plaintiff. Osage Nation v. United States, 16 Ind. Cl. Comm. 190 (1965). Viewing the plaintiffs' allegations from this vantage point, and regarding the pleadings as having been amended and refined by the briefs filed subsequent to the original and amended petitions, the plaintiffs' claim for compensation based upon the defendant's want of fair and honorable dealings is justiciable in the sense that issues are raised which may be best disposed of through the ordinary proceedings of trial, evidence, and briefing. Seminole Nation v. United States, 17 Ind. Cl. Comm. 67 (1966). The defendant devoted considerable attention to the question whether the plaintiffs could claim a proprietary interest in the fur seals or other produce of adjacent waters and concluded that the vast weight of the case law argued against any such compensable proprietary interest. In a somewhat analogous case, this Commission concluded that a claim for game is at least conceivable enough that a Motion for Summary Judgment was not the appropriate vehicle for disposing of the claim. Three Affiliated Tribes of the Fort Berthold Reservation v. United States, 16 Ind. Cl. Comm. 521 (1966).

Enough has here been stated to demonstrate the presence of the actual controversy, possible remedy, and genuine adversaries necessary to conclude that a justiciable claim exists. Osage Nation, supra. It follows that the defendant's second ground for Summary Judgment in Dockets 352 and 369 must be overruled.

RES JUDICATA

With respect to Docket 352, the defendant urges one final ground to support its Motion for Summary Judgment: That the issues have been judicially determined and the claim is res judicata by reason of the decision of the Court of Claims in Aleut Community of St. Paul Island v. United States, 127 C. Cls. 328 (1954).

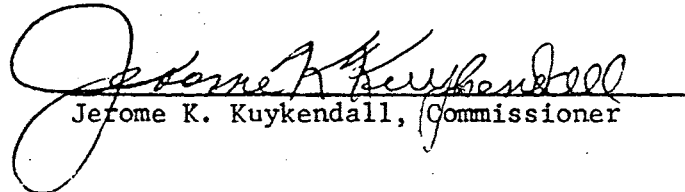
The cited case was brought in the Court of Claims under Section 1505 of Title 28, United States Code, relating to the original jurisdiction of the Court of Claims (formerly 25 U.S.C. 70w). This provision supplied a forum for claims accruing after the passage of the Indian Claims Commission Act of 1946, whereas that Act by its express terms (25 U.S.C. 70a) limited the jurisdiction of this Commission to claims accruing before the passage of the Indian Claims Commission Act of 1946. We have examined the cited decision in vain for any suggestion that the Court of Claims doubted its original jurisdiction because of pre-1946 accrual of causes of action. The Commission believes that if the suit had been for or on causes of action which accrued prior to 1946, the Court of Claims would have discerned that fact and would have dismissed for lack of jurisdiction. The only possible conclusion is that the cited decision relates only to causes of action which accrued after passage of the Indian Claims Commission Act of 1946.

The plaintiff states without cavil or quibble that the causes of action urged in the case at bar "relates to different injuries and damages which were sustained prior" to 1946, and cites examples of causes running from 1910 to 1944.

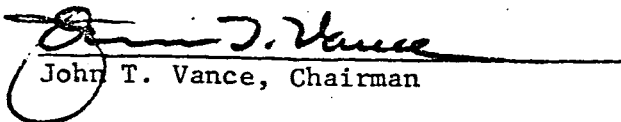
This Commission must conclude that the causes of action presented in the St. Paul Island case in the Court of Claims (supra), and in the case at bar vary. It follows that the defense of res judicata is not available to the defendant. Seminole Nation v. United States, 10 Ind. Cl. Comm. 450 (1962).

In view of the foregoing discussions, it is apparent that all of the pending motions in Dockets 285, 352, and 369 are denied. Docket 285, separately, and Dockets 352 and 369, together, will proceed to a determination of the defendant's possible liabilities on the merits.

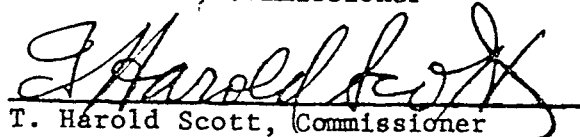
So ordered.

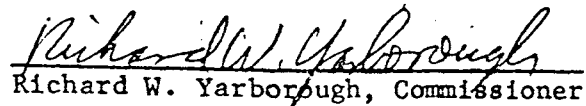

 Jerome K. Kuykendall, Commissioner

We concur:


 John T. Vance, Chairman

Wm. M. Holt, Commissioner


 T. Harold Scott, Commissioner


 Richard W. Yarborough, Commissioner