BEFORE THE INDIAN CLAIMS COMMISSION

ALEUT COMMUNITY OF ST. PAUL ISLAND Plaintiff, v. UNITED STATES OF AMERICA, Defendant.	)	Docket No. 352
THE ALEUT TRIBE, et al., Plaintiffs, v. THE UNITED STATES OF AMERICA, Defendant.	)	Docket No. 369

Decided: March 24, 1972

Appearances:
Donald H. Green and Stephen M. Truitt
of Wald, Harkrader & Ross, Attorneys
for the Plaintiffs.

James E. Clubb and Ralph A. Barney, with
whom was Mr. Assistant Attorney General
Kent Frizzell, Attorneys for the Defendant.

OPINION ON MOTIONS TO DISMISS

Kuykendall, Chairman, delivered the opinion of the Commission.

On January 3 and 10, 1972, the defendant filed motions in the above-captioned cases to dismiss. In neither case did the defendant ascribe a particular reason for its view that the case was ripe for dismissal (see the itemized defenses in the Commission's Rule 11(b)). However, the defendant did in each motion quote paragraphs (a), (b), and (c) of Section 4 of the Public Law 92-203, the Alaska

Native Claims Settlement Act of 1971. These actions raised a fair inference that the defendant believed that Congress by enacting the Alaska Native Claims Settlement Act of 1971 withdrew from this Commission jurisdiction over the subject matter of these pending claims.

The plaintiffs view the pending motions as sweeping "far too broadly" in that the petitions as amended allege five separate causes of action and the Alaska Native Claims Settlement Act of 1971 eliminates only one: Aboriginal title to the claimed lands. The plaintiffs do not object to a partial dismissal of each claim, limited to the aboriginal title cause of action. They do object, strenuously, to dismissal of their causes of action summarized as fair and honorable dealings, just compensation for fee simple title, a claim based on the Russia-United States Treaty of Cession, and an accounting claim. The defendant's analysis disclosed only three claims delimited as use of hunting and fishing grounds, use and occupancy of specific lands, and safeguarding the liberty and property of the plaintiff communities.

The plaintiffs are correct in contending that for the limited purpose of dealing with the motions to dismiss, the Commission must construe the pleaded allegations of the party not so moving in the light most favorable to that party. Three Affiliated Tribes of the Fort Berthold Reservation v. United States, Docket 350-H, 16 Ind. Cl. Comm. 521, 523 (1966). The defendant seems to be on equally solid grounds in insisting that the allegations must be actually pleaded, Wolfson

v. Mandell, 215 N.Y.S. 2d 658 (1961), Nadeau v. Power Plant Engineering Company, 337 P. 2d 313 (1959), and that, before the pleaded allegations can be construed in any light, they must suffice to constitute a justiciable cause of action under the Indian Claims Commission Act. Otoe & Missouria Tribe of Indians v. United States, 131 Ct. Cl. 593, 131 F. Supp. 265, cert den. 350 U.S. 848 (1955)(aff'g in part, rev'g in part, Docket 11, 2 Ind. Cl. Comm. 500 (1953)). Thus, the first task facing the Commission is the isolation of the actual causes of action as they have been pleaded.

The defendant's view that only the three delimited claims specified above are pending is based on an extremely literal reading of one of the Commission's more recent decisions in these cases, reported at 23 Ind. Cl. Comm. 371 (1970). That decision was on the defendant's motion to strike these plaintiffs' Second Amended Petitions on the ground that new causes of action were alleged in contravention of the jurisdictional statute of limitations contained in Section 12 of the Indian Claims Commission Act of 1946 (25 U.S.C. § 70k). The Commission denied the motion holding that these plaintiffs ". . . have sought only to clarify their petitions, not augment them." Thus, just as the defendant contends, the controlling documents are the "first amended petitions". However, in so stating it must be realized that those first amended petitions do, and always did, include treaty and just compensation causes of action.

The Commission views the pending causes of action as based on:

1. Aboriginal title to lands and adjacent waters.

2. Recognized title to lands and adjacent waters.

3. Fishing and hunting rights.

4. Lack of fair and honorable dealings.

The treaty and just compensation causes of action coalesce in the claim of title recognized by Russia or by the United States. The plaintiffs' alleged accounting action is not a demand for comparison of monies promised and appropriated, or of monies appropriated and expended, but is merely a demand that the defendant open its books to facilitate a computation of damages, assuming that any compensable cause of action survives the pending motions.

At the oral argument on March 16, 1972, plaintiffs' counsel strongly reemphasized that, for the purpose of ruling on the pending motions, the plaintiffs' allegations must be taken as true regardless of the possibility that there might be a subsequent failure of proof, and applied this point to the allegation that these plaintiffs were regarded by the Russian authorities as "civilized" tribes (Pl. Br., p. 8). The significance of this point is said to be that while Russian land tenure theories did not include the concept of fee title or anything just like it, fee title being uniquely a concept rooted in English law, Russia did guarantee to its civilized people (as opposed to "uncivilized tribes") the "free enjoyment of their property." From this point, the plaintiffs reason that they had under Russian law something analogous to fee title which, upon a taking by the defendant, would warrant a claim for just compensation since the Treaty of Cession obligated the defendant to

preserve pro tem whatever degree of enjoyment the residents had at the time. For the purpose of ruling on the pending motions, the Commission does assume, arguendo, that the Russian law was as the plaintiffs described it and that the plaintiffs do in fact derive any alleged interest in lands or waters other than aboriginal title from Russian law as reinforced by the Russia-United States Treaty of Cession. However, the Commission is unable to perceive how this line of reasoning helps the plaintiffs, for Section 4(c) of the Alaska Native Claims Settlement Act of 1971 reads as follows:

> All claims against the United States, the State and all other persons that are based on claims of aboriginal right, title, use, or occupancy of land or water areas in Alaska, or that are based on any statute or treaty of the United States relating to Native use and occupancy, or that are based on the laws of any other nation, including any such claims that are pending before any Federal or state court or the Indian Claims Commission, are hereby extinguished.

What the plaintiffs fail to recognize in this case is that Russian law does not control the extent to which plaintiffs' property rights in the Territory of Alaska are to be recognized or respected. When the United States acquired Alaska in 1867, the definition of plaintiffs' property rights was subject to the will of the new sovereign. Tee-Hit-Ton Indians v. United States, 128 Ct. Cls. 82, aff'd 348 U.S. 272 (1955), see also Aleut Community of St. Paul Island v. United States, 127 Ct. Cl. 328 (1954). The passage of Alaska Natives Claims Settlement Act of 1971 is the first Congressional expression defining the extent of land ownership by Alaskan Natives -- namely, aboriginal title.

The settlement act extinguishes all aboriginal titles, claims derivative of aboriginal title, recognized title claims under any treaty or statute of the United States and finally claims, including land claims, based on the law of any other nation. The plaintiffs could not have brought their just compensation and recognized title claims more squarely within the extinguishment provisions of Section 4(c) of the Act.

As noted above, the plaintiffs concede that all of their land and water claims based on aboriginal title were extinguished by the Act. There is no need to labor this point. However, the Commission specifically notes that such extinguishment includes derivative hunting and fishing rights.

There remains the matter of fair and honorable dealings. The section-by-section analysis of the Bill which, upon enactment, became the Alaska Native Claims Settlement Act of 1971, refers specifically to claims based on violations of the fair and honorable dealings clause of the Indian Claims Commission Act as among the claims <u>not</u> extinguished by Section 4 of the Alaska Native Claims Settlement Act of 1971. However, although this cause of action may not be treated as extinguished, yet for the purpose of disposing of the pending motions the Commission must determine whether this cause of action is compensable under any theory. The pattern of actions which the plaintiffs regard as neither fair nor honorable is, typically (paragraphs 13 and 21 of the original petition in Docket No. 352):

> Defendant and its agent failed to conform to the foregoing standards of fair and honorable dealings in that, among other acts and omissions, they (1) failed to protect the hunting and fishing operations of the petitioner community; (2) used the need to limit the killing of seals as an excuse for reducing the payments made to petitioner to figures unconscionably less than the skins were worth; (3) allowed lessees to profit greatly at the expense of the petitioner community and to subvert the government of the said community; (4) entrusted decisions concerning compensation of the petitioner community to employees and agents who received bribes and gifts from companies interested in the disposition of seal furs; and (5) profited unconscionably at the the expense of its wards.
>
> As a matter of fair and honorable dealings, defendant and its agents should have given the possessions of the petitioner the same respect and protection that other groups of Indians in territories ceded under similar treaties were entitled to demand; defendant should have carried out the promises made by its representatives that petitioner community and its members would enjoy all rights of citizenship; defendant should have insisted that its agents and lessees refrain from meddling in the local government of petitioner; defendant should have exercised the vast powers which had been entrusted to it, for the conservation of the seal herds and for the protection of native livelihoods, solely for those purposes, and should not have used such powers in ways designed to coerce petitioner community and its members to accept the role of asylum inmates that was assigned to them by the defendant's agents and lessees.

To the extent that the foregoing quotations are not merely supportive of other allegations, or other causes of action, including individual claims, the pattern which emerges is one that focuses on moral obligations on the part of employees of the defendant as well as on the part of individuals other than such employees whose business in the area brought

them into conflict with the interests of the individuals making up the plaintiff tribes.

During the oral arguments, plaintiffs' counsel was asked to distinguish this series of purported moral lapses on the part of the defendant from those which were found to be not actionable in the recent Commission decision in Gila River Pima-Maricopa Indian Community, et al. v. United States (Docket Nos. 236-K, L, M), 20 Ind. Cl. Comm. 131 (1968), aff'd 190 Ct. Cl. 790, 427 F. 2d 1194 (1970), cert. den. 400 U.S. 819 (1970). Counsel responded that the Gila River Indians enjoyed no treaty, no statute upon which they could predicate their claim. Counsel felt that, to the extent of that distinction, the instant plaintiffs enjoyed a stronger case. The Commission is not convinced. There are wrongs to which no remedy corresponds and this pattern is clearly one of them. It is the Commission's view that the cause of action denoted "fair and honorable dealings" is not compensable under the Indian Claims Commission Act of 1946 on the authority of the Gila River decision cited above.

For the reasons set forth in the foregoing opinion, the defendant's pending motions to dismiss these cases are granted.

Jerome K. Kuykendall, Chairman

We Concur:

John T. Vance, Commissioner

Richard W. Yarborough, Commissioner

Margaret H. Pierce, Commissioner

Brantley Blue, Commissioner