

Hearing before the Subcommittee on Asia, the Pacific, and the Global Environment of the Committee on Foreign Affairs, House of Representatives, 111th Congress, 2nd Session, May 10, 2010

STATEMENT OF MR. JONATHAN M. WEISGALL, LEGAL COUNSEL FOR THE PEOPLE OF THE BIKINI ATOLL

Mr. Weisgall. Mr. Chairman, thank you very much. I am legal counsel for the people of Bikini, but today I have been asked to testify on behalf of Bikini, Enewetak, Rongelap, and Utrok, the atolls most directly affected by the U.S. nuclear testing program. They are here today, Mr. Chairman, to tell you one story, and that is to review a 64-year shell game that the United States has played with their constitutional rights.

I am going to go over some of the issues that you covered with the first panel, but maybe from some different angles. So I am going to jump around a little bit in my statement.

Let's begin back in 1947 with the U.N. When the United States pledged to the United Nations in that agreement to protect the inhabitants against the loss of their lands and resources, that did not happen. The people of Bikini and Enewetak left their homelands and relied on the government's promise to return them safely. That has yet to happen. Bikini is still radioactive. No one lives there. The Enewetak people cannot return to their northern islands because of the high radiation levels there.

Let me give you an interesting statistic about that Bravo shot. The people of Rongelap, 125 miles away from Bikini, received radiation doses similar to people 2 miles from ground zero in Hiroshima and Nagasaki. That was the strength of the Bravo shot.

That Compact of Free Association--those solemn words by the United States, ``We accept the responsibility for compensation owing to the citizens of the Marshall Islands for loss or damage to property and person resulting from the nuclear testing program.' I have got that memorized.

On the other hand, the United States acknowledged its obligation but forced the Marshallese to seek the compensation in this newly established Nuclear Claims Tribunal. The atolls argued at the time that the funding was inadequate to protect their rights, and the U.S. courts ruled that they have to exhaust their remedies under the tribunal first before they come back. We will get back to that question.

Nineteen years go by with litigation before the tribunal. As you said, awards of \$2.2 billion and payments of \$3.9 million. If Mr. Ackerman were here, I would tell him the exact finances of that \$150 million trust fund which had to pay out \$18 million per year for 15 years. You do the math. It had to earn 12 percent per year. And, by the way, the first year of the trust fund was the 1987 crash, so you know what happened to that trust fund.

The Marshallese patiently pursued every possible remedy afforded by our legal system. They trusted the system to make them whole. The U.S. paid them nothing. And when they came back to the U.S. courts to seek to enforce the awards, the U.S.

said, ``Sorry, the doors are closed.''

Let me give you one sentence as to what happened. The United States legislated itself out of its obligation to provide just compensation to these islanders, forced their claims into an alternative forum, and then failed to provide adequate funds for that forum.

My written statement covers the 30 years of litigation before the U.S. courts and the tribunal, but let me stress two key points here, because it is going to lead to my conclusion on this reference case.

Number one, in the 1980s, the U.S. Government wed language in its legal briefs that would have led any reasonable judge to conclude that there would be adequate and sustained funding. I want to read you some highlights from their briefs back in the eighties when this system was set up and they said go to the tribunal.

They called the 177 Agreement, that trust fund--I am quoting--``a permanent alternative remedy, with substantial and regenerating funding, for compensating all claims, in perpetuity.''

Let me quote from some other lines. I am reading from the U.S. Government's briefs: ``Permanent funding mechanism.''
``Comprehensive long-term compensation plan.''
``Provides continuous funding.''
``Structured and financed to operate in perpetuity.''
And, in response to us, ``There is no basis to presume that the Agreement will fail to provide a just and adequate settlement.''

The second point I want to make, the courts. There is a level of sympathy there, and the courts, even in the eighties, said if the tribunal doesn't function correctly--the U.S. Government said if the tribunal doesn't function correctly, ``Congress would need to consider possible additional funding.''
And in their briefs, they refer to that trust fund as a base amount.

And when you read the written opinion of the U.S. Court of Appeals, the Federal Circuit Court of Appeals, two separate times it refers to that trust fund as an ``initial sum,''
an ``initial amount.''
And then 20 years later, last year, the Federal Circuit Court of Appeals recognized that the funding is simply outside of judicial remedy.

There is a role for Congress, that is my point, especially after the Supreme Court denied cert.

What should this committee do? Develop legislation under your congressional reference authority to refer these cases to the Court of Federal Claims; direct that court to make findings sufficient to inform Congress whether this is legal or equitable--that is an issue we have talked about today--legal or moral; and to determine the amount of damages. That court does that every day. They determine damages on land claims. And let them come back with a recommendation.

The American people--and you have heard it from your colleagues up there--the American people have a legal and moral obligation to compensate the people of the Marshall Islands. And I would say to those who have said that the book is closed on this issue because of the passage of the compact and because of the establishment of that trust fund, I would say that one chapter is missing in that book, and that book cannot be closed

until the lands of the islanders are restored and they receive full compensation for their claims against the United States, and the United States cannot and should not play a shell game with the constitutional rights of the Marshall Islanders.

Thank you.