BEFORE THE INDIAN CLAIMS COMMISSION

ALEUT COMMUNITY OF ST. PAUL ISLAND, Plaintiff,	)	
v.	)	Docket No. 352
THE UNITED STATES OF AMERICA, Defendant.	)	
THE ALEUT TRIBE, by Iliodor Merculieff as Representative of the said Tribe and all members thereof; and THE ALEUT COMMUNITY OF ST. PAUL ISLAND, Plaintiffs,	)	
v.	)	Docket No. 369
THE UNITED STATES OF AMERICA, Defendant.	)	

Decided: July 18, 1975

Appearances:

Donald H. Green and Stephen M. Truitt, Attorneys for the Plaintiffs; Wald, Harkrader & Ross, were on the briefs.

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

OPINION ON PLAINTIFFS' MOTION UNDER DOCKET NO. 369 TO SEVER CLAIM OF ALEUT COMMUNITY OF ST. GEORGE ISLAND FROM DOCKET 369 AND CONSOLIDATE THAT CLAIM FOR TRIAL IN DOCKET 352

Yarborough, Commissioner, delivered the opinion of the Commission.

On February 11, 1975, plaintiffs under Docket 369 filed the above-captioned motion. The parties filed timely response and reply, and oral argument was held on May 13, 1975.

The Commission's opinion and accompanying order denying defendant's motion under Docket 369 for judgment on the pleadings described the history of litigation under these dockets and we need not repeat that history here. See 35 Ind. Cl. Comm. 21 (1974).

In their motion plaintiffs urge that the first amended petition[1/] filed under Docket 369 on November 13, 1951, contains a claim on behalf of the Aleut Community of St. George Island, although said community is not mentioned at all in said petition and, further, that said claim involves questions of law and fact which are common to those in the claim of the Aleut Community of St. Paul Island, the sole plaintiff under Docket 352.

Plaintiffs' motion involves two issues. The first is whether the first amended petition may be construed to include as a plaintiff the Aleut Community of St. George Island although there is no mention of this band by name in said first amended petition. If the first question may be answered affirmatively, the second and more difficult question involves determinations of the scope of the claim of said community and whether there is an appropriate and proper basis for consolidation for trial of said claim with the claim under Docket 352 of the Aleut Community of St. Paul Island.

1/ The original petition was timely filed on August 13, 1951, but was typewritten. On August 23, 1951, the Commission ordered that the plaintiffs have the petition printed. Hence the November 13, 1951, filing date and the caption "First Amended Petition."

which island is the neighboring island to St. George Island in the Pribilof Islands. Under such circumstances, defendant asserts that the only reasonable presumption is that the St. George Community was neither intended to be nor was, in fact, included within the category "Aleut Tribe" as that term is used in said first amended petition. The thrust of defendant's argument is that under circumstances showing that reference to the St. George Community would have been so simple to make, the absence of such reference must dictate against inclusion.

Plaintiffs' argument, on the other hand, is that the drafters of the first amended petition did not purport to mention every band of the Tribe by name, but gave notice that members of the Tribe on whose behalf the claims in Docket 369 were brought dwelt in bands which claimed limited areas located throughout the homeland claimed for the Tribe in Paragraph 7.

The resolution of this issue rests in the interpretation in the most reasonable manner of the language actually used in the petition itself, and the notice of the claim thereby given. Consideration of what language could or should have been used is not the relevant test. See Lockhart v. Leeds, 195 U.S. 427, 435 (1904); 2A Moore's Federal Practice § 8.03 (1974).

The plain language of the first amended petition, specifically the caption and Paragraphs 3 and 5, clearly encompasses the entire Aleut Tribe and all the members thereof. The Aleut Tribe is a generic term used to identify all bands and groups comprising

constituent elements thereof. The defendant does not dispute that the members of the St. George Community are members of the Aleut Tribe. Since it is axiomatic that the whole is composed of the sum of all its parts and since the Aleut Community of St. George Island is a constituent band of the Aleut Tribe, it necessarily follows that the Aleut Community of St. George Island is included within the term "Aleut Tribe" as that term is used in the first amended petition. Furthermore, Paragraph 8 of said petition contains a specific reference to ". . . various other [i.e. unnamed] Aleut Communities. . ." of the Aleut Tribe whose rights the petition was intended to protect. The Aleut Community of St. George Island certainly fits within this term. For these reasons, it is our conclusion that the Aleut Community of St. George Island is included as a plaintiff in Docket 369 under the language of the first amended petition.

This brings us to the second issue. Plaintiffs assert that the claim under Docket 369 insofar as it relates to the Aleut Community of St. George Island presents questions of law and fact which are identical to questions under the Docket 352 claim of the Aleut Community of St. Paul Island, and different from the questions which must be resolved under Docket 369 in connection with those bands and groups of the Aleut Tribe who occupy the islands of the Aleutian Archipelago. Thus plaintiffs assert that severance of the St. George Community's portion of the Docket 369 claim and its consolidation for trial with

the claim under Docket 352 of the Aleut Community of St. Paul Island are appropriate.

This issue necessitates determination of the scope of the claim of the St. George Community. Only after we investigate what is encompassed within the allegations of the first amended petition can we pass upon the appropriateness of the relief sought by the plaintiffs in the form of severance and consolidation. Since the parties' arguments very fully cover the pertinent considerations we will recite the parties' contentions in some detail.

Plaintiffs argue that although the first amended petition under Docket 369 contained much more general allegations than the detailed allegations of exploitation of the St. Paul Community in the Docket 352 petition, said first amended petition did allege the same violation of fair and honorable dealings resulting in dire poverty and starvation for the St. George Community, and that a claim for the same economic exploitation can be proven within the broad allegations of the first amended petition under Docket 369. Plaintiffs further argue that the references contained in the first amended petition under Docket 369 to the fact that the claims under said docket were brought by an individual on behalf of the tribe and all its members, as well as by the Aleut Community of St. Paul Island, put defendant on notice of the possibility of a later, more specific claim on behalf of the St. George Community, and that defendant's references in Paragraph 17 of its answer, filed under Docket 369 on January 17, 1970, to the Act of July 1, 1870,

16 Stat. 180, and the Act of April 21, 1910, 36 Stat. 326, both of which related to the killing of fur seals and the taking of sealskins on the Pribilof Islands (and which treated St. Paul Island and St. George Island identically except in incidental matters) show that the defendant was, in fact, on notice that the claims under Docket 369 included a claim on behalf of the natives of the Pribilof Island of St. George.

Defendant's argument is that the decision of the Court of Claims, at 202 Ct. Cl. 182 (1973), remanding Dockets 352 and 369 clearly spelled out the fact that the remand applied only to the fair and honorable dealings claim based upon the sealskin trade; that the first amended petition under Docket 369 nowhere mentions seals nor the 1870 or 1910 Pribilof Island statutes; and that said first amended petition under Docket 369 pleaded only land claims, claims of property rights in wild game and fish, and breaches (under fair and honorable dealings) of individual rights guaranteed to the natives under the 1867 Alaska Treaty of Cession, 15 Stat. 539. Furthermore, defendant observed that in the Commission's recent decision denying defendant's motion for judgment on the pleadings under Docket 369, the Commission clearly stated that the only viable claim thereunder was the latter fair and honorable dealings claim based upon the 1867 Treaty. Furthermore, defendant argues, absence from the first amended petition under Docket 369 of the detailed allegations contained in the petition under Docket 352

relating to the sealskin trade, shows that there was no intention to plead a claim under Docket 369 based upon the sealskin trade.

Paragraph 17 of the first amended petition contains the following statement under the caption "Standards of fair and honorable dealings:"

> . . . defendant should have exercised the vast powers which had been entrusted to it for the conservation of fisheries, solely for those purposes. It should not have used such powers in order to confer exclusive rights in the hunting grounds and fisheries of the Petitioner Tribe to friends and associates of defendant's agents.

Paragraph 19 entitled "Damage" recites, in part, that:

> . . . Petitioner Tribe . . . has been excluded from the most remunerative of its traditional sources of livelihood, has been reduced to starvation and dire poverty, . . .

Under modern theories of notice pleading, as best exemplified by the Federal Rules of Civil Procedure, 28 U.S.C., upon which the Commission's General Rules of Procedure, 25 C.F.R., Part 503, are based, short and concise pleadings are encouraged and liberal construction of pleadings is the rule. In Conley v. Gibson, 355 U.S. 41, 47-48 (1957), the Supreme Court discussed this matter as follows:

> . . . the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is "a short and plain statement of the claim" that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests. . .. Such simplified "notice pleading" is made possible by the liberal opportunity for discovery and the other pretrial procedures established by the Rules to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues.

> Following the simple guide of Rule 8(f) that "all pleadings shall be so construed as to do substantial justice," we have no doubt that petitioners' complaint adequately set forth a claim and gave the respondents fair notice of its basis. The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits.

Specific instances of the application of such liberal construction of pleadings are contained in such cases as United States v. Missouri-Kansas-Texas R. Co., 273 F.2d 474 (10 Cir. 1959), where it was held that it is not necessary in a complaint to allege the particular law or theory under which recovery is sought; Minkoff v. Stevens Jrs., Inc., 260 F.2d 588 (2d Cir. 1958), where it was held that pleading in broad terms is particularly permissible where the generality of the pleading arises from use of statutory language; Nagler v. Admiral Corporation, 248 F.2d 319 (2d Cir. 1957), where it was held that the standard of simple, concise pleading applied equally in complex anti-trust cases; and Dioguardi v. Durning, 139 F.2d 774 (2d Cir. 1944), where it was held that evidentiary facts need not be pleaded.

In several Indian claims cases before the Court of Claims, pleadings have been liberally construed in a manner consistent with the modern Federal rules and with the unique relationship existing between the parties in Indian claims litigation. In Snoqualmie Tribe v. United States, 178 Ct. Cl. 570 (1967), aff'g in part, rev'g in part, Docket 93, 15 Ind. Cl. Comm. 267 (1965), plaintiff sought to

amend its petition to present a claim on behalf of descendants of the Skykomish Tribe under the Point Elliott Treaty. The Commission had refused to permit the amendment stating that the Skykomish claim was a new claim filed too late and, in such circumstances, the amendment could not relate back to the date of filing of the original petition. The Court of Claims reversed that decision, stating as follows:

> . . . Each case must be tested by the "conduct, transaction, or occurrence"standard [Rule 13(c) of the Commission's General Rules of Procedure] to determine whether adequate notice has been given. . . . The government can be charged with notice . . . through its authority as administrator of Indian Affairs. Second, although the claim brought by the Snoqualmie organization "on relation of" the Skykomish Tribe is technically a different cause of action from that presented originally, it is sufficiently closely related to warrant the conclusion that the government received adequate notice of the possibility that it might have to defend against a broader claim.
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> This makes particularly good sense in light of the fact that if the government's conduct was unconscionable or if the dealings were other than fair and honorable, the wrong affected all Treaty participants. [178 Ct. Cl. at 588.]

In Yankton Sioux Tribe v. United States, 175 Ct. Cl. 564, 568-69 (1966), aff'g in part, rev'g in part, Docket 332-A, 10 Ind. Cl. Comm. 137 (1962), the Court of Claims reversed the Commission's refusal after trial to permit amendment of the pleadings to conform to the evidence on the ground that the claim was not specified in the original petition. The court there stated:

> . . . we take cognizance of the liberality in pleading before judicial tribunals in these modern times, as fully discussed by Commissioner Scott [in his dissent at 10 Ind. Cl. Comm. 200], and need but mention that the Commission is bound both by the rules it has adopted and the spirit of the Indian Claims Commission Act to this liberality in procedure.

In United States v. Lower Sioux Indian Community, Appeal No. 17-74 (Ct. Cl., July 11, 1975), slip op. at 8-13, aff'g Docket No. 363, 22 Ind. Cl. Comm. 226 (1969), a petition ". . . drafted in very broad terms . . ." and filed in 1951 was permitted to be amended in 1969 to allege specifically claims contained in ". . . embryonic . . ." form in the original petition. The court held that the original petition gave fair and adequate notice to the government of the transactions and occurrences that were later more specifically claimed.

The case of Sioux Tribe v. United States, 205 Ct. Cl. 148 (1974), aff'g in part, rev'g in part, Dockets 74 and 332-C, 28 Ind. Cl. Comm. 204 (1972), 27 Ind. Cl. Comm. 79 (1972), is distinguishable from the instant case, just as the Court of Claims (slip op. at 32) stated that the facts in the Sioux case were distinguishable from those in the Snoqualmie case. Although in the Sioux case the Court of Claims affirmed that portion of the appeal based upon the Commission's order granting the motion of the Sioux to amend the original petition in Docket No. 74 by substituting two separate petitions to be designated as Dockets 74-A and 74-B, the court's opinion indicates that its reasons for affirming were (1) that the situation had only arisen because of actions taken by the Court of Claims more than ten years before, (2) that the Docket 74 Sioux and the Commission had relied on these earlier

actions of the court and had expended a great deal of time, work and money on the basis of that reliance, and (3) that it would be unconscionable to set aside those earlier actions where doubt subsequently arose as to how the question of law should be decided. Judge Skelton entered a vigorous dissent on this issue.

What distinguishes the Sioux case from the instant case is that in the original petition in the former case facts relating to several treaties and statutes were admittedly pleaded but the court disagreed as to whether the pleading of facts constituted notice of the possibility of subsequent pleading of a claim allegedly arising based upon those facts. Judge Skelton asserted that the pleaded facts were merely evidentiary, that the only claim pleaded in the original petition was for compensation for the taking of lands under an 1877 Act and that claims later made, although based upon facts pleaded in the original petition, were new claims barred by the statute of limitations. The majority was willing, in the circumstances earlier described, to resolve doubts in favor of the Sioux.

In the situation before us, neither the Act of July 1, 1870, 16 Stat. 180, nor the Act of April 21, 1910, 36 Stat. 326, were specifically pleaded in the first amended petition. However, if we seek to discover, with respect to the Pribilof Island communities, the facts to support their allegations in Paragraph 17 that it was unfair and dishonorable for the defendant to confer ". . . exclusive rights in the hunting grounds and fisheries[2/] of Petitioner Tribe to friends

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2/ Defendant has argued that sealing is neither hunting nor fishing. We believe this argument is specious. Seals are animals ferae naturae requiring capture in some manner. In Aleut Community of St. Paul Island v. United States, 127 Ct. Cl. 328 (1954), the court consistently

and associates of defendant's agents," we find that it was these above-cited statutes which created the extensive mechanisms of controls over the seal-skinning activities on the Pribilof Islands, and it was these statutes which also guaranteed the natives of these islands a livelihood, as well as their "comfort, maintenance, education, and protection." (16 Stat. at 182; 36 Stat. at 328.) The damages alleged in Paragraph 19 resulting from the natives' exclusion from their traditional sources of livelihood and consequent reduction to starvation and dire poverty also relate to the results of said mechanisms of controls over seal-skinning and the breaches of guarantees of the natives' welfare contained in said statutes.

In the present case, the relevant claim was one based upon "fair and honorable dealings" as that term is used in section 2(5) of the Indian Claims Commission Act, 60 Stat. 1049, 1050 (1946). Such a claim was specifically alleged in Paragraph 17 of the first amended petition using the statutory term "fair and honorable dealings." The bases upon which this claim rested were presented in allegations, contained in Paragraphs 17 and 19, that the defendant denied the members of the Aleut Tribe their traditional sources of livelihood by conferring upon certain persons exclusive rights in the plaintiffs' traditional hunting grounds and fisheries, with the result that

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(footnote continued)
referred to the process of attempting to capture seals as "hunting." Congress, in the statutes cited referred to "seal fisheries." See 16 Stat. 180 (sec. 4); 36 Stat. 326, 328 (title and sec. 9). The use of both the terms "hunting" and "fisheries" in the first amended petition certainly encompasses the act of attempting to capture seals.

the tribe was reduced to starvation and dire poverty. These bases for a claim under "fair and honorable dealings" were also specifically pleaded as such. The allegation describing the conferring of exclusive rights in the plaintiffs' traditional hunting grounds and fisheries is a short description of what the 1870 and 1910 Acts did, and the allegation of reduction to starvation and dire poverty strongly suggests reference to the guarantees of the natives' welfare contained in said statutes. Thus, as distinguished from the Sioux case, supra, what were not pleaded in the instant case were the specific facts on which the claim was based. The above-described allegations of a claim and the bases thereof were admittedly very broad but for the reason that they were either direct recitations or paraphrases of the Indian Claims Commission Act, supra, and the Acts of 1870 and 1910, supra. The broad language, in such circumstances, is sufficient in the petition. See Minkoff v. Stevens Jrs., Inc., supra. Disclosure "more precisely [of] the basis of both claim and defense. . ." through subsequent procedures is in accord with applicable law. See Conley v. Gibson, supra, at 48.

It is therefore our conclusion that the language of the first amended petition constituted fair notice to the defendant of a claim under fair and honorable dealings and of the basis thereof, which basis is identical to that of the claim of the Aleut Community of St. Paul Island pleaded under Docket 352, and more precisely disclosed in the opinion of the Court of Claims in the case of Aleut Community of St. Paul Island v. United States, 202 Ct. Cl. 182 (1973) aff'g in part,

rev'g in part, Dockets 352 and 369, 27 Ind. Cl. Comm. 177 (1972). The claim of the Aleut Community of St. George Island under Docket 369 does present questions of law and fact which are identical to questions under the Docket 352 claim of the Aleut Community of St. Paul Island and different from the questions which must be resolved under Docket 369 in connection with those bands and groups of the Aleut Tribe who occupy the islands of the Aleutian Archipelago. In such circumstances efficiency and expediency demand that the relief sought by plaintiffs be granted. Accordingly, we enter an order today under Dockets 352 and 369 severing the claim of the Aleut Community of St. George Island from the claims under Docket 369 and consolidating said claim for trial with the claim under Docket 352 of the Aleut Community of St. Paul Island.

Defendant has argued that as recently as October 1974, the Commission expressed the opinion that the fair and honorable dealing claim under Docket 369 was distinguishable from that under Docket 352 and was based upon obligations toward the plaintiffs arising exclusively under the 1867 Alaska Treaty of Cession, 15 Stat. 539. Under the posture of the case at the time that was true. However, the subsequently filed pretrial motion which today we are deciding brought fully to our attention for the first time the possibility that the claim of the St. George Community had from the beginning lain hidden (but nonetheless present) within the confines of the broad language of the first amended petition. Such pretrial amplification of the bare

outlines of a petition in the interests of judicial efficiency and substantial justice is precisely why pretrial procedures exist and are so important. Conley v. Gibson, supra, at 47-48; United States v. Lower Sioux Indian Community, supra, slip op. at 12 n. 10.

In the near future, the Commission will issue orders relating to pretrial procedures and the setting of trial dates in both Dockets 352 and 369.

Richard W. Yarborough, Commissioner

We concur:

John T. Vance, Commissioner

Margaret H. Pierce, Commissioner

Brantley Blue, Commissioner

Kuykendall, Chairman, concurring:

Although I dissented from the Commission's opinion and order of October 17, 1974, which denied defendant's motion for judgment on the pleadings (35 Ind. Cl. Comm. 21, at 28-29), the Commission's decision therein stands as the law of the case. I am thus bound by that decision. The issue raised by the present motion is, however, separate from and posterior to the issue resolved by the decision from which I dissented. With respect to the issue raised by the present motion, I agree with the views of Commissioner Yarborough, which are expressed in the next-to-last paragraph of his opinion, to the effect that the elements of a timely stated claim may expand with the divulgence of additional facts or the possibility of proof of additional facts and that the scope of the claims pleaded in Docket 369 was not necessarily and irreversibly defined in the Commission's opinion and order of October 17, 1974.

Jerome K. Kuykendall, Chairman