

CLAIM SUMMARY / DETERMINATION

Claim Number:	J05003-0007
Claimant:	IMC Shipping Co. Pte. Ltd., Ayu Navigation Sdn Bhd
Type of Claimant:	Responsible Party
Type of Claim:	RP payment to 3 rd Party Claimant – St. George Tanaq Corporation
Amount Requested:	\$1,600,000.00

INCIDENT

The M/V SELENDANG AYU (SELENDANG or vessel) was on a voyage from Seattle to China on December 06, 2004. While operating in adverse weather conditions, the crew shut down the main engine as a result of a casualty to the No. 3 cylinder. While attempting to repair the engine, the vessel drifted and eventually grounded on December 08, 2004 on a rocky shelf on the north shore of Unalaska Island, northeast of Spray Cape. The grounding ruptured the vessel's hull and bottom tanks, causing a discharge of approximately 330,000 gallons of bunkers into the waters off Unalaska Island.

CLAIMANT AND CLAIM

1. Claimants

Ayu Navigation Sdn Bhd (Ayu), IMC Shipping Co. Pte. Ltd. (IMC), Sveriges Angfartygs Assurans Forening (The Swedish Club), and International Group of Protection and Indemnity Clubs (International Group) (collectively "the Claimants") are the responsible parties under the Oil Pollution Act of 1990 (OPA) and their insurers. Ayu owned the vessel, and IMC operated it. The Swedish Club, International Group, and the International Group's reinsurers were the subrogated underwriters.

Pursuant to 33 U.S.C. § 2708(a)(2), the Claimants presented a claim to the Oil Spill Liability Trust Fund (OSLTF or the Fund) via the National Pollution Funds Center (NPFC) on December 07, 2007, asserting entitlement to a limit on its liability for oil removal costs and damages resulting from the incident. The Claimants sought reimbursement for incurred removal costs and for damages paid to third parties above their liability limit. On January 27, 2012, the NPFC determined that the Claimants were entitled to their statutory limit of liability, \$23,853,000. The NPFC began adjudicating the Claimants' removal costs claims, reimbursing qualifying costs that exceed the liability limit. This claim before the Fund seeks reimbursement of certain amounts Claimants paid in settlement to a third party who asserted property damages caused by the incident.

2. Third-Party Tribal Corporation Claim

The RP/Claimants settled a third party claim of the St. George Tanaq Corporation, a Native Alaskan Village Corporation (St. George), with a payment of \$1.6 million. St. George resides on St. George Island and has land holdings on Unalaska Island, which St. George argues were held for cultural and ecological preservation in their natural state and the RP argues were held for

commercial use.¹ St. George argued to the RP/Claimants that its land holdings on Unalaska Island were contaminated from the spill, and, as a result its land values were diminished. It sought compensation for the reduced land values. St. George presented a claim to the RP/Claimants, alleging that the SELENDANG's owner and operator were strictly liable under OPA, Alaska Statutes § 46.03.822, and common law trespass for contaminating St. George lands with oil from the spill.

APPLICABLE LAW

Under OPA, responsible parties are liable for certain defined removal costs and damages resulting from oil discharges into or upon the navigable water, adjoining shorelines, or the exclusive economic zone of the United States. 33 U.S.C. § 2702(a).

Pursuant to 33 U.S.C. § 2708(a) a responsible party may assert a claim for such removal costs or damages to the NPFC, provided the responsible party demonstrates entitlement to a complete defense or limitation of liability.

Where the asserted claim is for amounts paid to a third party claimant the responsible party, as subrogee, must support the claim for removal costs or damages just as any other claimant. 33 C.F.R. § 136.107.

A real or personal property damages claim seeks compensation for “[d]amages for injury to, or economic losses resulting from destruction of, real or personal property.” 33 U.S.C. § 2702(b)(2)(B).

33 CFR §136.215(a) provides the proof requirements for property damage claims. A claimant must establish --

- (1) An ownership or leasehold interest in the property;
- (2) That the property was injured or destroyed;
- (3) The cost of repair or replacement; and
- (4) The value of the property both before and after injury occurred.

Under 33 CFR §136.217(a), the “amount of compensation allowable for damaged property is the lesser of --

- (1) Actual or estimated net cost of repairs necessary to restore the property to substantially the same condition which existed immediately before the damage;
- (2) The difference between the value of the property before and after the damage; or
- (3) The replacement value.”

Compensation allowable for economic loss resulting from real property damages is limited to actual economic losses suffered from loss of use of commercial property or for costs incurred in utilizing substitute commercial property. 33 C.F.R. § 136.217(b).

Under 33 C.F.R. § 136.215(b), a claimant seeking economic losses resulting from destruction of the property must establish the following:

¹ The land use is debatable since the RP/Claimants argue that it was leased for a grazing operation. St. George admits that it was leased for grazing briefly, but no longer at the time of the incident.

- (1) That the property was not available for use and, if it had been, the value for that use;
- (2) Whether or not substitute property was available and, if used, the costs thereof; [and]
- (3) That the economic loss claimed was incurred as the result of the injury to or destruction of the property.

Claims for loss of use of noncommercial property are not compensable as an economic loss resulting from injury to real or personal property. 33 C.F.R. § 136.217(b).

Natural resource damages are damages for injury to, destruction of, loss of, or loss of use of, natural resources, including the reasonable costs of assessing the damage, which shall be recoverable by a United States trustee, a State trustee, an Indian tribe trustee, or a foreign trustee. 33 U.S.C. § 2702(b)(2)(A)

Under 33 C.F.R. §§ 136.105(a) and 136.105(e)(6), the claimant bears the burden of providing to the NPFC, all evidence, information, and documentation deemed necessary by the Director, NPFC, to support the claim.

RP/CLAIMANTS -- CLAIM TO THE FUND

Keesal, Young and Logan, attorneys for the RP/Claimants, provided the following documents to support its claim:²

- (1) letters between Faegre & Benson, attorneys for St. George, and Keesal, Young and Logan, attorneys for the RP/Claimants;
- (2) a MacSwain Associates appraisal prepared for Keesal, Young and Logan, and
- (3) an executed Settlement Agreement and Release dated March 12, 2008, and proof of payment.

The letters between St. George attorneys and RP/Claimants attorneys were arguments regarding each party's estimation of damages, methodologies and valuations for the St. George property and briefs to the mediator.

According to the letters to the RP/Claimants and a brief submitted to a mediator St. George argued that its entire 35,799 acres of owned and "selected" lands were impacted by the persistent nature of the oil, uncertainty and stigma due to the Selendang discharge of oil. St. George

²1) April 4, 2007 Faegre & Benson (FB) initial letter claiming damages from the RP;

2) August 15, 2007 Keesal, Young & Logan (KYL) letter to St. George's attorney with settlement offer, release and MacSwain Associates Restricted Use Appraisal.

3) September 20, 2007 FB rebuttal letter rejecting the RP's initial settlement offer and arguing for a higher claim amount.

4) November 5, 2007 FB letter presenting its argument to the mediator, [REDACTED]

5) November 6, 2007 Keesal, Young & Logan (KYL) letter presenting its argument to the mediator. KYL's letter included attachments. Attachment 1 contained comments and some information on the St. George Tanaq claim, including the MacSwain Associates Restricted Use Appraisal estimating land damages on St. George land on Unalaska Island. Attachment 3 contained maps of the island and distances to the island.; and

6) The signed final release and wire transfer payment details.

argued that it was entitled to damages for 17,601 acres of conveyed land and 18,198 acres of selected land. Using a projected impaired rental valuation over a 30-year period, St. George claimed \$19,630,434 for impairment of use of its property. In arguing injury to its property, St. George asserted that the highest and best use of the land is cultural and ecological preservation, and that the disruption of the use of their land should be valued in the context of damages to natural resources.³

The RP/Claimants stated that they were strictly liable to pay for damages resulting from a temporary impairment in the preservation value of lands that were being preserved.⁴ Their appraiser's report states that approximately 1.19 miles of shoreline⁵ of St. George's oceanfront land was contaminated by the incident. The MacSwain report states that the impact was temporary, terminating after one year by the end of the cleanup response. In their brief to the mediator, the RP/Claimants valued the property based on the MacSwain Associates appraisal, which used a standard appraisal technique for valuing remote lands in Alaska. It determined that the impaired rental value of St. George's affected 6,755± acres of shoreline-related area over the one impaired year was \$310,700.⁶

DETERMINATION

The RP/Claimants seek reimbursement from the Fund for the \$1.6 million settlement payment made to St. George for alleged real property damages. St. George sought damages for its entire holdings for a thirty-year period based on impaired rental values; however, the property is allegedly held for, and its best use is, cultural and ecological preservation. On the other hand the RP/Claimants argued that only a small portion of St. George land was temporarily impacted by the oil, basing its valuation on a fair market rental value of the alleged impacted shoreline for which there is no evidence that the shoreline was rented.

As will be more fully explained below the claim is denied on the grounds that the RP/Claimants have not established that the \$1.6 million payment to St. George compensated for real property damages as defined by OPA; therefore, the claim is not reimbursable from the Fund. Further, even if this was for real property damages payable from the Fund RP/Claimants have not established that the payment of the \$1.6 million is supported by the alleged values set forth in the claim.

OPA provides that the Fund is available to pay for uncompensated removal costs and uncompensated damages. 33 U.S.C. § 2712 (a)(4). Pertinent to this claim are damages for injury to, or economic losses resulting from, the destruction of, real or personal property, which shall be recoverable by a claimant who owns or leases that property. 33 U.S.C. §§ 2702(b)(2)(B). The Fund is also available to pay damages for the injury to, destruction of, or loss of natural resources, but these damages are only payable to a natural resource trustee that has been designated pursuant to OPA. 33 U.S.C. § 2702(b)(2)(A).

³ FB letter dated 4/4/07, p. 7

⁴ November 6, 2007 KYL letter to mediator, p. 2.

⁵ MacSwain Associates, Restricted Land Use Appraisal for St. George Corporation Land, page 15.

⁶ MacSwain Associates, Restricted Land Use Appraisal for St. George Corporation Land, pages 20 & 21.

Importantly, the Claims Regulations at 33 CFR 136.107 provide that a subrogee must support a claim in the same manner as any other claimant and is only entitled to reimbursement of OPA-compensable damages identified in 33 U.S.C. § 2702(b). Thus, under 33 CFR §136.215(a) the information presented by the RP/Claimants must establish that (1) St. George had an ownership or leasehold interest in the property, (2) the property was injured or destroyed by the incident, (3) the cost of repair or replacement of the damaged property; and (4) the value of the damaged property both before and after the injury occurred. Real property damage does not include impairment of preservation value.

Regarding ownership, there are references (but not primary evidentiary documentation)⁷ in the administrative record provided by the RP/Claimants that St. George owned lands from Pumicestone Bay to Kismaliuk Bay and from Kismaliuk Bay to Alimuda Bay on Unalaska Island and that some portion of the property may have been initially impacted by oil; however, RP/Claimants have not proven St. George's ownership in the allegedly damaged property.

The records provided by the RP/Claimants reflect that St. George and the RP/Claimants disputed key aspects of St. George's claim. The RP/Claimants disagreed with St. George as to: (1) the fair market value of the land; (2) whether the land was in fact being preserved when it was used to graze livestock;⁸ (3) the extent of the oiling; (4) the distance inland that the spill affected the temporary use of the land, and (5) the temporal duration of the impairment to use of the lands. The parties submitted their arguments to a mediator.

The RP/Claimants have not provided evidence of lingering injury or destruction of the property. The MacSwain report states that oil impacted some areas of the shorelines and required cleanup and further assessment, but either no oil was observed for the remainder of the lands or the location and extent of the oiling did not warrant cleanup operations.⁹ The property passed CG inspection by the end of August 2005, but a reinspection of some property occurred in the spring of 2006 at the request of St. George.¹⁰ MacSwain's assessment stated that any disruption of St. George's land use lasted one year.¹¹ Given, the estimate via MacSwain that no damage remained after one year, the record does not show why the RP/Claimant compensated St. George in the amount of \$1.6 million.

Further, the RP/Claimants have not provided evidence that St. George land actually lost value nor that St. George actually realized any financial loss due to oil damage, a necessity to proving damage. St. George remains the owner of the property and there is no evidence that the property was under contract for sale or lease at the time of the incident. There is no evidence that St. George suffered a loss of a sale or lease or suffered a reduced sale price or reduced rental income.

Based on the administrative record provided by the RP/Claimants St. George was not seeking reimbursement for repair or replacement of injured or damaged property or for economic losses

⁷ RP/Claimants provided no source documentation or evidence with its claim to the Fund.

⁸ Although the RP/Claimants state the tribal corporation leased their land to a livestock grazing operation, and the St. George Tanaq letters admit to a brief small commercial grazing operation on St. George Tanaq land which had ended, there is no evidence provided to support either position.

⁹ MacSwain Associates, Restricted Land Use Appraisal for St. George Corporation Land, page 15.

¹⁰ MacSwain Associates, Restricted Land Use Appraisal for St. George Corporation Land, page 15.

¹¹ MacSwain Associates, Restricted Land Use Appraisal for St. George Corporation Land, page 15.

due to destruction of property. It was, however, seeking \$19,630,434 for lost value and/or impairment of use of the entire 35,799 acres for a 30-year period. St. George argued that the land's best use was cultural and preservation; therefore, it is non-commercial property.¹² St. George, in a letter to the RP/Claimants, argued non-economic losses and damage to natural resources (i.e. disruption to preservation use of its lands). Such damages, if proven, would be payable only to natural resource trustees designated pursuant to OPA. St. George is not a designated natural resource trustee and could not be compensated from the Fund for such claimed damages. Thus, the RP/Claimants could not be compensated for paying St. George for this type of claim.

In summary, there is no information in the administrative record establishing that the RP/Claimants provided any documentation to support real property damages to St. George lands that would be compensable from the Fund and that those damages were \$1.6 million. It is clear, based on the Settlement Agreement and Release, that this was a "compromise by the Parties of disputed claims."¹³ St. George and the RP/Claimants executed a settlement agreement on March 12, 2008; the RP remitted a \$1.6 million payment on March 28, 2008.¹⁴ Simply paying a settlement does not establish that the RP/Claimant is entitled to reimbursement from the Fund.

Conclusion

For the reasons stated above this claim is denied.

Claim Supervisor:

Date of Supervisor's Review: 8/22/2013

Supervisor's Action: Denial Approved.

Supervisor's Comments:

¹² Lost use of non-commercial property is not OPA-compensable.

¹³ Settlement Agreement and Release, paragraph 5(e).

¹⁴ The Swedish Club Letter of Remittance for payment to St. George, dated March 28, 2008.