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SPECIAL RECENT DEVELOPMENTS

ABORIGINAL EXEMPTION TO THE INTERNATIONAL WHALING CONVENTION

Background

Whaling activities conducted by persons subject to the jurisdiction of the United States are governed by the Whaling Convention Act (16 U.S.C. § 916a-1). The Convention sets out the rights and duties of contracting governments, and the Schedule to the Convention contains regulations adopted by the International Whaling Commission.

Until recently, the Schedule expressly exempted aborigines, which included Alaskan Eskimos, from the prohibitions imposed on the "taking of gray or right whales," provided that the meat of such whales was used for local consumption by the aborigines. The hunting of bowhead whales, a species of right whale, has been an important part of the culture and subsistence lifestyle of Alaskan Eskimos for centuries. Hunting occurs in the spring and fall, and residents of nine villages participate in the hunt using only dart and shoulder guns, techniques which have been used for one hundred years.

In June 1977, the Commission amended the Schedule to prohibit the taking of bowhead whales. Because of the severe impact such an amendment would have on the Alaskan Eskimos, the United States considered objecting. To aid in the consideration, an environmental impact statement was prepared. In October 1977, the United States decided not to object in light of its commitment to international conservation. At the end of October 1977, the Alaskan Eskimos sued to compel the United States to file an objection, and the United States District Court for the District of Columbia ordered the United States to file an objection immediately. The Secretary of State appealed, and the United States Court of Appeals, District of Columbia Circuit, held that the plaintiffs failed to make the requisite strong showing of relevant factors in order to justify making the objection. [Adams v. Vance, D.C. Civil 77-1834 (D.C. Cir. January 17, 1978)].

At a special meeting on December 6-8, 1977, the Commission adopted an amendment to the Schedule which allowed a limited taking of bowhead whales. The United States received official notice of the action on December 29, 1977. On April 3, 1978, the following regulations, which appeared at 43 Fed. Reg. 13886 (1978) (to be codified in 50 C.F.R. § 230), became effective:

NATIVE SUBSISTENCE [NEW]

§ 230.70 General.

The provisions of §§ 230.70 through 230.77, which govern native subsistence whaling for bowhead whales, shall expire on December 31, 1978. § 230.71 Definitions.

(a) As used in § 230.70 through 230.77 of this Part 230:

(1) "Administrator" means the administrator of the National Oceanic and Atmospheric Administration;

(2) "Assistant Administrator" means the Assistant Administrator for Fisheries of the National Oceanic and Atmospheric Administration;

(3) "Bowhead" means a whale of the Bering Sea stock of bowhead whales, *Balaena mysticetus*;

(4) "Calf" means any bowhead which is less than 21 feet in length as measured from the point of the upper jaw and the notch between the tail flukes;

(5) "Landing" means bringing a bowhead or any parts thereof onto the ice or land in the course of whaling operations;

(6) "Whaling captain" or "captain" means any Indian, Aleut, or Eskimo domiciled in a whaling village who is in charge of a vessel and a whaling crew;

(7) "Stinker" means a dead unclaimed bowhead found upon a beach, stranded in shallow water, or floating at sea;

(8) "Strike" means hitting a bowhead with a harpoon, lance, or explosive dart;

(9) "Whaling" means the hunting, striking, harassing, killing, or landing of bowheads, but does not include the salvage or processing of any stinker;

(10) "Whaling crew" means those persons under the control of a captain, who collectively participate as a unit in whaling;

(11) "Whaling village" means any of the villages of Gambell, Savoonga, Wales, Kivalina, Point Hope, Wainwright, Barrow, Nuigsut, and Kaktovik in the State of Alaska; and

(12) "Wasteful manner" means a method of whaling which is not likely to result in the landing of a struck bowhead or which does not include all reasonable effort to retrieve the bowhead.

§ 230.72 Prohibited acts.

(a) No person shall engage in whaling except:

(1) A whaling captain licensed in accordance with the provisions of § 230.73;

(2) A whaling captain included under the terms of a license issued in accordance with the provisions of § 230.73; or

(3) A member of a whaling crew under the control of a captain referred to in subparagraphs (1) and (2) of this paragraph.

(b) No whaling captain shall engage in whaling for any calf or any bowhead whale accompanied by a calf.

(c) No whaling captain shall engage in whaling in a wasteful manner.

(d) No whaling captain shall continue to whale after (1) the quota set forth in § 230.74 for his village of domicile is reached, or (2) the license under which he is whaling is suspended as provided in § 230.73(e).

(e) No whaling captain shall claim domicile in more than one whaling village.

(f) No person may salvage a stinker without complying with the provisions of § 230.75.

(g) No whaling captain shall engage in whaling with a harpoon, lance, or explosive dart which does not bear a permanent distinctive mark described by the captain in a document submitted to the Assistant Administrator identifying the captain as the owner thereof.

§ 230.73 Licenses and certificates of inclusion.

(a) A license may be issued to a whaling captain or a representative of one or more captains who applies on their behalf.

(1) Application for a license shall contain:

(i) Name, address, and telephone number, if any, of the applicant. If the applicant is an organization or corporate entity, a copy of the corporate or organizational charter shall be included;

(ii) The name and village of domicile of the applicant (if he is a whaling captain) and of each captain represented by the applicant;

(iii) A statement by the applicant (if he is a whaling captain) and each whaling captain represented by the applicant;

(A) That he understands and will comply with the regulations of this part;

(B) That the whaling crew contains at least five members;

(C) That any vessel to be used contains adequate equipment for whaling and that there are adequate provisions for the whaling crew; and

(D) That no member of the whaling crew will receive money for participation in the native subsistence whaling:

(iv) A description of the distinctive marking to be placed on each harpoon, lance, and explosive dart of each captain covered by the application.

(2) The application for a license shall be submitted to the Assis-

tant Administrator for Fisheries, National Marine Fisheries Service, Washington, D.C. 20235.

(3) A license fee of \$100 is required. A check in this amount made payable to the National Marine Fisheries Service must accompany the application.

(4) The Assistant Administrator shall determine the adequacy and completeness of an application, and if found to be inadequate or incomplete will promptly notify the applicant.

(b) Notwithstanding the provisions of paragraph (a) of this section, the Assistant Administrator may issue a license, on his own initiative, to whaling captains registered with or belonging to a whaling association representing a significant number of whaling captains if the Assistant Administrator, in his discretion, determines that: (1) The association has established a system for regulating whaling activities of its members; (2) the system requires the captains to provide information equivalent to that required to be submitted by an applicant under paragraph (a) of this section; and (3) such information has been made available to the Assistant Administrator or his representative.

(c) A license issued under this section shall contain a limitation on the number of whales that may be landed or struck, as provided in § 230.74.

(d) Upon issuance of a license, the Assistant Administrator shall issue a certificate of inclusion to each native whaling captain represented by the license holder. Each certificate shall state the whaling village of domicile claimed by the captain and describe the distinctive mark to be permanently affixed to the equipment of the captain. Such certificates are not transferable.

(e) A license issued under this section shall be valid for whaling in 1978 only. The Administrator may suspend any license issued pursuant to this section if he, in his discretion, determines that a change in circumstances resulting from unauthorized whaling activities in 1978 creates an emergency presenting an imminent hazard to the viability of the bowhead population. Immediately upon such determination, the Administrator shall advise all holders of licenses and certificates of inclusion of the suspension and the reasons therefor. Any affected license holder shall, upon request, be entitled forthwith to a informal hearing to determine whether the suspension should be modified or lifted. § 230.74 Quotas.

(a) During the calendar year 1978, the quota for bowheads is allocated among whaling villages as follows:

(1) Kaktovic—1 whale landed or 2 struck, whichever occurs first

(2) Nuigsut—0 whale landed or 0 struck, whichever occurs first

(3) Barrow—3 whales landed or 4 struck, whichever occurs first

(4) Wainwright—2 whales landed or 2 struck, whichever occurs first

(5) Point Hope—2 whales landed or 2 struck, whichever occurs first

(6) Kivalina—1 whale landed or 2 struck, whichever occurs first

(7) Gambell—1 whale landed or 2 struck, whichever occurs first

(8) Savoonga—1 whale landed or 2 struck, whichever occurs first

(9) Wales—1 whale landed or 2 struck, whichever occurs first

(b) When the number of bowheads struck or landed by whaling captains domiciled in a whaling village equals the quota for such whaling village as set forth in paragraph (a) of this section, whaling by all captains domiciled in that whaling village shall cease. All license holders and certificate holders shall be notified promptly by the Assistant Administrator using all reasonable means of communication. Licenses and certificates of inclusion held by whaling captains domiciled in a whaling village which has reached its quota shall not be valid after the quota for that whaling village has been reached.

(c) If for any reason the landing or struck quota for a whaling village is not reached, the part of the quota which remains may be reassigned, upon request of such village, to a second whaling village by the Administrator: Provided, That no other whaling village has exceeded its quota at the time of the reassignment. In making such reassignment the Administrator shall consult with representatives of as many whaling villages as time reasonably permits and shall initially give preference to the village of Nuigsut.

§ 230.75 Salvage of stinkers.

(a) Any person salvaging a stinker shall submit to the Assistant Administrator or his representative an oral or written report describing the circumstances of the salvage within 12 hours of such salvage. He shall provide promptly to the Assistant Administrator or his representative each harpoon, lance, or explosive dart found in or attached to the stinker who shall return the device to the owner thereof promptly unless it is retained as evidence of a possible violation.

(b) There shall be a rebuttable presumption that a stinker has been struck by the captain whose mark appears on the harpoon, lance or explosive dart found in or attached thereto, and, if no

strike has been reported by such captain, such strike shall be deemed to have occurred at the time of recovery of the device.

§ 230.76 Reporting by whaling captains.

(a) All whaling captains shall provide to the Assistant Administrator or his representative an oral or written report within 12 hours of the striking, attempted striking, or landing of a bowhead. The Assistant Administrator is authorized to provide technological assistance to facilitate prompt reporting. The report shall include at least the following information:

(1) The number, dates, and locations of each strike, attempted strike, or landing;

(2) The length (as measured from the point of the upper jaw and the notch between the tail flukes), the extreme width of the flukes, and the sex of the bowhead(s) landed;

(3) The length and sex of a fetus, if present in a landed bowhead;

(4) An explanation of circumstances associated with the striking or attempted striking of any bowhead not landed; and

(5) The number of bowheads sighted by the whaling captain or any member of the whaling crew.

(b) Each captain shall keep a written record of the information required in paragraph (a) of this section, and shall forward the record to the Assistant Administrator within a reasonable time after whaling for bowheads has ceased for the season. In any event the report shall be submitted by July 15 for the preceding spring whaling season and by December 15 for the preceding fall whaling season.

§ 230.77 Penalties.

Any person who whales in contravention of these regulations, or violates any other provision of the Whaling Convention Act or of these regulations shall be subject to the penalties set forth in 16 U.S.C. 916e and 916f and any other penalties provided by law.

AMERICAN INDIAN RELIGIOUS FREEDOM

On December 15, 1977, Senator Abourezk from South Dakota, on the floor of the United States Senate, introduced a Joint Resolution relating to American Indian Religious Freedom. The Joint Resolution was read twice and referred to the Select Committee on Indian Affairs. On March 9, 1978, the Select Committee ordered that S.J. Res. 102 be reported to the Senate. The report was favorable, and no amendments were added to the Resolution. On April 3, 1978, the Resolution was unanimously passed by the Senate with amendments. The Resolution must now go to the House of Representatives for consideration. The text, as amended, appears below:

JOINT RESOLUTION

American Indian Religious Freedom.

Whereas the freedom of religion for all people is an inherent right, fundamental to the democratic structure of the United States and is guaranteed by the 1st Amendment of the United States Constitution;

Whereas the United States has traditionally rejected the concept of a government denying individuals the right to practice their religion and, as a result, has benefited from a rich variety of religious heritages in this country;

Whereas the religious practices of the American Indian (as well as Native Alaskan and Hawaiian) are an integral part of their culture, tradition and heritage, such practices forming the basis of Indian identity and value systems;

Whereas the traditional American Indian religions, as an integral part of Indian life, are indispensable and irreplaceable;

Whereas the lack of a clear, comprehensive, and consistent Federal policy has often resulted in the abridgment of religious freedom for traditional American Indians;

Whereas such religious infringements result from the lack of knowledge or the insensitive and inflexible enforcement of Federal policies and regulations premised on a variety of laws;

Whereas such laws were designed for such worthwhile purposes as conservation and preservation of natural species and resources but were never intended to relate to Indian religious practices and, therefore, were passed without consideration of their effect on traditional American Indian religions;

Whereas such laws and policies often deny American Indians access to sacred sites required in their religions, including cemeteries;

Whereas such laws at times prohibit the use and possession of sacred objects necessary to the exercise of religious rites and ceremonies;

Whereas traditional American Indian ceremonies have been intruded upon, interfered with, and in a few instances banned: Now, therefore, be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That henceforth it shall be the policy of the United States to protect and preserve for Native Americans their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiian, including but not

limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites . . .

Sec. 2. The President shall direct the various Federal departments, agencies, and other instrumentalities whose duties impact on Native American religious practices to evaluate their policies and procedures in consultation with Native religious leaders in order to determine and implement changes which may be necessary to protect and preserve Native American religious cultural rights and practices. Twelve months after approval of this resolution, the President shall report back to Congress the results of his evaluation, including any changes which were made in administrative policies and procedures, and any recommendations he may have for legislative action.

INDIAN CLAIMS COMMISSION 1977 ANNUAL REPORT

Highlights

In fiscal year 1977, the Commission entered 78 decisions affecting 117 dockets. These decisions added approximately two volumes (960 pages) to the Commission's official reports. The 78 decisions included 12 final awards involving 14 dockets and totalling more than \$67,000,000.

On October 8, 1976, the President signed Public Law 94-465 authorizing appropriations for the Commission for fiscal year 1977. This Act provides that the Commission shall terminate by September 30, 1978, at which time all cases still pending shall be transferred to the Court of Claims for adjudication. It also provides that at any time, beginning in December 1976, the Commission may transfer to the Court of Claims any cases which it determines cannot be completely adjudicated prior to the dissolution of the Commission.

Following enactment of its FY 1977 authorization, the Commission proceeded at once to schedule calendar conferences with the attorneys for the parties in the remaining cases. These conferences were held in late October and the first two weeks of November 1976. At these meetings the status of each pending matter was carefully reviewed, the need for future trials was considered, and agreements were reached wherever practicable as to the timing of the trials of the remaining phases of the cases. Whenever it appeared that a case could not be completed during the remaining life of the Commission, steps were initiated to insure its transfer to the Court of Claims as soon as possible. (See Appendix A. *)

Authorization bills for fiscal year 1978 were proposed in March 1977. On April, 1977, the House Subcommittee on Indian Affairs held a hearing at which the Commission requested an FY 1978 authorization of \$2,250,000, an amount which would cover all foreseeable needs including termination costs. Several provisions designed to facilitate completion of any remaining cases by the Court of Claims were added and, following Senate approval, the President signed the authorization on July 20, 1977 (Public Law 95-69).

Appendix A

CLAIMS TRANSFERRED TO THE COURT OF CLAIMS

Date of Docket Number Order	Tribe, Band or Group and Type of Claim or Claims	Transfer
19	Chippewa, Minnesota, et al.) Consolidate accountings claims.	
189-A	Chippewa, Red Lake, et al.)	
189-B	Chippewa, Red Lake, et al.)	Dec. 15, 1976
22-G	Apaches, Mescalero, et al. Accounting claims.	Dec. 15, 1976
22-H	Apaches, San Carlos, White Mountain, et al. Accounting claims.	Dec. 15, 1976
80-A	Baron Long, et al. (Soboba and other bands of Mission Indians of California). Claims arising from deprivation of certain water rights and from infringement of other water rights.	Dec. 15, 1976
80-B	Baron Long, et al. (Mission Indians of California.) Accounting claims	Dec. 15, 1976
179-A	Nez Perce of Idaho. Accounting claims for period beginning July 1, 1951.	Dec. 15, 1976.
184	Fort Peck Indians of Fort Peck Reservation, Montana Accounting claims.	Dec. 15, 1976
188	Chippewa, Minnesota, et al.) Consolidated damage and	
189-C	Chippewa, Red Lake, et al.) Accounting claims.	Dec. 15, 1976
236-N	Pima-Maricopa (Gila River). Accounting claims.	Dec. 15, 1976
291	Pima-Maricopa (Salt River). Accounting claims.	Dec. 15, 1976
320	Quechan. Claim for compensation for tribal land.	Dec. 15, 1976
326-C	Shoshone-Bannock, Fort Hall Reservation, Idaho. Accounting claims.	Dec. 15, 1976
363	Lower Sioux Indian Community in Minnesota, et al. Claims for an accounting for money and for the misuse or mismanagement of money.	Dec. 15, 1976
69	Navajo, Claim 7 in Docket No. 69.) Consolidated	
299	Navajo overlapping	
353	Navajo.) accounting claims.	Dec. 27, 1976

*Appendix A appears as Appendix 4 in the official report. Appendix B appears as Appendix 3 in the official report.— *Ed.*

69	Navajo, Claims 1 through 6 and Claim 8. These claims involve, <i>inter alia</i> , allegations of the loss or unauthorized use of tribal lands, unauthorized removal of land resources, failure of defendant to carry out education obligations, and breach of an agreement to return homelands "to the east."	Dec. 27, 1976 Feb. 17, 1977
350-G 179-A	Fort Berthold. Accounting claims. Colville, Accounting claims for the period beginning July 1, 1951.	Feb. 24, 1977

- 1 The transfers were effected pursuant to Public law 94-465, approved Oct. 8, 1976 (90 Stat. 1990).
- 2 Although Docket No. 363 is counted in Appendix 5 as one of 21 transferred to the Court of Claims, a portion thereof consisting of a claim for \$255,273.00, dependent on the outcome of the defendant's cross appeal mentioned in footnote 20 on page 12 of Appendix 2, was pending before the Commission at Sept. 30, 1977. Three final awards on separate claims in Docket No. 363 dated July 25, 1967, Feb. 27, 1974, and Sep. 14, 1977, are listed in Appendix 2.

Appendix B

FINAL AWARD SUMMARIES

SUMMARY OF FINAL AWARDS — FISCAL YEAR 1977:	Amount	No. of Dockets Disposed of by by Final Awards
Final awards certified to the Treasury in Docket Nos. 236-A and 236-B (Pima-Maricopa)	\$1,575,465.90	2
Final awards entered and certified to the Treasury in Docket Nos. 64, 335 and 338 (Shawnee); 73-A (Seminole); 100-B-1 (Klamath, et al.); 134 (S; Klallam); 196 (Hopi); 342-G (Seneca); 363 (Sioux); and 364 (Ottawa-Chippewa)	38,935,860.97	8
Final awards entered having appeal time running at September 30, 1977, in Docket Nos. 226 (Caddo), and 326-K (Western Shoshone)	26,528,665.44	
Final awards entered that were on appeal in the Court of Claims at September 30, 1977, in Docket Nos. 18-D (Chippewa, Bois Forte), and 169 (Creek)	2,139,514.85	
Totals	\$ 69,179,507.16	10

CUMULATIVE SUMMARY OF FINAL AWARDS
AT SEPTEMBER 30, 1977*

Final awards certified to the Treasury	669,165,045.13	284
Final awards having appeal time running as stated in 1977 summary, above.	26,528,665.44	
Final awards on appeal before the Court of Claims in Docket Nos. 15-C, 29-A and 71 (Potawatomi); 18-D (Chippewa, Bois Forte); 169 (Creek); and 236-E (Pima-Maricopa)	11,829,944.75	
Totals	\$ 707,523,655.32	284