BEFORE THE INDIAN CLAIMS COMMISSION

GILA RIVER INDIAN COMMUNITY, Plaintiff,	)	
v.	)	Docket No. 236-A Docket No. 236-B
THE UNITED STATES OF AMERICA, Defendant.	)	

Decided: April 28, 1971

Appearances:

Z. Simpson Cox, of Cox and Cox, Attorney for the Plaintiff. L. J. Cox, Jr., Alfred S. Cox and Ira I. Schneier were on the briefs.

William H. Donham and Roberta Swartzendruber, with whom was Mr. Assistant Attorney General Shiro Kashiwa, Attorneys for the Defendant.

OPINION OF THE COMMISSION

Yarborough, Commissioner, delivered the opinion of the Commission.

These suits were brought to recover additional compensation and damages under Clauses 3 and 5 of Section 2 of the Indian Claims Commission Act of 1946 (60 Stat. 1049, 1050), in that the consideration was unconscionable and the underlying agreements were neither fair nor honorable. These suits, now receiving initial consideration, were consolidated at this stage by the Commission since both arose out of the same transaction, namely, the location of the Gila River Relocation Center for West Coast evacuees on the plaintiff's reservation shortly

after the commencement of World War II.

When the defendant's War Relocation Authority (hereinafter "WRA") was given the responsibility of providing suitable surroundings for thousands of individuals of Japanese ancestry who, at the inception of World War II, resided on the West Coast of the United States, WRA planned that the evacuees would live in agricultural communities. One of the sites ultimately selected and developed for that purpose was a portion of the Gila River Indian Community's reservation which provided thousands of acres under cultivation, some uncultivatable acreage suitable for construction, and more thousands of acres of grazing or pasture lands which could be contoured and otherwise prepared for irrigated cultivation. The last category, grazing or pasture lands, covers all of the 8,850 acres of undeveloped tribal land known as Parcel B which is the subject of the claim in Docket No. 236-A. The thousands of acres under cultivation are known collectively as Parcel A; the uncultivatable acreage ultimately used for Camp Sites numbered 1 and 2 are known as Parcels C and B-1, respectively. Parcels A, B-1, and C are the lands involved in claims in Docket No. 236-B.[1/]

Early in 1942, WRA negotiated with reservation Superintendent A. E. Robinson for the leases necessary for the proposed Gila River

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1/ Trial of Docket No. 236-A was held November 18, 1968, and the Commissioner's report on preliminary determination of the issues was made November 20, 1968. The conclusions of that report are adopted in part and modified in part by this opinion and findings of fact. Trial of Docket No. 236-B was held June 18, 1969.

Relocation Center. The superintendent did not inform the plaintiff Indians that such a project was contemplated or, as the negotiations progressed, of the terms being negotiated. Finally the plaintiff was presented with the project in the context that WRA "had taken over" a portion of their reservation, that there was nothing the plaintiff could do about it, and that the superintendent had obtained for the plaintiff Indians the best terms available. The specific terms contemplated, which the superintendent did not then disclose to the plaintiff, were $20 per acre plus a water charge of $3.60 per acre per year for Parcel A (the land already under cultivation), and $1.00 per acre per year for Parcels B-1 and C (the land not susceptible of cultivation which was to be used for Camp Site Nos. 2 and 1, respectively). The terms for Parcel B specified no cash amount per acre per year. The "compensation" was the work necessary to "subjugate" the land -- that is, prepare it for cultivation -- with the agricultural improvements to be left for the plaintiff. If the subjugation was found to be inadequate compensation, then there was provision for a negotiated cash lump sum payment.

In his discussions which would lead to securing approval by the tribal council, the superintendent assured the Indians that the project would bring them employment, that the tribe would receive some $387.60 income per day from rental of the irrigated lands (Parcel A), and that certain permanent improvements in the form of roads, fencing, cattle guards, and the like would be left on the Indian's land.

In August of 1942, the Director of the WRA and the Secretary of the Interior signed a memorandum of understanding respecting WRA use of Parcels A, B, B-1 and C for the Gila River Relocation Center. The proposed land use permits were based on the relevant provisions of this memorandum of understanding. When the superintendent presented the land use permits to the plaintiff Indians' council for execution, not all of the council members had an opportunity to read the proposed permits before approval, and those who did relied more upon the superintendent's representations concerning the proposed benefits than upon the actual phrasing of the permits. The permits were approved by the plaintiff's council on October 7, 1942.

Neither the use permits nor the underlying memorandum of understanding contemplated that the camp site improvements would be left for the plaintiff upon termination of the leases, and there was no standard restoration clause. Accordingly, when the leases were terminated on April 30, 1947, WRA exercised its right to remove all saleable improvements and to leave the resultant rubble on the camp sites. It was estimated that it would cost nearly $120,000 to restore Parcels B-1 and C to pre-lease condition, but in the absence of a standard restoration clause defendant refused either restoration or a cash settlement in lieu of restoration. On Parcel B, the defendant had performed virtually no subjugation work, what little had been done had been done unsatisfactorily, and not all of the roads had been constructed. The parties' contract calling for no monetary compensation or consideration per acre, none had been paid, and thereafter

neither the plaintiff nor the Secretary of the Interior on its behalf demanded additional compensation although the land use permit for Parcel B made provision for such a demand if the actual compensation (subjugation) was inadequate.

The defendant contends that the only issue in Docket No. 236-A is whether the plaintiff received fair compensation for Parcel B for the five years that WRA excluded the plaintiff from that land. Referring to the law of temporary takings, the defendant contends that the measure of compensation is the fair rental value of the land for the period that it was held by the United States. Kimball Laundry Co. v. United States, 338 U.S. 1 (1948) (citing United States v. General Motors Corp., 323 U.S. 373 (1945), and United States v. Petty Motor Co., 327 U.S. 372 (1946)). Along this line, the defendant urges that while there is some evidence that the land in the area, suitable only for pasturage and used only for pasturage, would have fairly rented during the war years at twenty-five cents per acre per year, in no event would the fair rental of Parcel B land have exceeded the dollar per acre per year which the plaintiff received for the undeveloped land used for camp sites (Parcels B-1 and C).

The Commission views the situation in a different light. First, it is apparent that as early as March 17, 1944, WRA had irrevocably abandoned all plans to perform the subjugation work which the plaintiff understood was to be the compensation for the plaintiff's exclusion from Parcel B. Considering all the circumstances

surrounding the plaintiff's exclusion from its land for no consideration, it was manifestly neither fair nor honorable for the defendant to exclusively use and occupy Parcel B without giving the plaintiff anything of value whatever for it. The measure of damages is not the fair rental per acre per year, since that does not reflect the promise of improvements the plaintiff tribe understood to have been made to them to obtain their consent. Since the consideration was to consist of improvements of a permanent nature, the measure of damages is the fair market value of Parcel B as it would have been if the defendant had performed the subjugation work, less the fair market value of Parcel B in its raw and unimproved condition. Gardner v. Darling Stores Corp., 242 F. 2d 3 (2d Cir. 1957), aff'g 138 F. Supp. 160 (D.C.S.D. N.Y., 1956); City Council of Augusta v. Mertins, 46 Ga. App. 711, 168 S.E. 924 (1933). These fair market values will be determined as of the day of breach of performance, March 17, 1944, the date on which the defendant wrote to the reservation superintendent that ". . . Regarding the subjugation of land near Butte Community, all thought of this was discontinued . . ."

Respecting the camp site locations (Parcels B-1 and C), the plaintiff conceded that $1.00 per acre per year was fair consideration. However, the plaintiff contends that it had been led to believe that the buildings to be constructed on those parcels would be left for the tribe's use. Accordingly, plaintiff argues, such a provision should have been included in the memorandum of understanding, and the

use permits which the defendant prepared for the plaintiff. We find no evidence to support the position that the plaintiff was ever informed or understood that the camp site improvements would be left for the tribe, and the consideration offered for the leasing of the camp sites did not include any specific promise to leave, upon termination of the leases, whatever buildings might have been constructed for Relocation Center purposes.

The plaintiff also contends that both the WRA and the reservation superintendent understood and intended that the memorandum of understanding and any lease or permit for use of the land for camp sites would include a provision requiring WRA to restore the land to its original condition after the improvements were removed. The defendant concedes that, although not expressed in the legal documents, there was an implied obligation on the defendant's part to restore the land to its condition prior to the lease. The Commission agrees that the defendant was under an obligation to restore Parcels B-1 and C or to make some payment in lieu of restoration. The failure of the defendant to do either was not fair and honorable. Where, as here, the cost of restoration would probably far exceed the diminution in market value resulting from the failure to restore, the measure of damages is limited to the diminution in market value. Dodge Street Building Corp. v. United States, 169 Ct. Cl. 496, 341 F.2d 641 (1965), Spitzel v. United States, 146 Ct. Cl. 399 (1959). Accordingly, the plaintiff is entitled to the diminution in the value of the camp site

lands (Parcels B-1 and C), consisting of 1,296.22 acres, which diminution resulted from the defendant's failure to restore the parcels to the condition in which it received them.

Finally, the plaintiff seeks to recover additional compensation for the lease of Parcel A (6,977 acres), contending that the payment of $20.00 per acre per year plus the annual operation and maintenance water charge of $3.60 per acre per year was less than the fair rental value of those lands. The rental figure was agreed upon by reservation Superintendent Robinson, A. L. Walker of the Agricultural Affairs, and P. J. Webster and E. E. Zimmer of the WRA. The four men involved considered the rental to be adequate and just to all parties concerned.

The plaintiff introduced the affidavit of Mr. W. S. Gookin, a registered professional engineer, who stated that he had consulted with a number of individuals concerning a fair rental value for Parcel A. He obtained a wide range of results from his survey, varying from $20 to $90 per acre per year, and concluded that a fair cash rental for the period from October 6, 1942, to October 7, 1945, would have been approximately $45 to $50 per acre per year. However, the contents of the affidavit do not suggest that the survey was of lands comparable to Parcel A or that the affiant attempted to ascertain the fair rental value of lands in the San Carlos irrigation project which were in fact comparable to Parcel A. Such evidence does not satisfy the plaintiff's burden of proving that it was in

fact inadequately compensated for the use of Parcel A.

The remaining issue at this time concerns the possible credit against the prospective awards for the value of the roads, fences, and cattle guards constructed by the defendant. Those improvements were for the defendant's use and benefit in carrying out the WRA project. With respect to Parcel B, such improvements cannot be viewed as part of the consideration for the five-year lease, since they were intended to serve the defendant-lessee's camp sites and irrigated lands. There is no evidence that the proposed road construction was an inducement to the tribe's approval of the lease. The defendant will not be allowed any credit on account of these improvements as against the ultimate award in Docket No. 236-A. The only recovery to be made in the matter of Docket No. 236-B relates to the failure of the defendant to fulfill its obligation to restore the camp sites to their pre-lease condition. There is no issue concerning adequacy of the consideration. Fair and honorable dealings require that the defendant compensate the plaintiff for the damages suffered by the failure to restore. No credit will be allowed against any award in Docket No. 236-B with respect to the road, fence and cattle guard improvements.

Both of these cases will proceed to the necessary valuation determinations.

Richard W. Yarborough, Commissioner

We Concur:

Jerome K. Kuykendall, Chairman

John T. Vance, Commissioner

Margaret H. Pierce, Commissioner

Brantley Blue, Commissioner