

FOREIGN CLAIMS SETTLEMENT COMMISSION
OF THE UNITED STATES
WASHINGTON, D.C. 20579

IN THE MATTER OF THE CLAIM OF

MATTHEW A. FRYER
a/k/a
SANDY FRYER

Claim No. CU-1617

Decision No. CU -6241

Under the International Claims Settlement
Act of 1949, as amended

Counsel for claimant:

Jesse R. Smith, Esq.

Petition to reopen; Proposed Decision dated and entered June 23, 1971; Final Decision entered October 20, 1971.

AMENDED FINAL DECISION

Under date of October 20, 1971, the Commission entered its Final Decision on this claim certifying a loss in favor of claimant in the amount of \$435,000.00 plus interest. A portion of the claim based upon a mining concession covering the Antonio Mine was denied for lack of proof.

Subsequently, claimant petitioned to reopen the claim, based upon newly discovered evidence, pursuant to the governing regulations of the Commission. (FCSC Reg., 45 C.F.R. §531.5 (1) (1970).) The new evidence consists of a detailed affidavit of January 26, 1972 from claimant; copies of contemporaneous correspondence indicating that the Antonio Mine contained valuable ores and was in operation; and an affidavit of January 24, 1972 from an individual who had investigated the Antonio Mine.

Upon consideration of the new evidence in light of the entire record, the Commission amends the decision in this matter as follows:

The Commission finds that since January 30, 1954 claimant was the lessee for an indefinite term of a mining concession covering the Antonio Mine at Las Villas Province, Cuba. The Commission further finds that the mine was taken by the Government of Cuba on October 15, 1960.

The record shows that the Antonio Mine contained 2,857,142 tons of ore. Claimant's obligation to his lessors was \$0.20 per ton, and pursuant to a sublease in 1958 with a Cuban corporation the sublessee's obligation was to pay claimant \$1.00 per ton and \$0.20 per ton to claimant's lessors. Accordingly, claimant's equity in the ores was \$1.00 per ton.

It further appears that the Antonio Mine was in operation, and that as a result of substantial investments by claimant's lessee the production capacity of the mine was 10,000 tons of ore per month. Therefore, the ores in the mine would be exhausted in almost 24 years.

The Commission finds that the valuation most appropriate to the Antonio Mine and equitable to claimant is the result obtained by the application of a 12% annual discount rate to the yearly valuations of claimant's equity in the ores during the said period of almost 24 years in order to arrive at the aggregate value thereof on October 15, 1960, the date of loss. Accordingly, the Commission finds that claimant's equity in the ores had the following value on October 15, 1960:

| <u>Year</u> | <u>Gross Value</u> | <u>Discount Factor</u> | <u>Net Value</u> |
|-------------|--------------------|----------------------------|------------------|
| 1961 | \$ 120,000.00 | .892857 | \$107,142.84 |
| 1962 | 120,000.00 | .797194 | 95,663.28 |
| 1963 | 120,000.00 | .711780 | 85,413.60 |
| 1964 | 120,000.00 | .635518 | 76,262.16 |
| 1965 | 120,000.00 | .567427 | 68,091.24 |
| 1966 | 120,000.00 | .506631 | 60,795.72 |
| 1967 | 120,000.00 | .452349 | 54,281.88 |
| 1968 | 120,000.00 | .403883 | 48,465.96 |
| 1969 | 120,000.00 | .360610 | 43,273.20 |
| 1970 | 120,000.00 | .321973 | 38,636.76 |
| 1971 | 120,000.00 | .287476 | 34,497.12 |
| 1972 | 120,000.00 | .256675 | 30,801.00 |
| 1973 | 120,000.00 | .229174 | 27,500.88 |
| 1974 | 120,000.00 | .204620 | 24,554.40 |
| 1975 | 120,000.00 | .182696 | 21,923.52 |
| 1976 | 120,000.00 | .163122 | 19,574.64 |
| 1977 | 120,000.00 | .145644 | 17,477.28 |
| 1978 | 120,000.00 | .130040 | 15,604.80 |
| 1979 | 120,000.00 | .116107 | 13,932.84 |
| 1980 | 120,000.00 | .103667 | 12,440.04 |
| 1981 | 120,000.00 | .092560 | 11,107.20 |
| 1982 | 120,000.00 | .082643 | 9,917.16 |
| 1983 | 120,000.00 | .073788 | 8,854.56 |
| 1984 | <u>117,142.00</u> | .065882 | <u>7,717.55</u> |
| Totals | \$2,857,142.00 | | \$933,929.63 |

Claimant's total losses are summarized as follows:

| <u>Item of Property</u> | <u>Date of Loss</u> | <u>Amount</u> |
|-------------------------|---------------------|-----------------------|
| Americano Mine | March 1, 1959 | \$ 435,000.00 |
| Antonio Mine | October 15, 1960 | <u>933,929.63</u> |
| | Total | <u>\$1,368,929.63</u> |

The Commission reaffirms its holding that interest shall be allowed, and it is so ordered as follows:

| <u>FROM</u> | <u>ON</u> |
|------------------|-----------------------|
| March 1, 1959 | \$ 435,000.00 |
| October 15, 1960 | <u>933,929.63</u> |
| Total | <u>\$1,368,929.63</u> |

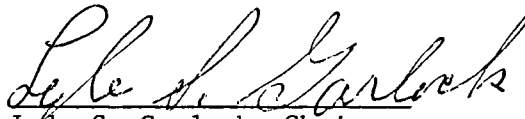
Accordingly, the Certification of Loss in the Final Decision of October 20, 1971 is set aside and the following Certification of Loss will be entered, and in all other respects the Final Decision, as amended herein, is affirmed.

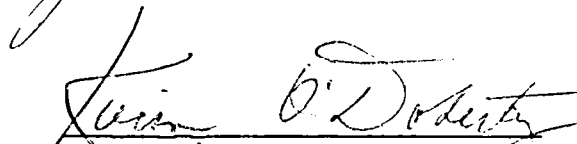
CERTIFICATION OF LOSS

The Commission certifies that MATTHEW A. FRYER a/k/a SANDY FRYER suffered a loss, as a result of actions of the Government of Cuba, within the scope of Title V of the International Claims Settlement Act of 1949, as amended, in the amount of One Million Three Hundred Sixty-eight Thousand Nine Hundred Twenty-nine Dollars and Sixty-three Cents (\$1,368,929.63) with interest thereon at 6% per annum from the respective dates of loss to the date of settlement.

Dated at Washington, D. C., and
entered as the Amended Final
Decision of the Commission

JUN 30 1972
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Lyle S. Garlock, Chairman


Kieran O'Doherty, Commissioner

FOREIGN CLAIMS SETTLEMENT COMMISSION
OF THE UNITED STATES
WASHINGTON, D.C. 20579

IN THE MATTER OF THE CLAIM OF

MATTHEW A. FRYER
a/k/a
SANDY FRYER

Claim No. CU -1617

Decision No. CU-6241

Under the International Claims Settlement
Act of 1949, as amended

Counsel for claimant:

Jesse R. Smith, Esq.

Appeal and objections from a Proposed Decision entered on June 23, 1971;
oral hearing requested.

Oral hearing held on October 6, 1971

FINAL DECISION

Under date of June 23, 1971, the Commission issued its Proposed Decision certifying a loss in favor of claimant in the amount of \$400,000.00 plus interest. The amount allowed represented claimant's loss of royalties with respect to the lease of a Cuban mine, El Americano, to a Cuban corporation, Fomento Ball-Bro, S.A. (Fomento). A portion of the claim based on a 10% royalty for the ore at the mine site in the amount of \$35,000.00 was denied because the evidence of record, including the record in the claim of the lessee, Claim of Howard E. Holtzman, et al., Claim No. CU-2168, indicated that said royalty had been paid. Other portions of the claim were also denied.

Claimant objected to the Proposed Decision insofar as it denied portions of the claim, and requested an oral hearing which was held on October 6, 1971. At that hearing, counsel for claimant offered oral argument and introduced new documentary evidence. Testimony was heard from claimant and Joseph S. Sirgo, a mining engineer.

Upon consideration of the entire record, including the evidence presented at the oral hearing, the Commission finds that Fomento, the lessee, did not

pay the said royalty of \$35,000.00. It is therefore concluded that claimant's loss in this case should be increased by that amount.


Accordingly, the Certification of Loss in the Proposed Decision of June 23, 1971 is set aside and the following Certification of Loss will be entered, and in all other respects the Proposed Decision is affirmed.

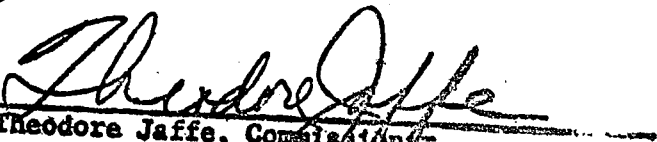
CERTIFICATION OF LOSS

The Commission certifies that MATTHEW A. FRYER a/k/a SANDY FRYER suffered a loss, as a result of actions of the Government of Cuba, within the scope of Title V of the International Claims Settlement Act of 1949, as amended, in the amount of Four Hundred Thirty-Five Thousand Dollars (\$435,000.00) with interest thereon at 6% per annum from March 1, 1959 to the date of settlement.

Dated at Washington, D. C.,
and entered as the Final
Decision of the Commission

OCT 20 1971


Lyle S. Garlock, Chairman


Theodore Jaffe, Commissioner

FOREIGN CLAIMS SETTLEMENT COMMISSION
OF THE UNITED STATES
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IN THE MATTER OF THE CLAIM OF

MATTHEW A. FRYER
a/k/a
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Claim No. CU - 1617

Decision No. CU - 6241

Under the International Claims Settlement
Act of 1949, as amended

Counsel for claimant:

Jesse R. Smith, Esq.

PROPOSED DECISION

This claim against the Government of Cuba, filed under Title V of the International Claims Settlement Act of 1949, as amended, in the amended amount of \$4,486,942.00, was presented by MATTHEW A. FRYER a/k/a SANDY FRYER based upon the asserted loss of mines in Cuba. Claimant has been a national of the United States since birth.

Under Title V of the International Claims Settlement Act of 1949 [78 Stat. 1110 (1964), 22 U.S.C. §§1643-1643k (1964), as amended, 79 Stat. 988 (1965)], the Commission is given jurisdiction over claims of nationals of the United States against the Government of Cuba. Section 503(a) of the Act provides that the Commission shall receive and determine in accordance with applicable substantive law, including international law, the amount and validity of claims by nationals of the United States against the Government of Cuba arising since January 1, 1959 for

losses resulting from the nationalization, expropriation, intervention or other taking of, or special measures directed against, property including any rights or interests therein owned wholly or partially, directly or indirectly at the time by nationals of the United States.

Section 502(3) of the Act provides:

The term 'property' means any property, right, or interest including any leasehold interest, and debts owed by the Government of Cuba or by enterprises which have been nationalized, expropriated, intervened, or taken by the Government of Cuba and debts which are a charge on property which has been nationalized, expropriated, intervened, or taken by the Government of Cuba.

Claimant asserts the following losses:

| | |
|--|-----------------------|
| El Americano and Demasia a Josefina Mines | \$1,629,800.00 |
| Antonio Mine | <u>2,857,142.00</u> |
| | <u>\$4,486,942.00</u> |

El Americano and Demasia a Josefina

According to claimant's statements of December 8, 1969, he went to Cuba in 1949 and later met Mr. Joseph Alloway who owned the El Americano and Demasia a Josefina, two adjoining manganese mines in Bayamo, Oriente Province, Cuba, which mines are hereafter called Americano. Mr. Alloway gave the claimant a power of attorney (dated March 24, 1954) to act on his behalf with respect to his Cuban property (Exhibit 2). Claimant states that in October 1954 he purchased Americano for \$5,000.00, and he claims ownership in fee simple. The Commission's records include the Claim of Howard E. Holtzman, et al., Claim No. CU-2168, involving an 80% stock interest in Fomento Ball-Bro, S.A. (Fomento), a Cuban corporation which leased Americano in 1957. That record contains a report from abroad which indicates that the rights with respect to Americano were acquired by the Sandy Mining Company for \$500.00.

It further appears that the Sandy Mining Company (Cia. Minera Sandy, S.A.), a Cuban corporation, was wholly owned by claimant, and that Americano was its sole asset. On September 5, 1957, Sandy Mining Company entered into a contract with Fomento pursuant to which Americano was leased to Fomento for one year, renewable from year to year at the option of the lessee, the maximum period being 30 years (Exhibit 10). That lease recites that Sandy Mining Company owns mining concessions with respect to El Americano and Demasia a Josefina in Bayamo, Oriente Province, Cuba. The Commission therefore finds that Sandy Mining Company owned mining concessions with respect to both mines (Americano).

In Holtzman, supra, the Commission found that Americano had been taken by the Government of Cuba on March 1, 1959 while Fomento was in possession.

Since Sandy Mining Company was organized under the laws of Cuba

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it does not qualify as a corporate "national of the United States" defined under Section 502(1)(B) of the Act as a corporation or other legal entity organized under the laws of the United States, or any State, the District of Columbia, or the Commonwealth of Puerto Rico, whose ownership is vested to the extent of 50 per centum or more in natural persons who are citizens of the United States. In this type of situation, it has been held that an American stockholder is entitled to file a claim for the value of his ownership interest. (See Claim of Parke, Davis & Company, Claim No. CU-0180, 1967 FCSC Ann. Rep. 33.)

The Act provides in Section 503(a) that in making determinations with respect to the validity and amount of claims and value of properties, rights, or interests taken, the Commission shall take into account the basis of valuation most appropriate to the property and equitable to the claimant, including but not limited to fair market value, book value, going concern value, or cost of replacement.

The question, in all cases, will be to determine the basis of valuation which, under the particular circumstances, is "most appropriate to the property and equitable to the claimant". This phraseology does not differ from the international legal standard that would normally prevail in the evaluation of nationalized property. It is designed to strengthen that standard by giving specific bases of valuation that the Commission shall consider.

In his affidavit of March 24, 1971, claimant computes the amount of his claim on account of Americano as follows:

- | | |
|---|-----------------------|
| 1. 10% of \$350,000.00, the amount found by the Commission as the value of the inventory of mined ore at the mine sites in <u>Holtzman, supra</u> | \$ 35,000.00 |
| 2. 10% of \$450,000.00, the amount found by the Commission as the value of the leased mines as a "going business" in <u>Holtzman, supra</u> | 45,000.00 |
| 3. 10% of the residual value of the ore after expiration of Fomento's lease | <u>1,549,800.00</u> |
| Total | <u>\$1,629,800.00</u> |

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1. Ore at the Mine Sites

The Commission found in Holtzman, supra, that Fomento's interest in the mined ore at the mine sites had a value of \$350,000.00. It was noted that pursuant to the lease from Sandy Mining Company to Fomento, the lessor was to receive 10% of the net sales price for each mined ton of concentrated ore after deduction of any freight and related expenses not to exceed \$10.00 per ton for transportation and delivery to the shipping port. Since no such expenses had been incurred by Fomento with respect to the ore at the mine sites, no deductions were made.

Claimant asserts a loss of \$35,000.00 based upon 10% of the value of the ore at the mine sites, which he states was due pursuant to the lease with Fomento. The record in Holtzman, supra, includes an affidavit of December 23, 1968 from Howard E. Holtzman, in which affiant attests that all royalties on the mined ore at the mine sites had been paid. On that basis, the Commission found that the value of Fomento's equity in the ore at the mine sites was equivalent to the value of said ore.

The Regulations of the Commission provide:

The claimant shall be the moving party and shall have the burden of proof on all issues involved in the determination of his claim. (FCSC Reg., 45 C.F.R. §531.6(d)(1970).)

Upon consideration of the entire record in this claim and that of Holtzman, supra, the Commission finds that claimant herein has failed to sustain the burden of proof with respect to the portion of the claim based upon 10% of the value of the mined ore at the mine sites. Accordingly, this portion of the claim is denied.

2. 10% of "Going Business" Value

In Holtzman, supra, the Commission found that the value of Fomento's mining operations as a "going business" was \$450,000.00. The Commission considered a geologist's report of June 29, 1956 which indicated a potential of 25,000 tons of high grade ore and the possibility of mining another 25,000 tons of such ore if certain procedures were followed.

In finding that the "fair and reasonable value of the mines as a going business was \$450,000.00 on the date of loss", the Commission took into consideration all relevant factors in this respect, such as the amount of ore in the mines, the costs of mining operations, and other expenses involved in refining and selling the ore, as well as the royalties due the lessor. Since the value found by the Commission, \$450,000.00, was not the value of the ore in the mines, claimant is not entitled to 10% of that amount. Rather, claimant is entitled, under the terms of the lease, as sole owner of Sandy Mining Company, to an allowance of 10% of the net value of the ore in the mines on the basis that it constituted the lessor's equity in the ore, in the nature of a debt of a nationalized enterprise. (See Claim of Kramer, Marx, Greenlee & Backus, Claim No. CU-0105, 25 FCSC Semiann. Rep. 62 [July-Dec. 1966].)

Upon consideration of the entire record in this claim and that of Holtzman, supra, the Commission finds that the valuation most appropriate to the property and equitable to the claimant is the result obtained from concluding that Americano contained 50,000 tons of high grade ore valued at \$90.00 per ton. The Commission therefore finds that the gross value of said ore on March 1, 1959, the date of loss, was \$4,500,000.00. As already noted, the lease provided for the deduction of transportation and delivery expenses not to exceed \$10.00 per ton. In the absence of evidence to the contrary, the Commission finds that a deduction of \$500,000.00 should be made, resulting in a net value of \$4,000,000.00 for the 50,000 tons of high grade ore in Americano. Therefore, the debt due Sandy Mining Company on account of said ore or its equity therein, was 10% thereof or \$400,000.00.

3. 10% of Residual Value of Ore After Expiration of Fomento's Lease

Claimant asserts that Americano contained considerably more ore than the Commission found in Holtzman, supra, and claims a loss of \$1,549,800.00 as the value of the 10% royalty. Claimant relies entirely upon statements of one Joseph S. Sirgo, formerly employed by Fomento as manager of the mines (Exhibit 6). According to Mr. Sirgo's sworn statements of October 20, 1969 (Exhibit 6) and his report of August 9, 1967 to claimant, Americano

contained 189,000 tons of high grade ore which had a gross value of \$17,388,000.00. Claimant computes this portion of his claim by deducting from that amount \$1,890,000.00 on account of transportation and delivery expenses and taking 10% of the result.

In claimant's affidavits of December 19, 1969 and March 24, 1971, and in Mr. Sirgo's affidavit of February 10, 1970 (Exhibit 11), it is stated that after Fomento acquired the lease covering Americano, considerable drilling and exploration took place, which led to Mr. Sirgo's report. Upon inquiry, counsel for claimant stated on May 28, 1971 for the record that in 1958 Mr. Sirgo had reported his findings to Fomento. An affidavit of October 13, 1967 from Mr. Holtzman, President of Fomento, stated he had learned that Sirgo had been killed by Castro's men.

It appeared desirable that the record reflect the reason why Mr. Holtzman had never mentioned such a report from Mr. Sirgo, since it would have been to his advantage to do, as Fomento held a long term lease on Americano. The record shows that Mr. Holtzman relied on the geologist's report of June 29, 1956 which indicates that Americano had 50,000 tons of high grade ore, whereas Mr. Sirgo's report indicates the presence of 189,000 tons of such ore. Counsel submitted an affidavit of May 31, 1971 from claimant. Claimant recited therein that Fomento was under-capitalized and was using poor equipment, according to Mr. Sirgo; that Fomento simply exploited the mines and was satisfied with that alone; and that Mr. Sirgo had advised claimant that he was not aware that Mr. Holtzman was connected with Fomento.

The Commission has fully considered this entire matter. However the sole issue is whether there would be any ore left in Americano after the termination of Fomento's 30-year lease in 1987. As already noted, Sandy Mining Company did not own Americano in fee simple, but owned only mining concessions covering the two mines in question.

When this matter is considered in that light, the following appears. According to Holtzman's affidavit of December 23, 1968, Fomento was extracting crude ore at the rate of 6,000 tons per month, realizing about 1,200 of high grade ore. Whether Americano contained 50,000 tons of high grade ore as

indicated in Holtzman, supra, or 189,000 tons of concentrated ore as stated by Mr. Sirgo, it is clear that all of the ore would have been exhausted long before the end of Fomento's lease.

The Commission therefore finds that claimant has failed to sustain the burden of proof with respect to this portion of the claim. The record does not establish that after the termination of Fomento's lease there would be any ore remaining in Americano. Therefore this portion of the claim is denied.

Antonio Mine

Claimant asserts the loss of \$2,857,142.00 on account of the Antonio mine situated in Las Villas Province, Cuba. The record includes a copy of a lease, dated January 30, 1954 (Exhibit 7), pursuant to which claimant obtained a concession to exploit the Antonio mine. The lease was to end on January 31, 1956, but was renewable for an indefinite number of two-year terms at the option of the lessee. Claimant was obliged to pay the lessors a royalty of \$.20 for each mined ton that was sold and shipped.

In his affidavit of December 8, 1969, claimant states that a Cuban corporation, Compania Minera Macantonio, S.A., was formed for the purpose of holding the lease for the benefit of claimant. It is further stated that one Alberto Diaz Masvidal, formed another Cuban corporation, Compania Minera Masvidal, S.A., which leased Antonio from claimant's holding corporation. According to claimant's affidavit of March 24, 1971, the holding corporation was to receive a royalty of \$1.00 for each ton of ore removed from the Antonio mine.

Claimant has informed the Commission that a copy of the lease from his holding corporation to the Masvidal corporation is not available. In lieu thereof, claimant has submitted the affidavit of November 18, 1969 from Clarence W. Moore, an attorney who had personal knowledge of the facts (Exhibit 8). This affiant states that in 1958 or early 1959 the Masvidal corporation was formed and that it took a lease on the Antonio mine from claimant's holding corporation; and that in 1958 and 1959 the Masvidal corporation installed certain mining equipment on the Antonio mine site through a loan of about \$250,000.00.

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Claimant computes his asserted loss with respect to the Antonio mine on the basis of an affidavit of October 20, 1969 from Mr. Sirgo (Exhibit 9). That affiant states that the Antonio mine contained a pyrite deposit (generally, a mineral containing ingredients from which primarily sulphuric acid may be manufactured); that at the request of claimant he had prepared on July 7, 1969 a report on the Antonio mine from personal notes; and that the report showed that the mine contained 2,857,142 tons of ore. Apparently, Mr. Sirgo's personal notes are not available. However, counsel submitted a copy of a report from Mr. Sirgo, dated August 9, 1967 at Nogales, Arizona, which includes the same information.

It is asserted by claimant that the Antonio mine was a going concern and that he had received some royalties from the operation thereof. He states that the mine was taken by Cuba in October 1960. Claimant's assertion concerning the operation of the mine is supported by a general statement from Mr. Moore (Exhibit 8), and a statement from Mr. Sirgo (Exhibit 9) that the mine was worked and that its ore was shipped to Italy.

It is noted that claimant was obliged to pay his lessor a royalty of \$.20 for each mined ton sold and shipped. Admittedly claimant never operated the mine directly, or indirectly through his holding corporation. The record contains no evidence to show that claimant ever paid any royalties to his lessor. The sublease from claimant's holding corporation to the Masvidal corporation, purportedly providing for a royalty of \$1.00 per mined ton, is not available. Apart from claimant's statement that he received "some royalties" from the mine, there is no evidence that the Masvidal corporation paid any royalties pursuant to the lease with claimant's holding corporation.

Upon consideration of the entire record, the Commission finds that claimant has failed to sustain the burden of proof with respect to the portion of the claim based on royalties from the Antonio mine. The evidence of record does not establish that the mine contained the asserted amount of ore; nor does it establish the extent to which the mine was ever exploited; nor does it establish that even if the mine contained the asserted amount of ore, it was commercially feasible and profitable to operate the mine; nor does the evidence establish that claimant's mining concession had any value on the asserted date of loss. For all of the foregoing reasons, this portion of the claim is denied.

The Commission has decided that in certifications of loss on claims determined pursuant to Title V of the International Claims Settlement Act of 1949, as amended, interest should be included at the rate of 6% per annum from the date of loss to the date of settlement (see Claim of Lisle Corporation, Claim No. CU-0644), and in the instant case it is so ordered.

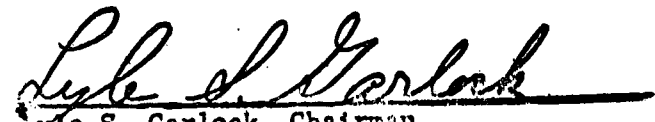
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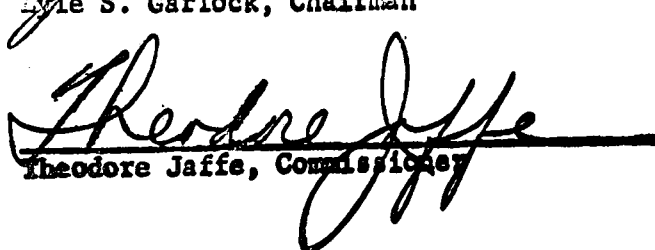
CERTIFICATION OF LOSS

The Commission certifies that MATTHEW A. FRYER a/k/a SANDY FRYER suffered a loss, as a result of actions of the Government of Cuba, within the scope of Title V of the International Claims Settlement Act of 1949, as amended, in the amount of Four Hundred Thousand Dollars (\$400,000.00) with interest at 6% per annum from March 1, 1959 to the date of settlement.

Dated at Washington, D. C.,
and entered as the Proposed
Decision of the Commission

JUN 23 1971


Lyle S. Garlock, Chairman


Theodore Jaffe, Commissioner

The statute does not provide for the payment of claims against the Government of Cuba. Provision is only made for the determination by the Commission of the validity and amounts of such claims. Section 501 of the statute specifically precludes any authorization for appropriations for payment of these claims. The Commission is required to certify its findings to the Secretary of State for possible use in future negotiations with the Government of Cuba.

NOTICE: Pursuant to the Regulations of the Commission, if no objections are filed within 15 days after service or receipt of notice of this Proposed Decision, the decision will be entered as the Final Decision of the Commission upon the expiration of 30 days after such service or receipt of notice, unless the Commission otherwise orders. (FCSC Reg., 45 C.F.R. 531.5(e) and (g), as amended (1970).)

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