

CLAIM SUMMARY/DETERMINATION FORM

Claim Number	J05003-0008
Claimant	IMC Shipping Co. Pte. Ltd. <i>et al</i>
Type of Claimant	Responsible Party (US)
Type of Claim	RP payment to 3 rd Party Claimant - Ounalashka Corporation
Amount Requested	\$410,000.00

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 Claimant's 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 third parties who asserted property damages caused by the incident.

2. Third-Party Tribal Corporation Claim

The RP/Claimants settled a third party claim¹ with the Ounalashka Corporation (OC), a Native Alaskan Village Corporation, with a payment of \$410,000.00. OC allegedly owned approximately 29,180 acres of contiguous, undeveloped land on Unalaska Island. The land

¹ The record provided by the RP/Claimants does not evidence that OC properly presented a claim in accordance with OPA, (e.g. there is no written demand for a sum certain).

consists of meandering shoreline and shoreline-adjacent portions on Makushin Bay, Humpback Bay, Portage Bay, Cannery Bay, Udamak Cove, and Naginak Cove allegedly contaminated by oil from the *Selendang* incident.² OC seemingly argued to the RP/Claimants that since these land holdings were contaminated by the spill, OC temporarily lost use of the property. For this alleged loss of use, OC and the RP/Claimants settled on a payment to OC in the amount of \$410,000.00.³

APPLICABLE LAW

Where an RP's 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.

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.

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) That the property was not available for use and, if it had been, the value for that use;

² See MacSwain Associates Restricted Land Use Proposal for Ounalashka Corporation Land, page 12, submitted to the NPFC by the claimant with the claim on 3/23/2012.

³ See the Settlement Agreement and Release (OUN 79-89), dated 5/18/2007, and the KYL check, dated 6/06/2007, both submitted to the NPFC by the claimant with the claim on 3/23/2012.

- (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)

RP/CLAIMANTS -- CLAIM TO THE FUND

Keesal, Young and Logan (KYL), attorneys for the RP/Claimants provided the following documentation with the claim:

1. Cover Letter from MR & Associates, LLC, dated 11/27/2007
2. Segment Inspection Reports for Segment IDs AND06, AND07, AND08, CNB01, CNB10, CNB11, CNB14, CNB15, CNB17, CNB20, CNB21A, PTS01, PTN04, PTN10, HMP 05, HMP06, HMP07, HMP08, HMP10, HMP11a, HMP11b, HMP 12, HMP13a, HMP13b, MKS01, NGW02, NGW03, NGE07, UDW01, UDW04, and UDE16
3. Copy of Third-Party Damage Claims description (Ounalashka Corp. was not listed)
4. Letter from Turner & Mede, PC to RP/Claimants, dated 11/17/2006
5. Letter from RP/Claimants to Turner & Mede, PC, dated 12/04/2006
6. Letter from RP/Claimants to Turner & Mede, PC, dated 4/13/2007
7. MacSwain Associates Restricted Use Appraisal Report
8. Letter from MacSwain Associates to RP/Claimants. Dated 5/16/2007
9. Letter from Turner & Mede, PC to RP/Claimants, dated 5/18/2007, with attached OC Attorney Fees
10. OC Costs for Employee Compensation Spreadsheet
11. Settlement Agreement between OC and RP/Claimants, signed and dated 5/18/2007
12. Signed Check from RP/Claimants to OC, date 6/06/2007

It is not clear from the administrative record sent to the Fund that the Ounalashka Corporation (OC) presented a claim to the RP/Claimants for a sum certain. Although Turner & Mede, P.C. (Turner and Mede) represented OC during negotiations and settlement it appears that the OC initially began negotiations with the RP/Claimants prior to the OC retaining attorneys in this claim.

OC sought compensation from the RP/Claimants for temporary lost use to its approximately 29,180 acres caused by oiling and the subsequent removal and cleanup actions. OC asserted that it did not suffer direct economic losses nor was it seeking diminution in value. The OC attorneys and RP/Claimants' attorneys agreed that MacSwain Associates (MacSwain) would provide an

expert appraisal of the value of the OC lands.⁴ Based on a one-year estimate of rentals on an estimated 6814± acres of shoreline-related land, MacSwain arrived at a damage estimate for loss of use totaling \$245,000. The alleged OC attorney's fees were \$34,971 and OC personnel costs were \$9,548.42. These amounts total \$289,519.42. The RP/Claimants paid OC \$410,000.

DETERMINATION

The RP/Claimants seek reimbursement from the Fund for the \$410,000 settlement payment made to OC. OC sought compensation from the RP for the temporary loss of use of its lands,⁵ OC personnel costs and legal fees⁶ as mentioned above. OC specifically stated that it was not seeking compensation for diminution in value of its property nor was it claiming that it suffered direct economic losses relating to its property.^{7 8} Rather, OC stated outright that it was claiming that it had suffered temporary lost use stemming from the *Selendang* incident and the resulting cleanup operations.⁹ OC alleged that these lands' highest and best use was "preservation as natural land in its pristine state"—i.e., a noncommercial purpose.¹⁰

In general, under 33 C.F.R. § 136.217(b) claims for loss of use of noncommercial property are not compensable to third parties as an economic loss resulting from injury to real or personal property. There is one exception under OPA: designated natural resource trustees may recover for loss of use of noncommercial real property or natural resources. 33 U.S.C. § 2702(b)(2)(A). Trustees include federal, state and Indian tribe trustees. 33 U.S.C. § 2706(b)(1); however, the definition of an "Indian tribe" under OPA excludes any Alaska Native regional or village corporation. 33 U.S.C. § 2701(15). The Ounalashka Corporation is an Alaskan village corporation; therefore, it is not an Indian tribe trustee as defined by OPA and cannot recover for loss of natural resources.

Further, the OC asserts that its lands' highest and best use is preservation as natural land in a pristine state; therefore, it is non-commercial land. The claims regulations provide that the loss of use of noncommercial property is not compensable as an economic loss; therefore, the Fund is not available for payment. Since compensation is inappropriate under OPA to the extent that the settlement reflects payment for loss of use of the tribal corporation's lands, the RP/Claimants may not recover from the OSLTF for payments made to OC for loss of use of preserved, noncommercial lands. 33 C.F.R. § 136.217(b).

Attorney's Fees

OC presented the RP/Claimants with its attorney fees and employee fees in the amount of \$34,971 and \$9,548.42 respectively. OC's representatives provided the Claimants with an

⁴ Turner & Mede letter to Keesal, Young & Logan dated 11/17/2006, and confirmed by Keesal, Young & Logan in its letter dated 12/04/2006.

⁵ Turner & Mede letter to Keesal, Young & Logan dated 11/17/2006, p. 4.

⁶ These three costs account for \$317,597.67. It remains unclear as to what the entire claim amount actually covers.

⁷ Turner & Mede letter to Keesal, Young & Logan dated 11/17/2006, p. 4.

⁸ Even if OC had sought real property damages, they would not be compensable since the RP/Claimants had not shown the requirements of ownership, sustained damages and valuations under the regulations.

⁹ See Turner & Mede, P.C. Correspondence Letter (page 4), dated 11/17/ 2006, and submitted to the NPFC by the claimant with the claim on 3/23/2012.

¹⁰ See Turner & Mede, P.C. Correspondence Letter (page 4), dated 11/17/ 2006, and submitted to the NPFC by the claimant with the claim on 3/23/2012.

accounting for attorney's fees incurred by OC in response to the *Selendang* incident, assessment and claim preparation.¹¹ While a claimant may recover reasonable costs of assessing compensable damages under OPA it may not recover attorney's fees or other administrative costs associated with preparing and presenting a claim.


To the extent the attorneys fees were incurred to prepare the claim, assess damage or negotiate with the RP/Claimants the fees are not recoverable under OPA. The Agreement noted that this was a compromised settlement of claims between the parties and does not detail what the settlement encompasses; therefore, any part of the RP/Claimants' claim that represents payment of OC's attorney fees is denied.

OC stated that it incurred \$9,548.42 for OC personnel time allegedly working on the negotiations and/or time on scene during property damage and value assessments, and it provided a spreadsheet statement of the costs.¹² According to OC's attorney the activities allegedly involved participation in stakeholder and public meetings, but there is no evidence or details of the activities; therefore, it is not known if any of these personnel costs would be compensable under OPA. Again, the negotiated settlement does not evidence for what, if any, the RP/Claimants compensated the OC personnel; therefore, it is not known if the costs would be OPA-compensable. Thus, the RP/Claimants cannot recover these costs from the Fund.

Conclusion

OC was not eligible as a natural resource trustee to seek loss-of-use damages under OPA. OC also did not hold the land for commercial use; therefore, any economic losses for loss of use would not be compensable as real property damages.

The RP/Claimants negotiated a settlement payment to OC in the amount of \$410,000. The Settlement Agreement and Release does not provide details of the compensation paid to the OC by the RP/Claimants. The Agreement noted that this was a compromised settlement of claims between the parties. Based on the record provided to the NPFC the RP/Claimants have not established that its payment to the OC was for OPA-compensable damages; therefore, the claim is denied.

Claim Supervisor: 

Date of Supervisor's Review: 9/4/2013

Supervisor's Action: Denial Approved.

Supervisor's Comments:

¹¹ See Turner & Mede, P.C., Correspondence Letter, dated 5/18/2007 and the Turner & Mede, P.C., Invoices, 5/10/2007, both submitted to the NPFC by the claimant with the claim on 3/23/2012.

¹² See Ounalashka Corporation's Costs for Employee Compensation as a Result of Selendang Ayu Oil Spill (OUN 71—78), undated, submitted to the NPFC by the claimant with the claim on 3/23/2012.