BEFORE THE INDIAN CLAIMS COMMISSION

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

Decided: June 9, 1978

Appearances:

Donald H. Green, Stephen M. Truitt, Leslie S. Bretz, Wald, Harkrader & Ross, Attorneys for the Plaintiffs.

Alexander J. Pires, Jr., with whom was Acting Assistant Attorney General James W. Moorman, Attorneys for the Defendant.

OPINION OF THE COMMISSION

Yarborough, Commissioner, delivered the opinion of the Commission.

This is a claim brought under clause 5 of Section 2 of the Indian Claims Commission Act (60 Stat. 1049, 1050) by the Aleut Community of

St. Paul Island, a subdivision of the Aleut Tribe, in Docket 352, and by the Aleut Tribe, as captioned above, in Docket 369. The Aleut Community of St. George Island, a constituent band of the Aleut Tribe, presents its claims in Docket 369.

The original petition in Docket 352 was filed August 11, 1951, and amended by order of the Commission on January 26, 1970. Plaintiff in Docket 369, with the permission of the Commission, amended its original petition of August 13, 1951, on November 13, 1951. Both the Aleut Community of St. Paul Island and the Aleut Community of St. George Island, bands of American natives residing on the Pribilof Islands of Alaska, now are recognized by the Secretary of the Interior as having the authority to represent the tribal interests of their members.[1/]

The essence of these claims is that the plaintiff communities were established as colonies, by the Russians, on the remote and inhospitable Pribilof Islands of the Bering Sea, to kill and skin the fur seals that bred there in great numbers, and that the United States over the period 1870 to 1946 continued these colonies to exploit the fur seal trade, reaping enormous profits for it and its lessees from the labor of the plaintiffs, while keeping the plaintiffs in a condition of impoverished near-peonage. Plaintiffs argue from the evidence presented that the United States had a duty, derived from its statutes, to pay plaintiffs

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1/ The Aleut Community of St. George was not so recognized at the onset of this litigation. *See* the First Amended Petition in Docket 369 (filed Nov. 13, 1951).

a fair compensation for their contribution to the fur seal enterprise, that the United States did not provide for plaintiffs adequately although there were ample profits from which it could have done so, and that damages should be awarded. As will be seen in the necessarily lengthy opinion and findings that follow, we agree.

The issues arising from plaintiffs' claims in these two dockets have been the subject of a number of Commission orders and two Court of Claims opinions. The initial issue tested was whether the Commission had jurisdiction to hear and decide claims by Aleut and Eskimo groups (as distinct from Indian tribes) in Alaska. This question, posed in a certification of a question of law by the Commission to the Court of Claims, was answered in the affirmative. United States v. Native Village of Unalakleet, 188 Ct. Cl. 1, at 13 (1969). In that same opinion, the court rejected defendant's argument that plaintiffs failed to state a cause of action, and rejected the argument that the claims were barred by a prior court decision, Aleut Community of St. Paul Island v. United States, 127 Ct. Cl. 328 (1954).

Subsequent to the congressional enactment of the Alaska Native Claims Settlement Act of 1971 (85 Stat. 688), the Commission and the court were again asked by defendant to dismiss the claims in these two dockets. The Commission, at 27 Ind. Cl. Comm. 179-80 (1972), viewed the plaintiffs' claims as fourfold. There were claims based upon: (1) aboriginal title to lands and adjacent waters; (2) recognized title to lands and adjacent waters; (3) fishing and hunting

rights; and (4) lack of fair and honorable dealings. The Commission held that the first three causes of action were extinguished by the Alaska Native Claims Settlement Act, and that under the Commission decision in Gila River Pima-Maricopa Indian Community v. United States, 20 Ind. Cl. Comm. 131 (1968), aff'd, 190 Ct. Cl. 790 (1970), cert. denied, 400 U. S. 819 (1970), the fair and honorable dealings claim was non-compensable. The cases were therefore dismissed.

On appeal, the Court of Claims affirmed in part and reversed in part the Commission's decision. Aleut Community of St. Paul Island v. United States, 202 Ct. Cl. 182 (1973). The court affirmed with regard to the issues of aboriginal title, recognized title, and hunting and fishing rights -- albeit on somewhat different grounds -- but reversed on the issue of fair and honorable dealings. Considering the pleadings in a light most favorable to plaintiffs, the court concluded that plaintiffs should be given the opportunity to present evidence at trial on this issue (202 Ct. Cl. at 195). The court went on to distinguish the case of Gila River Pima-Maricopa Indian Community, supra, by finding that in this case a "series of statutes . . . placed the appellants in a 'special relationship' to the Government" (202 Ct. Cl. 201). Since a "special relationship" is present, the court stated, plaintiffs should be allowed to attempt to show that "the obligation was to the Tribe, that the United States failed to meet its obligation, and as a result the Tribe suffered damages" (202 Ct. Cl. at 196).

In proving these assertions it is essential, said the court, that it be shown that the "ecological condition of the islands made the natives dependent upon continued access to traditional hunting and fishing grounds" (202 Ct. Cl. at 198), and that the hunt was a "community endeavor" with payment made to the entire community, to be divided in part into individual portions and to be used in part for community needs (202 Ct. Cl. 198-99). Another important element in plaintiffs' case, the court stated, is the allegation that plaintiffs were paid minimal compensation for their labor over the 76 years in question (202 Ct. Cl. at 200). Finally, the court instructed the Commission to

> allow the profits of the sealskin monopoly to be shown, with a view to determining whether they sufficed for adequate protection, care, and education of the Aleuts, as well as to pay the costs and reasonable profits to others in the chain of distribution. It [the Commission] should inquire whether the Aleuts had their comfort, care, maintenance and education provided for, as the Congress in 1870 prescribed. If they were not, and if there were profits not used for that purpose, that could and should have been used, these profits would establish the measure of damages. [202 Ct. Cl. 200]. 2/

2/ The Commission hereby includes in the definition of "sealskin monopoly" activities, such as fox skinning, which were inextricably bound with the sealskin trade and which were carried out by the same concerns that operated the sealskin trade.

Following the Court of Claims decision, defendant moved for judgment on the pleadings in Docket 369, charging that the St. George Island plaintiffs had not pleaded the two statutes relied upon by the court as the basis for a "special relationship." The Commission, at 35 Ind. Cl. Comm. 30, denied defendant's motion. Subsequently, the Commission ordered the severance from Docket 369 of the St. George Island claim and its consolidation for trial with Docket 352 (36 Ind. Cl. Comm. 252). The Commission found that the pleadings in Docket 369 were sufficiently inclusive to be deemed to include as a basis for recovery the two statutes relied upon by the Court of Claims.

Because of the unusual nature of this claim, a brief history of the Pribilof Aleuts will be helpful.

Plaintiffs in these dockets, the Aleuts of St. Paul and St. George, Alaska, are of Asiatic heritage. Their forefathers migrated to the New World from Siberia over the Bering Strait land bridge approximately 10,000 years ago. Following the Alaska coast south, these people eventually came to the Aleutian Islands, an archipelago stretching over 1,100 miles from Port Moller on the east to Attu Island in the west. Living in the Aleutians -- 70 treeless islands with high, snow-covered mountains -- the Aleuts became dependent upon, and proficient at, sustaining themselves from the sea. This was, in fact, a matter of necessity since the islands are so agriculturally poor that there is no record of any

substantial food crop ever being grown. Vegetation is limited to grasses, lichens, mosses, flowers, and small bushes. Very few animals made their home on the islands and of those that did probably only the sea birds were of significance to the Aleuts. In contrast to the land, the sea surrounding the Aleutians was an area teeming with life. Sea mammals -- hair and fur seals, sea lions, sea otters, and whales -- existed alongside the fish -- salmon, halibut, cod and smelt -- and the marine invertebrates.

Becoming expert boatbuilders, navigators and fisherman, the Aleuts caught the marine animals of the islands and put to some use almost every part of the animal. During the period of Aleut stewardship of the Aleutians the numbers of animal species became stabilized, and no species became extinct. Approximately 16,000 Aleuts lived on the Aleutian Islands prior to the Russian discovery in the mid-18th Century.

An important characteristic of Aleut communities in the "pre-contact" period was the extent to which cooperative behavior existed. Most of the important community functions were carried out by the Aleuts as a group. Aleuts hunted as a group and upon return to the village would share the catch with the community as a whole. An individual Aleut's ties to the community group were very strong.

In 1741 the Russians discovered the Aleutians and, with their firearms, began a slaughter of marine animals. At the same time, as a result of mistreatment and exposure to European diseases, the Aleut population was decimated.

Forty-five years later Gerasim Pribilof sighted what are now known as the Pribilof Islands. Not a part of the Aleutian chain, the Pribilofs lie approximately 200 miles to the north of the Aleutians. The two main islands, St. Paul and St. George, are separated by 40 miles of sea. (There are also three small, uninhabited islets in the Pribilofs.)

The Pribilofs were known to the Aleuts prior to their discovery by Russia, but there is no record of any Aleut habitation. The reason for this may have been the inferior living environment on the Pribilofs as compared to the islands in the Aleutian chain. The Pribilofs are significantly colder than the Aleutians, and, in addition, the climate is extremely cloudy, windy and wet. Because it is colder, ice conditions are more severe and this hampers fishing. There is no record of agricultural production of any kind on the Pribilofs, and only grasses, lichens, mosses, flowers and small bushes grow. Unlike the Aleutians the Pribilofs have relatively smooth coastlines, depriving the islands of the protected bays, protective reef systems, and good harbors that encourage fishing and provide a haven for varied food sources. Due to a lack of fresh, running streams, salmon (a mainstay of the Aleut diet) are not found on the Pribilofs. Finally, even though the Pribilofs were, and are, one of the world's major fur seal rookeries, this source of food is not an unmitigated advantage for Aleut inhabitants. The swarming presence of fur seals on the islands for 4 to 6 months each year makes it difficult for the Aleuts to use the

coastline for fishing and for collecting marine invertebrates. In addition, Aleuts have never considered seal meat to be the most desirable variety of food.

The Russian traders were more interested in the seal rookeries than in the deficiencies in the Pribilofs as an Aleut habitat, and settled Aleuts from the eastern Aleutians in the Pribilofs to kill and skin fur seals. The taking of fur seals on the Pribilofs continued under the fishing and trading monopoly granted by the Russian Government to the Russian-American Company in 1799. The Russians often pressed Aleuts into Russian-American Company service for years at a time, paying them for their labor, but otherwise giving the Aleuts little more freedom than slaves. In keeping with the Aleuts' communal tradition the amount earned by the Pribilof Aleut communities was distributed at the end of a year to each community as a whole. Shares in the community fund were determined by work classification, and work classification was determined by the type of work done.

Although the period of Russian administration was destructive to Aleuts and the Aleut environment, Aleuts were partially assimilated into Russian culture, most converting to the Russian Orthodox religion and many learning the Russian language.

In 1867 under the Treaty of Cession, Alaska became an American territory, and a "free trade" period with regard to the killing and

skinning of Pribilof seals ensued. In 1869, Congress took the first step in controlling the seal kill on the Pribilofs by making the islands a "special reservation" (15 Stat. 348). All sealing and landing on the islands was prohibited except by the authorization of the Secretary of the Treasury.

On July 1, 1870, Congress passed an act relating to the sealing industry and the Pribilof Islands (16 Stat. 180), which the Court of Claims found to be one of the two statutory pronouncements evidencing an obligation by the United States toward the Pribilof Aleuts. The Act of 1870 provides in part:

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> Section 1
> ***natives of said islands shall have the privilege of killing such young seals as may be necessary for their own food and clothing during other months, and also such old seals as may be required for their own clothing and for the manufacture of boats for their own use, which killing shall be limited and controlled by such regulations as shall be prescribed by the Secretary of the Treasury.

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> Section 4
> *** And in making said lease, the Secretary of the Treasury shall have due regard to the *** comfort, maintenance, and education of the natives ***.

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> Section 6
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> *** and the Secretary of the Treasury is hereby empowered and authorized to make all needful rules and regulations *** for the comfort, maintenance, education, and protection of the natives of said islands, ***.

The court found it evident from the above that "the United States recognized the dependence of the appellants [plaintiffs] upon fishing and seal hunting for their continued existence. And that the United States undertook to protect appellants [plaintiffs] in securing their comfort, maintenance, and protection" (202 Ct. Cl. at 197).

The act assigned to the Secretary of the Treasury the power to lease out to a private concern the exclusive right to conduct the process of taking sealskins on the islands. A newly-formed concern, the Alaska Commerical Company (hereinafter the ACC) was subsequently selected as the monopolist. The 20-year lease signed by the ACC and the Government provided for the payment of an annual rental, a tax on each sealskin taken and shipped, and a tax on each gallon of fur seal oil obtained for sale. The lease also obligated the ACC to provide the Pribilof Aleuts with firewood, dried fish, salt, and barrels.

In 1890, when the first lease expired, the Government chose the North American Commercial Company (hereinafter the NACC) as new lessee. This second lease provided for increased rental and tax payments to the Government and increased obligations by the lessee to the Aleuts. The lease stated, in part, that the NACC

> . . . will furnish to the native inhabitants of said islands of St. George and St. Paul annually such quantity of dried salmon and such quantity of salt, and such number of salt barrels for preserving their necessary supply of meat as the Secretary of the Treasury shall from time to time determine.

> That it will also furnish to the said inhabitants 80 tons of coal annually, and a sufficient number of comfortable dwellings in which said native inhabitants may reside; and will keep said dwellings in proper repair; and will also provide and keep in repair such suitable schoolhouses as may be necessary, and will establish and maintain during eight months of each year proper schools for the education of the children on said islands, the same to be taught by competent teachers who shall be paid by the company a fair compensation, all to the satisfaction of the Secretary of the Treasury; and will also provide and maintain a suitable house for religious worship; and will also provide a competent physician or physicians, and necessary and proper medicines and medical supplies; and will also provide the necessaries of life for the widows and orphans and aged and infirm inhabitants of said islands who are unable to provide for themselves; all of which foregoing agreements will be done and performed by the said company free of all costs and charges to said native inhabitants of said islands or to the United States.

During the first lease period (1870 to 1889) the ACC annually harvested almost 100,000 seals, the maximum number permitted by statute. Profits during this period were enormous. As a result of such excessive harvesting, however, the size of the seal herd was declining. By 1890, when the NACC took over the lease, the diminishing number of seals was of serious concern. In addition to the excessive harvesting, the prolific growth of pelagic sealing (the killing of seals on the open sea) was taking its toll on the herd. Overall, the NACC harvested fewer than one-fifth the number of seals harvested by the ACC during the first lease period, and profits declined.

On April 21, 1910, Congress ended the system of leasing the Pribilof Islands to private concerns, and the United States assumed complete control over the seal harvesting operation. The Pribilof seal population had diminished to a small fraction of its 1870 numbers. The

herd began to increase, though, as commercial killing was temporarily halted and pelagic sealing declined. This growth was slow, however, and the average take of sealskins in the government period lagged far behind that of the first lease period.

Since 1910, the United States has been the sole administrator with full authority to harvest and market the furs taken on the Pribilof Islands. The 1910 Act, section 3, provided that

> whenever seals are killed and sealskins taken on any of the Pribilof Islands the native inhabitants of said islands shall be employed in such killing and in curing the skins taken, and shall receive for their labor fair compensation, to be fixed from time to time by the Secretary of Commerce and Labor, who shall have the authority to prescribe by regulation the manner in which such compensation shall be paid to the said natives or expended or otherwise used in their behalf and for their benefit.

Section 9 of the act provided, in part, that the Secretary of Labor and Commerce "shall likewise have authority to furnish food, shelter, fuel, clothing, and other necessaries of life to the native inhabitants of the Pribilof Islands and to provide for their comfort, maintenance, education, and protection."

The Court of Claims viewed this act as the second official pronouncement evidencing an obligation or special relationship undertaken by the United States for the protection of the Aleuts (202 Ct. Cl. at 198). The act also continued the policy of making the Pribilofs a special reservation: No person could lawfully land on the islands without government authorization.

The plaintiffs contend that the Government was obligated under all the circumstances of the fur sealing operation to provide to the Pribilof Aleuts, from 1867 to 1946,[3/] fair compensation for their labor, adequate food, clothing, housing and furnishings, fuel for heating, sanitation and utilities, medical care, and education. It is plaintiffs' position that the statutes of July 1, 1870, and April 21, 1910, "recognized, but did not create, the special relation between the parties" (Pl. Post-Trial Brief, at 5).

Plaintiffs argue that the measure of damages in this case is the difference between what was provided the plaintiffs during the 76-year period 1870-1946, and what should have been provided. Both the profits of the private lessees of the Pribilof Islands and the profits of the Government should be considered to be available to satisfy the unfulfilled obligation to the plaintiffs, say plaintiffs. Plaintiffs further assert that these profits total $50,150,100. Damages due the Aleuts for inadequate food, clothing, housing and furnishings, fuel for heating, sanitation and utilities, and education is computed by plaintiffs to total $4,528,790. Damages for the amount owed the plaintiffs for fair compensation for labor is calculated by plaintiffs as $33,752,139 on the "share basis" and $9,398,847 on the "wage basis." The "share basis" figure derives from the theory that plaintiffs should have been paid wages equalling 50 percent of the gross revenues of the Pribilof

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3/ Although the Government's obligation is alleged to have begun in 1867, no damages are claimed for the period 1867-1869.

Island operations. The "wage basis" figure is computed on the theory that the Pribilof Aleuts should have received wages equalling those paid to contemporary workers in the western United States.

Defendant objects to plaintiffs' contentions and interposes several defenses as complete or partial bars to a recovery by plaintiffs. First, defendant asserts that the Commission has no jurisdiction to decide this case because the claims are individual in nature rather than tribal.

Alternatively, defendant contends that the Government fulfilled its obligation to plaintiffs from 1870 to 1946. This obligation, according to defendant, did not include the guarantee of fair compensation to the Aleuts until so mandated by the Act of April 21, 1910.

Third, defendant disputes plaintiffs' position as to the funds to be considered available to compensate plaintiffs if defendant is found to have failed to fulfill its obligation. Defendant's view is that recovery is barred for any year in which the Government made no profit on the Pribilof Islands operations. In addition, profits, according to defendant, cannot include tax revenues received on Pribilof Island sealskins or foxskins. By defendant's calculations, no profits accrued to the Government for 31 of the 76 years in question. Defendant also disregards profits made by the third-party private lessees on the ground that these profits were not funds that "could or should have been used" for plaintiffs' welfare.

Consistent with its contentions, as outlined above, defendant finds no need to rebut plaintiffs' comprehensive profit figure for those parties reaping benefits from the Pribilof Island operations. Defendant does dispute, however, plaintiffs' estimate of expenses borne by the Government. Defendant's two experts judge expenses to be $48,992,142 and $35,052,236.27, respectively, as compared with plaintiffs' expert's estimate of $25,088,540. The major difference of opinion in the experts' reports concerning expenses is whether or not to treat as Government expense the cost of naval patrol in the North Pacific Ocean. Predictably, the defendant sees the naval patrol as a direct cost of maintaining the Pribilof Island sealing operations, while the plaintiffs see the naval patrol as an indirect governmental service that would have been provided in any case and no more chargeable against the Pribilof sealing operations than the cost of maintaining territorial rule in Alaska.

In order to buttress their claims each party has submitted into evidence a substantial amount of information. Each side employed experts in various fields to analyze and prepare reports dealing with the Pribilof Aleut communities.

Plaintiffs' primary expert report (introduced as Pl. Ex. 701, Vol. I) was prepared under the direction of economists Dr. Roger H. Willsie and Dr. Herschel F. Jones of the Bellvue, Washington, firm CH_2M Hill. This report utilizes a topical approach to analyze the profits made by

the Pribilof Island operations and the damages due plaintiffs for inadequate goods, services, and compensation provided. The report is comprehensive in that it estimates money values for all the issues in controversy,[4/] and arrives at a final sum said to be due plaintiffs.

Plaintiffs have also submitted materials, designated Pl. Ex. L, written and compiled by Dr. William S. Laughlin, an anthropologist at the University of Connecticut. These materials deal only with the anthropological and sociological aspects of this case.

Defendant has submitted a number of expert reports, none of which is comprehensive in the same sense that Pl. Ex. 701, Vol. I, is. The report most relied upon by defendant is Def. Ex. G-1, a report prepared by the General Services Administration (hereinafter the GSA). This report, which is organized around the three management periods in question, 1870-1889, 1890-1909, and 1910-1946, is primarily an attempt to define, through the use of charts, the receipts and expenditures of the Pribilof Islands operation. The GSA report concentrates on government receipts and expenditures, and defendant uses this data as the foundation upon which it estimates profit to the Government for each year in the 76-year period.

4/ Pl. Ex. 701, Vol. I, estimates the cost of providing housing, fuel and other services and then compares these figures with what plaintiffs should have received in these areas. Likewise, the report compares compensation actually realized with what should have been realized.

Dr. George Rogers, an economist presently associated with the University of Alaska, submitted an expert report on economic and sociological issues, designated Def. Ex. R. This report contains a number of calculations concerning the Pribilof Islands operations, and contains some comparisons between the Aleuts' economic position and that of a mainland United States worker. Def. Ex. J, authored by Dorothy M. Jones, a professor at the University of Alaska, details Aleut history and sociology from the period prior to Russian control through the end of the period in question in this case. Defendant's final expert report is a four-page economic rebuttal by Dr. Allan G. Gruchy, professor of economics at the University of Maryland.

We shall begin our examination of the parties' contentions by considering the defendant's assertion that the Commission lacks jurisdiction under our Act, 25 U.S.C. §70(a) (1976), to hear this claim because the claim is individual and not tribal. The Court of Claims has set out two assertions whose proof is essential to a showing that this claim is tribal. It is necessary to show that: (1) "[T]he hunt was traditionally a community endeavor," and (2) "[P]ayment for the hunting of seals for both the Alaskan [sic] Commercial Company, and the United States was made to the entire community to be divided in part into individual portions and to be retained in part by the community to care for those too old or infirm to care for themselves and for other community needs" (202 Ct. Cl. at 198-99). Plaintiffs have proven both of these assertions.

We have found that the Aleuts treated the hunt and other important group functions as community endeavors. The burden of these community endeavors was borne by the whole community, and the rewards of these activities were enjoyed by the group (see finding of fact Nos. 8, 9, 25, 26, 35, 36, 51, 53). This was true from the time of Aleut stewardship of the islands until 1946, the end of the period in question. We have also found that payment of compensation was made to the community as a whole and was distributed not only to individuals but also applied to community needs (see finding of fact Nos. 26, 36, 53, 70).[5/]

During the first portion of the 1870-1946 period the Aleut chiefs apportioned the money among the community. Later, government agents assumed a great deal of authority in the distribution of the community fund. Portions of the community payment were, at times, given to widows and orphans, to the priest, to the church, and used for minor community needs.

In addition to satisfying the criteria set forth by the Court of Claims for this particular case, the facts here satisfy the criteria developed by the Commission in other cases in determining whether a claim is tribal or individual. The overall amount of pay to be distributed

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5/ In some years there were some activities for which Aleuts received compensation as individuals. Payment for miscellaneous labor was made to individual Aleuts as was, at times, payment for the taking of fox. This compensation was minor, however, when compared to community-distributed compensation.

to the Aleuts was based on the total furs taken and represented pay for the production of the group as a whole, and not compensation for any individual's labor. The compensation and other benefits actually provided were considered as payment in return for the whole communal endeavor. The claim is that the communities did not receive the compensation and other benefits to which the communities were entitled. The rights allegedly violated are, therefore, tribal and not individual rights, although individual rights may incidentally have been violated. See Creek Nation v. United States, 201 Ct. Cl. 386, 409-10 (1973), aff'g. Docket 272, 26 Ind. Cl. Comm. 410 (1971).

The extent of the Government's duty to the Aleut colonies on the Pribilofs is to be found in an obligation of the Government to the tribe created by treaty or statute. In cases involving claims under the fair and honorable dealings clause of our act, such as this case, the defendant's conduct must be measured against the self-imposed "special relationship." See Gila River Pima-Maricopa Indian Community v. United States, supra, 20 Ind. Cl. Comm. 131 (1968). As previously pointed out by the Court of Claims in this case, the Acts of July 1, 1870 (16 Stat. 180), and April 21, 1910 (36 Stat. 326), concerning the United States regulation of the Pribilof Islands, their native Aleut inhabitants, and the fur seals, establish a "special relationship" with these plaintiffs from which a duty is definable.

The parties are in agreement that these two statutes (16 Stat. 180, 36 Stat. 326) obligated the Government to provide for the comfort, maintenance, and education of the plaintiffs, and this standard then obligated the Government to supply adequate levels of (1) food, (2) clothing, (3) housing and furnishings, (4) fuel for heating, (5) sanitation and utilities (water, sewer, and electricity), (6) medical care, and (7) education. (Pretrial order, April 7, 1976, at 3, §4a). The parties also agree that the Act of April 21, 1910, obligated the Government to provide "fair compensation" to the plaintiffs (id., at §4b). The parties disagree, however, as to whether the Government was obligated to provide "fair compensation" to the plaintiffs during the private lease period, 1870-1909.

The Act of July 1, 1870, does not explicitly provide for "fair compensation" but, as previously stated, it does obligate the Government to provide for "comfort, maintenance, education, and protection." Had the statute listed only "maintenance, education, and protection," we might acknowledge some legitimacy in defendant's argument, which appears to be that any level of support that at least barely sustained life would be sufficient. However, Congress added the word "comfort," which must be taken to mean a standard of support higher than that of bare subsistence. Comfort at least implies a fair reward for labor, so that the energetic and thrifty can aspire to the acquisition of consumer goods and the

accumulation of savings. We find support in the contemporary construction of the 1870 Act.[6/]

After the act was passed, but before the lease was granted to the ACC, the Government indicated that adequate compensation to the Aleuts would be required under the lease. The Secretary of the Treasury's public announcement that proposals would be taken from private firms "for the exclusive right to take fur seals" required that

> [i]n addition to the specific terms prescribed in the act, the successful bidder will be required *** to pay the natives of the islands for the labor performed by them such compensation as may be necessary for their support, under regulations prescribed by the Secretary of the Treasury.

The lease the ACC signed did not expressly refer to "fair compensation" but did bind the ACC to accept "all needful rules and regulations which shall at any time or times hereafter be made by the Secretary of the Treasury *** for the comfort, maintenance, education, and protection of the natives of said island." The ACC acknowledged that the Government had the right to set compensation, for in January 1872, the company, in its regulations, stated that

> ***[t]he Aleutian people living on the islands will be employed by the company in taking seals for their skins, and they will be paid for the labor of taking each skin

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6/ The legislative history of the Act of July 1, 1870, mentions only obliquely the Aleut natives. Discussion instead centered on possible revenue to the Government, and length of the lease period, and other areas (Cong. Globe, 41st Cong., 2nd Sess. 4944-4946, 5027-5033).

> and delivering the same at the salt-house, forty cents, coin, until otherwise ordered by the Secretary of the Treasury. [Def. Ex. E-32, at 78; emphasis supplied]

There is no record, however, of the Secretary of the Treasury taking any action to approve the 40 cents per skin wage or to set another wage in the 1870-1889 period.

In the lease of March 12, 1890, granting the NACC the right to take sealskins for 20 years, the company agreed to pay the native inhabitants "a fair and just compensation, such as may be fixed by the Secretary of the Treasury." During the second lease period the Government did exercise its right to set the rate of compensation to Aleuts. In 1891 the Secretary of the Treasury fixed payment at 50 cents per skin. In 1906 compensation was increased to 75 cents per skin on the order of the Secretary of Commerce and Labor.[7]

In view of the official actions of the administrative officers charged with the implementation of the Act of July 1, 1870, it must be assumed that these officers believed the act gave the Government the authority to set a level of fair compensation to the Aleuts. Courts have given great deference to the interpretation of administrative officers charged with the implementation of a statute. See e.g., Power Reactor Co. v. Electricians, 367 U.S. 396, 408 (1961); McLaren v. Fleischer, 256 U.S. 477, 481 (1921). The Commission also takes note

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7/ The Department of Commerce and Labor assumed authority over the islands in 1903.

that through the period 1870-1909 Congress appropriated money to, and conducted special investigations of, the Pribilof Islands operation. At no time in this period is there any record that Congress disapproved of the construction given the act by the Secretary of the Treasury Department or by the Secretary of the Department of Commerce and Labor.

The Commission also takes notice of the unique circumstances on the Pribilofs at the time of the 1870 Act. The Pribilof Aleuts had no means of livelihood other than selling their labor to sealing firms. The creation of a sealing monopoly coupled with no guaranteed fair wage would mean that the lessees would have been getting a lease to hold the Pribilof Aleuts, in effect, as indentured servants. We do not believe that Congress intended such a plan, and believe that the duty to provide "fair compensation" to the plaintiffs was required in the 1870-1909 period. Thus for the whole period in question, 1870-1946, the United States guaranteed the Aleut communities fair compensation and maintenance for their contribution to the fur seal harvest.

Plaintiffs have argued at some length that the guarantee of "fair compensation" to the Aleuts means that the Aleuts should have received 50 percent of the gross revenues of the sealskin operations over the 76-year period. None of the witnesses in this case have disputed the fact that payments to the Aleuts constituted a very low percentage of the gross revenues of the sealskin monopoly. Dr. Rogers, defendant's expert,

estimated that the Aleuts' share of gross revenues in the 1870-1889 period was only 3.3 percent of the total. Plaintiffs contend that had the Aleuts been able to bargain equally with the Government, they could have negotiated for a 50 percent share of the gross revenues of the sealskin monopoly. Moreover, plaintiffs argue that economic theory supports this kind of return for labor in a labor intensive operation.

The Commission takes no position on and does not reach the question of plaintiffs proper bargaining power or the question of which economic theory is proper. Rather, the Commission finds that on the basis of the Acts of 1870 and 1910 -- which have been previously determined to be the sole basis of the Government's obligation to plaintiffs -- plaintiffs are not entitled to recover 50 percent of the gross revenues. The Commission believes that when Congress and government agents used the term "fair compensation" in these statutes or in their interpretation, the meaning was that the United States obligated itself to provide an adequate wage for labor performed.

The Commission deems it extremely unlikely that in 1910 Congress intended to guarantee the Aleuts a 50 percent share of the gross revenue when the language of the statute, without further explanation, stated that fair compensation was to be paid. In the 1870 statute Congress did not even include the term "fair compensation" and did not explicitly mention compensation at all. If Congress did intend to provide the Aleuts with a percentage of the gross revenues, or allow the Aleuts to bargain

for a percentage, it seems likely the Congress would have taken steps to effectuate this procedure rather than remain silent while the Aleuts received compensation on a very different basis. We do not find in the statutes creating this "special relationship" any hint that the plaintiffs have a claim on the entrepreneurial rewards, a share of the equity in the enterprise, or any degree of ownership of the seals. The United States obligated itself to treat plaintiffs as fairly-rewarded employees, but not as partners.

Extensive expert testimony and economic data have been offered in an attempt to put specific numbers on what the plaintiffs should have received as compensation. We have largely adopted plaintiffs' "wage basis" approach to the problem of quantifying what should have been done for the Pribilof communities, with refinements as explained below and in the findings. We start from the premise that the Aleut workers should have been paid for their labor at a rate comparable to that a United States worker of equivalent skills at that time and place might have expected to receive. Starting from data on wages received by eastern United States workers in each year under study, we adjust to reflect our conclusion from the evidence that the composition of the Aleut work force was one-half skilled labor and one-half unskilled labor. We further adjust to reflect the "frontier factor"--due to the demand for labor in the Western United States, and even more in Alaska, a wage premium over those wages paid to an Eastern United States worker has historically been paid.

We take judicial notice that the recent average of Alaska wages is more than 45 percent above continental United States wages for production workers. Since the "frontier factor" exists because of the difficulties of transportation and communication from the economy's centers of production and population, an "Alaska factor" of at least 45 percent must have existed over the study period of 1870 to 1946. It might be argued for the same reasons that an additional "Pribilof Islands factor" should also be applied, but we are unable to find data to support such an attempt at fine-tuning. We believe the data supports our calculations as to what fair compensation for the labor performed should have been, or, alternatively, comes close to representing what wage level would have been required to recruit continental United States workers to perform this labor in the Pribilofs.[8/]

Thus calculated, we find the wages that should have been paid to be $1,732,560.28 for the first lease period, $1,185,148.44 for the second lease period, and $6,986,706.83 for the government period. The total is $9,904,416.

In addition to fair compensation, the 1870 and 1910 acts obligate the defendant to provide comfort, maintenance, and education to the plaintiffs. As in the case of other workers in remote sites, such as

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8/ The standard of comparison used is that of a year's wages, even though the plaintiffs' only compensation often was based solely on the furs taken during the short sealing season. However, the plan of the enterprise was that the communities would be maintained on the Pribilofs on a year-round basis, using the off-season to maintain company and community structures and perform miscellaneous labor. Additional income after the sealing season was generated by foxing.

loggers, seamen, and Alaska pipeline workers, the obligation undertaken was to provide "board and lodging." Plaintiffs have offered evidence through their expert witnesses in an attempt to construct six specific standards for what should have been provided. We have adopted this approach for the most part, with changes as explained below and in the findings.

I. Housing. The Commission determines, in light of the number of people in each Aleut family and the climatic conditions on the Pribilofs, that each Aleut family should have been provided with a small, four-room dwelling during the lease periods, and should have been provided with a small, five-room dwelling during the government period. The total expense for housing construction during the period 1870 to 1946 should have been $445,223 and the maintenance expenses would then have been $239,049. From the sum of these two numbers 25 percent must be deducted as that portion of the cost of housing which would have been payments to Aleuts for labor. This amount has been previously included in the calculations for compensation. The cost of housing that should have been provided is $513,204.[9/]

II. Fuel. The Commission finds that in order to keep Aleut cottages in the lease periods heated properly 75 lbs. of coal were needed each day in the coldest month of the year. In other months less coal was needed; amounts were calculated using climatological data. This quantity of coal was needed because the type of stoves provided the Aleuts were inefficient, because the Pribilofs have a very cold climate, and because a low quality coal was supplied to the Aleuts.

9/ See findings of fact Nos. 177-188.

During the government period the average fuel need per family in the coldest month of the year rose to 112.5 lbs. per day. This increase in coal need was due to the construction of a number of larger Aleut dwellings. The value of the coal that should have been provided in the 76-year period was $1,061,204.[10/]

III. Food, Clothing, Household Furnishings. The Commission believes the Pribilof Aleuts should have received the same level of food, clothing, and essential household furnishings (beds and stoves, for example) as were enjoyed by an average wage-earning family in the lower 48 states. Statistics in the record disclose expenditures for food, clothing, and household furnishings by American families for 26 of the years in question. These figures were adjusted to reflect the price level for each year of the study period and an average found from the 26 series for each year.[11/] Each year's average expenditure was then multiplied by the number of Aleut families to give an expenditure value. The total expenditure on food, clothing, and essential household furnishings from 1870 to 1946 should have been $3,822,252.[12/]

10/ See finding of fact Nos. 189-199.

11/ The resulting figure is a retail, continental United States average. Plaintiffs adjust their similar figure downward to get a wholesale figure, then upward for transportation to the Pribilofs. We are not persuaded of the reliability of the adjustment factors and decline to apply them; they are mostly offsetting.

12/ See finding of fact Nos. 200-210.

IV. School Construction and Maintenance, 1870-1909. The record shows that the Aleuts should have been provided with adequate schoolhouses on both St. Paul and St. George during the lease periods. (Plaintiffs do not claim damages for educational deprivation other than lack of proper facilities in the lease periods.) The cost of constructing and maintaining school buildings would have been $8,200.[13/]

V. Water Supply. Water should have been piped to central locations in the villages of St. Paul and St. George in the lease periods. In the government period water lines should have been extended to each Aleut dwelling. The estimated total cost of a proper water supply is $20,137.[14/]

VI. Sanitation System. During the lease periods each Aleut family should have had the use of an outhouse. During the government period sewage lines should have been connected with Aleut houses. The total cost of an adequate sanitation system would have been $10,140.[15/]

Were there profits available to have paid this fair standard of compensation to the Aleut communities? In answering this inquiry, defendant argues that only the profits to the United States should be considered, that no damages are due for years in which the United States made no profit, and that any revenues that were received as a "tax" cannot be used in computing profit.

13/ See finding of fact Nos. 215-218.

14/ See finding of fact Nos. 211, 212.

15/ See finding of fact Nos. 213, 214.

Defendant's position that only the profits of the United States are to be considered is already partially answered, we think, in the 1973 Court of Claims opinion. The court states that "[w]here the Government assumes such an obligation [to an Indian tribe, by virtue of a special relationship], it is liable even if third parties actually inflict the injuries" (202 Ct. Cl. at 198). We think this statement applies to government liability for profits realized by third parties as well as for government responsibility for injuries inflicted by third parties. This position is particularly apt in this instance, where the United States had ultimate control over the sealskin trade and its revenues, and where the very terms of the leases, under which the private parties realized their profits, were drawn up and signed by the United States.[16/]

The court also directed that "*** the Commission should allow the profits of the sealskin monopoly to be shown, with a view to determining whether they sufficed for adequate protection, care, and education of the Aleuts, as well as to pay the costs and reasonable profits to others in the chain of distribution" (202 Ct. Cl., at 200). The court had previously indicated its understanding that private companies were involved in the Pribilof sealing operations (id., at 198). Therefore,

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16/ The terms of the leases the United States signed were not favorable to the United States (see Def. Ex. R, at 27-30). As defendant's own expert witness writes, "This was the age of the post-Civil War 'robber barons,' but even in that context the net return [to the ACC] appears very high" (Def. Ex. R, at 29). This expert also states that to a large extent the Government surrendered its responsibilities for assuring the best financial arrangement for the United States and perpetuation of the resource yield (Def. Ex. R, at 31). The defendant should not be able to escape liability because of its own improvident dealings. Defendant's contention that the profits of the private lessees should not be considered because these profits would not have been available to benefit the natives is erroneous in light of the above and is based upon a misreading of the court's opinion (see 202 Ct. Cl. at 200).

the very term "sealskin monopoly" indicates that the court desired the profits of all the parties involved in the sealskin monopoly to be shown, not solely the profits of the United States.

Defendant's second position, that the United States should be liable for damages only in years when the United States realized net profits, is untenable in light of the court's finding that profits should include those realized by third parties. Moreover, there is no foundation for defendant's position that profits should be determined on a year-by-year basis. The court directed that the profits of the sealskin monoply be shown. This indicates an analysis of profits over the 76-year period as a whole, not the extraordinarily exacting task of computing profits for each of the 76 years individually. In fact, the two leases were for 20 years each, and the lessees might reasonably expect profitability only over the term of the lease, not each year.

Defendant also contends that profits to the United States cannot include tax revenues received by the United States. This is a claim unsupported by any authority. The court has directed that profits should be shown. The court has not indicated that direct revenues should not be counted towards profits solely because they were termed a "tax." The monies that defendant would have the Commission exclude from its purview directly derived from the Pribilof operations, and provision for collecting these funds was included in the leases the Government signed with the private lessees. We see no reason a direct revenue of

the sealskin monopoly should not be included because of what it is called as it enters the possession of the Government.

The Commission is of the opinion, however, that some revenues and expenditures are so indirectly related to the Pribilof Islands sealskin monopoly that they should not be considered for the purpose of determining the profits of the monopoly. For instance, plaintiff contends that the import duties on Pribilof sealskins imported into the United States for sale after dressing and dying in Great Britain should be considered revenue of the sealskin monopoly. We disagree. Import duties are a general revenue-producing levy imposed by the United States on many articles. Some Pribilof sealskins were shipped to the United States after they were finished and made ready for sale in London. Presumably the Government collected duties on these skins, but this was after the product was divorced from the sealskin-taking enterprise. The Commission feels that these duties have too attenuated a link to the original sealskin operations to be treated as its revenues.[17/]

For a similar reason, the Commission believes to be faulty defendant's contention that the government's expense of patrolling Alaskan waters should be treated as an expense of the sealskin monopoly. It is true that the Government assigned various vessels to patrol the Bering Sea

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17/ Estimation of revenues from duties would also be extremely speculative given the information provided. See finding of fact No. 73, footnote 14.

and other Alaskan waters, and it is true that these vessels spent a portion of their time in activities related to the protection of the Pribilof seal herd. The Commission feels, however, that this type of Governmental law-enforcement activity is one characteristically borne by the nation as a whole, and that the Government would have patrolled Alaskan waters regardless of the existence of the Pribilof fur seal herd.[18/] Therefore, the cost of patrolling Alaskan waters will not be treated as an expenditure of the sealskin monopoly.

The profit of the parties to the sealskin monopoly will now be stated, as computed in the findings of fact.[19/]

The profit to the private lessee, the ACC, during the first lease period, 1870-1889, was $18,697,869 (revenues were $27,473,668 and expenses $8,775,799). Profit to the Government was $5,851,360 (revenues were $6,010,566 and expenditures $159,206).[20/]

18/ See finding of fact Nos. 78, 79, 80, 118, 119, 120, 155. Even though the Commission has not attempted to arrive at a comprehensive figure for Government patrol costs in the 1870-1946 period, it is clear that those costs allocable to protection of the Pribilof seal herd are far lower than defendant's estimates. See finding of fact Nos. 79, 80, 120. After 1911 pelagic sealing declined and therefore the necessity of government patrols to protect the fur seals did also. See finding of fact No. 138.

19/ The findings of fact which accompany this opinion examine in detail all the revenues and expenditures of the 76-year period. Only the results of those computations will be restated here. All figures are computed to the nearest dollar.

20/ See finding of fact Nos. 53 through 77.

The profit to the private lessee, the NACC, during the second lease period, 1890-1909, was $4,422,776 (revenues were $9,720,128 and expenditures $5,297,352). The profit to the Government in this period was $2,866,506 (revenues were $3,460,675 and expenses, $594,169).[21/]

The profit to the Government during the period of government operation was $14,579,924 (revenues were $44,352,143, expenditures $26,320,486, and net treaty obligations under various agreements with Japan, Russia and Canada were $3,451,733).[22/] Total profit over the entire period 1870-1946 is the sum of these separate profits: $46,418,399.

The remaining task in this case is to determine the value of compensation, goods, and services provided to the Pribilof Aleuts by defendant and defendant's lessees. Although the records are not complete, there is considerable agreement between plaintiffs and defendant as to what was expended. By comparing what was provided with what should have been provided, the Commission will establish damages, if any. As computed in the findings of fact which accompany this opinion, the value of compensation, goods, and services provided

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21/ *See* finding of fact Nos. 88 through 115.

22/ *See* finding of fact Nos. 126-156. In finding No. 115, items 6 and 7 were included as expenses. Other items in No. 115 were either included in other figures or deemed to have too tenuous a connection with the sealskin monopoly and therefore excluded.

in those areas in which the plaintiffs claim damages is as follows:[23]

Compensation	
Lease Periods	$ 972,294
Government Period	1,128,515
Housing	
Lease Periods	37,437
Government Period	79,665
Food and Clothing	
Lease Periods	320,621
Government Period	1,264,001
Fuel	
Lease Periods	105,760
Government Period	173,445
Educational Buildings	
Lease Periods	2,750
Government Period	16,773
Water Supply	
Lease Periods	N/A
Government Period	12,450
Sanitation	
Lease Periods	N/A
Government Period	3,011

23/ These figures are taken from finding of fact Nos. 167-172 and 174-176.

The Commission is aware of allegations that not all of the funds for compensation, goods, and services said to have been spent on the Aleuts were indeed so spent. However, there is no basis in the evidence for selecting any amount less than what the official reports show the Aleuts were to have received.

The Commission has totaled the value of goods and services provided without regard to the quality or type of the goods or services. The Commission realizes that some food (or other good or service) may have been of very poor quality or of a type disliked by the Aleuts, but no discount has been made for these factors.

Without further information, the money, goods, and services that were furnished to the Aleuts might be presumed, erroneously, to be enough to meet some standard of obligation. What the figures do not show, by themselves, is the sheer misery in which the Pribilof Aleuts lived. The record shows that compensation to the Aleuts was absolutely minimal and that the Aleuts suffered terribly because of a lack of proper housing, fuel, food, clothing, water, and sanitation. The Government was obligated to provide for "comfort," but "wretchedness" and "anguish" are the words that more accurately describe the condition of the Pribilof Aleuts. The accompanying findings of fact, drawing upon reports of contemporary observers, recite many instances of hardship and suffering; this evidence alone mandates the conclusion that the United States did not do for plaintiffs what should have been done.

In order to reach a final damage figure in each area the difference between what should have been provided and what was provided will be calculated. The Commission is of the opinion that the Acts of 1870 and 1910 obligated the Government to provide adequate goods and services in addition to fair compensation. A just result decrees that on this remote, wholly-owned government reservation--where the Aleuts worked and made profits for the United States, but were never allowed to acquire any property rights or any of the legal protections of either private or federal employees--the Government should have provided living expenses as well as a fair wage.

Comparing what should have been expended on the Aleut plaintiffs against what was actually spent reveals, in summary, the following:

Compensation	
Standard Expenditure	$ 9,904,416
Actual Expenditure	2,100,809
Deficit	$ 7,803,607
Housing	
Standard Expenditure	$ 513,204
Actual Expenditure	117,102
Deficit	$ 396,102
Fuel	
Standard Expenditure	$ 1,061,204
Actual Expenditure	279,205
Deficit	$ 781,999
Food, Clothing	
Standard Expenditure	$ 3,822,252
Actual Expenditure	1,584,622
Deficit	$ 2,237,630
Water Supply	
Standard Expenditure	$ 20,137
Actual Expenditure	12,450
Deficit	$ 7,687
Sanitation System	
Standard Expenditure	$ 10,140
Actual Expenditure	3,011
Deficit	$ 7,129
Educational Buildings	
Standard Expenditure	$ 8,200
Actual Expenditure	2,750
Deficit	$ 5,450
Total	
Sum of Standard Expenditures	$15,339,552
Sum of Actual Expenditures	4,099,949
Difference	$11,239,604

Computing what the plaintiffs should have received as compared to what they did receive, the Commission finds that plaintiffs are entitled to damages in the amount of $11,239,604. In computing these damages the Commission is mindful of the Court of Claims' instruction that damages should not exceed an amount precluding "reasonable profits to others in the chain of distribution" of the sealskin monopoly. The Commission has found that profits to the Government and its lessees were $46,418,399 over the 76-year period. In the first lease period, from profits of $24,549,193 to the lessee and the United States, the additional amount of $2,563,483 should have been used to compensate and support the plaintiffs. During the second lease period, with profits of $7,289,282, $1,428,456 more would have met the standards that the plaintiffs should have received. During the period of government operation, profits of $14,579,924 would have created an ample fund from which to draw the additional $7,247,665 needed to adequately compensate and support the plaintiffs.

The Commission believes that an award of $11,239,604 leaves abundant profits to others in the chain of distribution and therefore the award is well within the mandate of the Court of Claims.

The odd-dollar figure of our final judgment implies a precision in fact-finding that would be difficult to attain. Many decisions on data and thousands of calculations have been made to give proper weight to the mass of evidence produced here. Although every effort has been made to guard against it, it is possible that arithmetical errors may have crept

into the chain of calculations. Had we the power of an ordinary jury in a civil case to integrate mentally all the evidence into one conclusive figure as our verdict on damages, we would have chosen a number very near to that expressed above, but rounded up or down. The path we have chosen to reach our judgment adequately documents the reasons for our judgment as required by statute and case law. (See Seminole Indians v. United States, 196 Ct. Cl. 639 (1972).) Even if minor errors of calculation were shown we would not be disposed to modify our result; it represents a fair judgment on the whole distressing record.

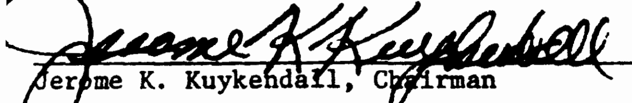
Plaintiffs have built their case, and our judgment rests, on selected quantifiable aspects of the United States' management of the Pribilof Islands. No numbers have been put on the effects of the policy of educational deprivation apparently aimed at keeping the Aleuts from so much knowledge of the outside world as would excite their aspirations for a better lot. Damages were not sought for the consequences of malnourishment and disease which seemed for a time to have doomed the population to extinction. And no appropriate dollar figure is suggested or suggests itself to compensate for this history of subjugation and exploitation. Within the legal guidelines that constrain the case, however, we find that our judgment fairly reflects the whole record.

The nature of the plaintiffs' claim is such that it would appear that any offsets the Government might assert have already been presented and credited as part of the case-in-chief. We will not, however,

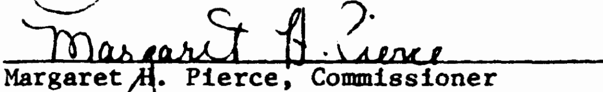
prematurely foreclose the defendant's right to assert offsets. Therefore, an interlocutory order will be entered herewith awarding the plaintiffs damages in the amount of $11,239,604, and providing for any further proceedings which may be necessary under these dockets.

Richard W. Yarborough, Commissioner

We concur:


Jerome K. Kuykendall, Chairman

John T. Vance, Commissioner


Margaret H. Pierce, Commissioner

Brantley Blue, Commissioner