

BEFORE THE INDIAN CLAIMS COMMISSION

THE ALEUT TRIBE, et al.,)	
)	
Plaintiffs,)	
)	
v.)	Docket No. 369
)	
THE UNITED STATES OF AMERICA,)	
)	
Defendant.)	

Decided: October 17, 1974

Appearances:

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

Bernard J. Rothbaum, Jr., with whom was
Assistant Attorney General Wallace H.
Johnson, Attorneys for the Defendant.

OPINION ON MOTION FOR JUDGMENT ON THE PLEADINGS

Yarborough, Commissioner, delivered the opinion of the Commission.

On June 20, 1973, the Court of Claims reversed the Commission's prior dismissal of both this docket and Docket 352, and remanded both these dockets to the Commission with instructions that the plaintiffs ". . . should be given the opportunity to proceed to trial on their claim for breach of fair and honorable dealings, within stated restrictions." Aleut Community v. United States, 202 Ct. Cl. 182, 195 (1973) (aff'g in part, rev'g in part Dockets 352 and 369, 27 Ind. Cl. Comm. 177 (1972)). The court affirmed the Commission's dismissal of all other claims in these two dockets.

On February 26, 1974, the defendant moved to dismiss the fair and honorable dealings claim under this docket for failure to state a claim upon which relief can be granted. The plaintiffs responded in opposition on March 18, 1974, and on April 24, 1974, filed a supplemental memorandum in opposition to the motion. On June 27, 1974, the defendant responded to the plaintiffs' supplemental memorandum and also filed a motion for judgment on the pleadings to which the plaintiffs responded on August 23, 1974. The grounds supporting the motion for judgment on the pleadings are duplicative of those supporting the motion to dismiss for failure to state a claim upon which relief can be granted. Since the two motions seek the same relief on identical grounds and, under Rule 11(h) of the Indian Claims Commission's General Rules of Procedure, 25 C.F.R. § 503.11(h), the motion for judgment on the pleadings is the proper motion at this stage of proceedings, we will deny on procedural grounds the defendant's motion of February 26, 1974, to dismiss for failure to state a claim upon which relief can be granted. We will decide on its merits the defendant's motion for judgment on the pleadings.

The defendant argues that, in remanding this docket and Docket 352, the Court of Claims found that any "special relationship" necessary to support a claim under fair and honorable dealings was created, if at all, under the Acts of July 1, 1870, 16 Stat. 180, and April 21, 1910, 36 Stat. 326. According to defendant these two statutes applied only to the Pribilof Islands, a group of islands--which includes St. Paul Island--north of and

geographically distinct from the islands of the Aleutian Archipelago. The defendant further asserts that the plaintiffs under this Docket 369 have alleged themselves to be the Aleut Tribe who now, and since time immemorial, have resided upon the Aleutian Islands. The defendant therefore argues that the special relationship which may have been created by the 1870 and 1910 statutes could not have extended to the plaintiffs under this docket. The defendant further argues that, as a matter of law, no such special relationship was created by the Alaska Treaty of Cession, 15 Stat. 539 (1867), or otherwise. Consequently, the defendant asserts that in the absence of such a special relationship between the United States and the Aleut Tribe the claim in Docket 369 under fair and honorable dealings should be dismissed.

Both this docket and Docket 352 were dismissed by the Commission on March 24, 1972, at 27 Ind. Cl. Comm. 186, on motion of the defendant. The Commission dismissed the fair and honorable dealings claims under both dockets on the authority of the case of Gila River Pima-Maricopa Indian Community v. United States, Dockets 236-K, L, and M, 20 Ind. Cl. Comm. 131 (1968), aff'd, 190 Ct. Cl. 790, cert. denied, 400 U.S. 819 (1970), which case held that in the absence of a "special relationship" created by statute, treaty, or representations, under which the United States expressly undertook to provide certain services

on behalf of an Indian tribe, the failure to perform such services did not give rise to a claim under fair and honorable dealings.

The plaintiffs appealed the dismissal of the fair and honorable dealings claims under both this docket and Docket 352 arguing, insofar as here pertinent, that the petitions under both dockets alleged facts sufficient to create a special relationship. The plaintiffs asserted to the Court of Claims that, under the claim in Docket 352, a special relationship had been created by the Alaska Treaty of Cession, supra, and by the Acts of July 1, 1870, and April 21, 1910, supra. Under the claim in Docket 369, the plaintiffs asserted that the Alaska Treaty of Cession alone created the special relationship.^{1/}

The Court of Claims reversed the Commission's decision which had dismissed the fair and honorable dealings claims under both these dockets. The court remanded both dockets ". . . for further proceedings in accordance with this opinion." (202 Ct. Cl. at 201.)

While it is true, as both parties have pointed out, that nowhere in its opinion did the court specifically differentiate the fair and honorable dealings claim pleaded under Docket 352 from the corresponding claim pleaded under this docket and, further, that the court's opinion deals almost exclusively with the fair and honorable dealings claim pleaded under Docket 352, we believe, for several reasons, that the court intended that the fair and honorable dealings claim under this docket should be tried.

^{1/} The plaintiffs' pleadings under Docket 369 contain no allegations relating to the Acts of July 1, 1870, and April 21, 1910.

The Court of Claims was certainly aware of the fact that two dockets were on appeal and that the fair and honorable dealings claims under the two dockets were distinguishable. The briefs on appeal, particularly that of the plaintiffs, clearly drew these distinctions for the court to ponder. As a matter of fact, the court's familiarity with the plaintiffs' brief is quite evident in that the court's detailed discussion of the plaintiffs' fair and honorable dealings claim under Docket 352 is drawn in large part from the explication of said claim set forth in the plaintiffs' brief.

The court explained why it was remanding both dockets in the following terms:

As stated by this court in Native Village of Unalakleet, supra, at p. 14, 411 F. 2d at 1261, "in reading pleadings for the purposes of a motion to dismiss or for summary judgment, we are obliged to consider them in a light most favorable to the party against whom judgment is sought." Applying this rule to the pleadings in the case at bar leads us to the conclusion that appellants should be given the opportunity to proceed to trial on their claim for breach of fair and honorable dealings, within stated restrictions. Whether or not the facts alleged in the appellants' petitions will be proven at trial remains to be seen. In our view they should not be precluded from the opportunity of proving their allegations. (202 Ct. Cl. at 195-96.)

Next, after stating the need for a showing of the existence of a "special relationship" in a claim under fair and honorable dealings, and reciting the requirements for recovery under a fair and honorable dealings claim, the court proceeded to state that:

. . . Certain allegations in the appellants' petitions meet all of the above requirements.

In asserting a "special relationship" appellants invite the court's attention to Article III of the Treaty of Cession, 15 Stat. 539, March 30, 1867. They contend that as a civilized tribe they were entitled, under this Article, to "all the rights, advantages and immunities of citizens of the United States, and shall be maintained and protected in the free enjoyment of their liberty, property, and religion." (202 Ct. Cl. at 196.)

We believe that these statements from the court's opinion can only mean that the court intended that the allegation under this docket of the existence of a special relationship arising under the 1867 Treaty of Cession should be put to proof at trial. See Lipan Apache Tribe v. United States, 180 Ct. Cl. 487, 502 (1967). If the court had intended otherwise, it would have affirmed our dismissal of Docket 369. The fact that the court remanded this docket is sufficient to defeat the defendant's argument.

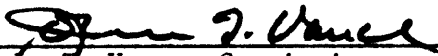
We acknowledge the force of defendant's arguments that the 1867 Treaty of Cession alone did not create a "special relationship," i.e., a duty owed the tribe, breaches of which by any acts alleged in the petition could give rise to liability. However, our previous opinion was rejected by the court above, and we judge that the Docket 369 plaintiffs were there ordered to proceed to provide the factual context in which the sufficiency of their petition may be made clearer.

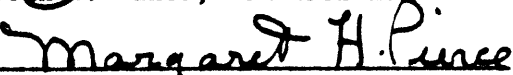
Our conclusion is that the court's remand of this docket requires a trial. Our accompanying order therefore denies the defendant's motion for judgment on the pleadings. We will also deny defendant's motion of March 28,

1974, to strike a portion of the plaintiffs' response to the defendant's motion to dismiss. We see nothing improper or erroneous in permitting plaintiffs to make such assertions. We note, however, that our denial of the defendant's motions does not rest upon any of these assertions.


Richard W. Yarborough, Commissioner

We concur:


John T. Vance, Commissioner


Margaret H. Pierce, Commissioner


Brantley Blue, Commissioner

Kuykendall, Chairman, dissenting:

I am of the opinion that the defendant's motion for judgment on the pleadings should be granted. The briefs on appeal to the Court of Claims, particularly that of the plaintiffs, unequivocally pointed out that the fair and honorable dealings claims under the two appealed dockets were distinguishable, the distinction being that only in the claim in Docket 352 was it alleged that the Acts of July 1, 1870, 16 Stat. 180, and April 21, 1910, 36 Stat. 326, created a special relationship which obligated the United States to protect the Aleut Community against economic exploitation arising out of the operation of the Government authorized sealskin monopoly on St. Paul Island. The court expressly held that it was these two statutes which created a special relationship, and that the claim to be tried was the one based upon such economic exploitation.

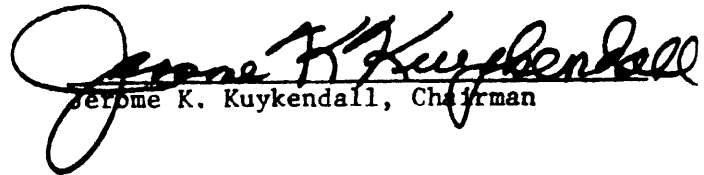
The plaintiffs also had pointed out in their brief that the other claim which they asserted arose solely out of obligations assumed by the United States under the Alaska Treaty of Cession, 15 Stat. 539 (1867). The opinion of the court merely took note of the treaty (202 Ct. Cl. at 196) but thereafter made no comment upon it in reaching its conclusions. We were not instructed to try this latter claim. The only natural and reasonable conclusion to be drawn from the court's opinion is that we were to try only the claim the court instructed us to try.

In my opinion the Court of Claims has clearly and unmistakably said that the purported claim in Docket 369 does not contain any basis for a recovery by plaintiff. Plaintiffs will gain nothing by our ordering

a trial, and defendant should not be required to go to trial in a case it has already won.

Under the authority of Gila River Pima-Maricopa Indian Community v. United States, Dockets 236-K, L, and M, 20 Ind. Cl. Comm. 131 (1968), aff'd, 190 Ct. Cl. 790, cert. denied, 400 U. S. 819 (1970), the claim in Docket 369 is not cognizable under section 2, clause (5) of our act. 60 Stat. 1049, 1050 (1946).

What has been remanded to us under Docket 369 is a hollow docket without a viable claim within it.


Jerome K. Kuykendall, Chairman