BEFORE THE INDIAN CLAIMS COMMISSION

GILA RIVER INDIAN COMMUNITY,)
)
Plaintiff,)
)
v.) Docket Nos. 236-A and 236-B
)
THE UNITED STATES OF AMERICA,)
)
Defendant.)

Decided: June 30, 1976

Appearances:

Z. Simpson Cox, of Cox and Cox, Attorney for the Plaintiff. Alfred S. Cox was on the brief.

Roberta Swartzendruber and M. Julia Hook, with whom was Assistant Attorney General Wallace H. Johnson, Attorneys for the Defendant.

OPINION OF THE COMMISSION

Yarborough, Commissioner, delivered the opinion of the Commission.

On April 28, 1971, the Commission issued findings of fact, an opinion, and an interlocutory order in this case, wherein it found and concluded, that of the 17,123 acres of Gila River Indian Reservation lands leased by the War Relocation Authority during World War II as a Japanese war relocation center; (1) the defendant had adequately compensated the plaintiff tribe for some 6,977 acres of cultivated land on the reservation (Parcel A); (2) the defendant had failed to pay the plaintiff tribe any compensation for the use of some 8,850 acres of uncultivated land on the reservation (Parcel B); and, (3) the

plaintiff tribe was materially damaged by the defendant's failure to restore two campsite areas (Parcel B-1 and Parcel C) to their prelease condition following the closing of the relocation center after World War II.[1/]

The Commission dismissed the plaintiff's claim against the defendant for Parcel A. With respect to Parcel B, the Commission found and concluded that the defendant had promised to subjugate the 8,850 acres of undeveloped land or otherwise compensate the plaintiff tribe, and, having failed to do either one, the plaintiff is entitled to recover from the defendant the difference between the fair market value of Parcel B as if it had been subjugated and its value as undeveloped land, as of March 17, 1944, the date upon which the United States abandoned all plans to subjugate Parcel B.[2/] For its failure to restore the campsite areas, the Commission found the defendant liable to the plaintiff tribe for the diminution in value of Parcel B-1 and Parcel C as of April 30, 1947, when the campsite leases were formally terminated.[3/] Finally, the Commission disallowed the defendant any credit for improvements required by lease--mainly road construction--against any potential award herein

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1/ 25 Ind. Cl. Comm. 250, 258.

2/ Id. p. 255, 275. Parcel B is commonly referred to by the parties, and the Commission, as containing 8850 acres, its original size. From that, 530.02 acres were added to Campsite 2, and 60 acres were too elevated to irrigate, see Finding 17(a), infra. We think defendant's obligation to subjugate extended only to the 8259.98 practicably subjugable acres in Parcel B, not to the full 8850 acres in the parcel as plaintiff contends.

3/ Id. p. 273, 276.

to plaintiff tribe.[4/]

Both sides appealed the Commission's interlocutory decision. On October 13, 1972, the Court of Claims issued an opinion affirming the Commission in all respects, except for the disallowance of all improvements as a possible credit to the defendant against any award herein.[5/] The court remanded this case to the Commission for further consideration as to what credit, if any, the defendant should be allowed for the construction of a 7.25 mile stretch of road from Parcel C to Arizona State Highway No. 187.

Thus, the principle objective at this phase of the case is to determine the land values of the respective parcels as they were and as they should have been had the lease been properly performed by the defendant. As is customary, each party has offered expert testimony supporting widely differing estimates of value. The most helpful evidence was that of selected comparable sales presented by the defendant's expert, and, as explained below, that evidence leads the Commission to its conclusions on value.

The evidence proffered by the plaintiff tribe in support of its value contentions centered for the most on the summary report and

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4/ Id. p. 276.

5/ Gila River Pima Maricopa Indian Community v. United States, 199 Ct. Cl. 586 (1972), affirming in part, reversing in part, and remanding Dockets 236-A and 236-B, 25 Ind. Cl. Comm. 250 (1971).

testimony of Mr. L. L. Monsees, an appraiser from Phoenix, Arizona.[6/] Mr. Monsees appraised only the 8,850 uncultivated acres of Parcel B. In appraising Parcel B as if it had been subjugated, Mr. Monsees relied exclusively upon an income capitalization method for the reason that he could find no sales of farmland comparable in size and location to Parcel B. In applying the income capitalization method, Mr. Monsees selected 9 one year leases that had been executed between the plaintiff tribe and non-Indian lessees for certain cultivated tracts within the plaintiff's "Southside Area" farm, a tract adjacent to and closely comparable to Parcel B. From these 9 leases, the earliest being written in 1943, and the rest between 1949 and 1952, Mr. Monsees calculated an annual net rental value of $30 per acre, which he then applied to the 8,850 acres in Parcel B. Mr. Monsees then selected a capitalization rate of 4 1/2%, which was derived from a combination of the purported 1944 prime and non-prime bank interest rates. When capitalized at 4 1/2%, the $30 per acre rental value attributable to Parcel B produced a fair market value figure for the subject tract of $5,900,000 or roughly $667 per acre. Using the

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6/ Plaintiff is seeking an overall judgment of approximately 6.7 million dollars, plus interest, for the defendant's wartime use of Parcel B, Parcel B-1 and Parcel C. This judgment figure is based on value determinations in excess of those appearing in Mr. Monsees' appraisal report and to which he testified.

Plaintiff's new demand for interest as a part of "just compensation" is without merit. The case heretofore has been presented to the Commission as one sounding in breach of contract to enforce the lease agreement by which plaintiffs consented to the use of the land. On this theory, the Commission's decision, in relevant part, was affirmed by the Court of Claims. The law of the case on the recoverable damages is settled.

same income capitalization method, with a 25¢ per acre rental value for grazing land, Mr. Monsees calculated the 1944 value of Parcel B "as desert grazing land" at $49,166.66. The cash difference in the value of Parcel B as subjugated and as desert land is $5,850,833.34.

Apart from its simplicity, there is nothing to commend Mr. Monsees' income capitalization approach as the proper method in this case for determining the 1944 fair market value of Parcel B, whether it be subjugated or not. In fact we must reject it in toto for several reasons.

First of all, the basic theory underlying the capitalization of net income method of appraisal is that a stabilized net income over the useable life of an income producing property is like an annuity which is paid for or bought like any other annuity. To determine the capitalized value of a given well established and stable income flow, it is necessary to apply to the income capitalization formula an appropriate capitalization rate. Clearly, this "capitalization rate" contemplates the use of a rate of return in comparable investments; one that reflects the degree of risk in the undertaking involved. Evidence of a rate of return that is in no way related to a comparable investment fails to meet this requirement. United States v. Leavell & Ponder, Inc., 286 F.2d 398, 407 (5th Cir. 1960), cert. denied, 366 U.S. 944 (1961). Far more basic is the proposition that the income capitalization method is usually applied to determine the market value of rent-producing property. Evidence of the rental value of "comparable" property is not

considered competent in establishing the fair market value of the particular property to be valued. McCandless v. United States, 74 F.2d 596, 603, (9th Cir. 1935), rev'd. on other grounds, 298 U. S. 342 (1936).

In the instant case, the subject area to be valued is Parcel B, a non-income-producing tract. In determining the income factor in his income capitalization formula, Mr. Monsees, plaintiff's appraiser, tendered the Commission nine separate one year leases, involving neighboring lands in plaintiff's "Southside Area" farm. With the exception of one share crop lease, which was renewed, the remaining leases appear to be one year rentals and do not qualify as long term income producers. Most of these leases suffer the defect of producing rental income on a sharecrop or percentage basis where any return to the lessor depends primarily upon the farming skill of the lessee in overcoming the vicissitudes of climate, weather, and the other risks inherent in farming.

Equally unacceptable is Mr. Monsees' selection of a capitalization rate, a combination of prime and non-prime bank interest rates. A safe return on a debt obligation in no way reflects what a prudent and knowledgeable investor would demand as a reasonable return for risking his capital by investment in farmlands. We might have been more receptive to the income capitalization method had the plaintiff's appraiser selected a more relevant capitalization rate, perhaps one derived from the relationship between the rental income from the nine leases selected by the plaintiff and the market or comparable sales

data proffered by the defendant, or a rate used by farm investors in Arizona in 1944.

The defendant called Mr. Walter D. Armer as its expert witness on value. Mr. Armer, an appraiser and realtor from Tucson, Arizona, also filed an appraisal report. Defendant's expert relied principally on the market data or comparable sales method in evaluating Parcel B and in ascertaining the diminution in value of Parcel B-1 and Parcel C. To some extent he utilized the cost method of appraisal in confirming his market data value conclusion relative to Parcel B as subjugated farmland. Mr. Armer rejected the income capitalization method of appraisal as inapplicable in this case on the basis that, as unimproved land, neither Parcel B nor the campsite areas could produce any income consistent with their highest and best use which in each case he determined to be potential farmland.

In valuing Parcel B as unimproved potential farmland, Mr. Armer selected 13 sales of unimproved desert acreage with farmland potential, that is, land with some access to water. These desert sales, which occurred between 1940 and 1947, ranged in size from 159 to 640 acres, and in price from $6.25 to $16.19 per acre. After comparing these desert sales with the subject tract on the basis of time, location, access, size, soil, topography, climate, and water, Mr. Armer concluded that, as of March 17, 1944, Parcel B as potential farmland was worth $12.50 per acre, or $103,999.75 for 8,319.98 acres.

In valuing Parcel B as subjugated farmland, Mr. Armer selected 13 sales of developed farmland located within the San Carlos Irrigation Project. These particular sales occurred between 1937 and 1951 and, with the exception of a 30 acre tract with industrial potential that sold for $216.67 per acre, ranged in price from $90 to $160 per acre. After deducting a 60-acre butte in Parcel B as non-irrigable, Mr. Armer concluded from these sales that the remaining 8,259.98 acres in Parcel B would have had a 1944 fair market value of $125 per acre as irrigable farmland, or a total value of $1,032,497.50.

In an effort to confirm his 1944 value of Parcel B as if it had been subjugated, Mr. Armer went to the cost method of appraisal. Mr. Armer's procedure under the cost approach was to add the estimated cost of subjugating desert land with farmland potential to the initial cost of the land, thus determining its possible market value. From several sources, including an estimate made by the War Relocation Authority in 1944, of the cost of subjugating Parcel B, Mr. Armer calculated the subjugation costs at $75 per acre or $619,498.50 for the 8,259.98 irrigable acres in Parcel B. Adding the $12.50 per acre 1944 value of Parcel B as potential farmland to the subjugation cost, Mr. Armer concluded that Parcel B under the cost approach would have a 1944 value as improved land of $87.50 per acre. To this figure he added the value of water which he calculated at $37.50, which happens to be the difference between the market data value of $125 per acre and his cost method of value.

Mr. Armer also valued the two campsite areas, Parcel B-1 and Parcel C, as of April 30, 1947, for the purpose of ascertaining the diminution in value that resulted from the defendant's failure to restore the campsites to their original condition following termination of the relocation center. In valuing 850.02 acres of Parcel B-1, Mr. Armer divided the tract into grazing land and potential farmland and assigned a $12.50 per acre value to both areas. To the potential farmland portion of Parcel B-1, some 380.77 acres, he found a post campsite value of $1.00 per acre as result of the defendant's failure to remove the abandoned concrete slabs, partial structures and other debris. He calculated the diminished value of the 380.77 acres of potential farmland in Parcel B-1 to be $4,378.86. He then concluded that the 468.25 acres of grazing land in Parcel B-1 suffered no diminution in value as a result of the defendant's failure to restore the actual campsite. Accordingly, he allowed no recovery for that portion of Parcel B-1.

In valuing the 446.20 acres in Parcel C, Mr. Armer assigned the same $12.50 per acre figure for potential farmland. However, in calculating the post campsite value of Parcel C, Mr. Armer was of the opinion that only 226.20 acres were adversely affected by the defendant's failure to restore the campsite to its prelease condition. Without restoration this 226.20 acres had only a nominal $1.00 per acre value. The diminution in Parcel C under Mr. Armer's reasoning amounted to $2,601.30.

The Commission agrees with the defendant that the market data or comparable sales method of appraisal is the proper approach in this case. At the same time we are aware of the problem of just what sales may or may not meet the test of comparability in any given case. In dealing with this problem, we cannot accept the argument of the plaintiff that "comparable" means "identical," and that in the absence of any sales comparable in size to Parcel B, there are no comparable sales of record. We decry the paucity of market sales data in the present record but, nevertheless, such data does give to the Commission a starting point upon which to build its own value conclusions.

Even though we have approved Mr. Armer's market data evaluation approach, we do think that his value conclusions need some adjustments.

First of all, Mr. Armer has concluded that the desert land sales data indicates a 1944 fair market value of $12.50 per acre for unimproved desert land with farm potential. Having so concluded, he has assigned this $12.50 per acre figure to Parcel B in its unimproved state and, where applicable, to Parcel B-1 and Parcel C. However, the Commission's analysis of the same desert land sales data shows the following: (1) there were 13 desert land sales between 1940 and 1947, mostly quarter sections, amounting to 2,894 acres, for a total price of $31,300, or $10.82 per acre; (2) in 1944, there were two quarter section sales at an overall price of $3,000, or roughly $9.69 per acre; and, (3) in his appraisal report Mr. Armer stated that, in addition to the 13 selected sales of desert land, "there were

numerous State of Arizona land sales (Similar to Sales #D-1, 8, 9, 10, and 11) which in many instances sold for less than $10.00 per acre."[7/] In light of all this sales data, the Commission feels that the 1944 fair market value of Parcel B as potential farmland is closer to $10.00 per acre, and we have so found.

In valuing Parcel B as if it had been subjugated, Mr. Armer relied upon the farmland sales data, and concluded that irrigable farmland in 1944 comparable to Parcel B had a fair market value of $125.00 per acre, close to the average sale price, which value he assigned to Parcel B. Since these sales are our only link to the then land market, our value finding is reasoned from them. The tracts lack true comparability with a subjugated Parcel B, since the latter is far larger than each or all comparison tracts, appears to have better soil than the average, and a superior water supply. The parties argue much over the water available to Parcel B. Although both it and the comparison tracts are in the San Carlos Irrigation Project and entitled to equal amounts of project water, Parcel B as Indian land would have first priority on additional natural flow water, while it appears the comparison tracts would rarely receive natural flow. Natural flow water accounts for at least 30% of the available water supply. Defendant calculates the water increment to Parcel B at 10 - 15%, while plaintiff offers calculations showing a 200 - 300% increment. We think the order of magnitude of the increment shown by the plaintiff

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7/ P. 13, Def. Ex. 36.

is more persuasive and more likely to be the one in mind of the hypothetical 1944 purchaser, although that purchaser would also know that in some years there might be very little natural flow.

The relative sizes of the tracts affects comparability. The small size of some of the comparison tracts prevents them from being effective economic units, for in the usual year of inadequate water, that water would be concentrated on a portion of the entitled acreage. All the advantage of flexibility and reducing planting but meeting fixed costs rests with the owner of the larger tract.

From these considerations, the Commission finds that an average of the comparable sales offered by the defendant does not adequately reflect the special advantages Parcel B would have had if subjugated. We think an approximate but realistic estimate of its 1944 value would have been $200 per subjugated acre, a price above most of the sales of inferior land, but within the spectrum of prices actually paid.

When he valued the campsite areas, Parcel B-1 and Parcel C, Mr. Armer excised out of each campsite area that acreage which he felt was not adversely affected by the defendant's failure to restore each site to its prelease condition. The Commission has adopted the same procedure in valuing the two campsite areas. However we do differ with Mr. Armer with respect to the pre and post campsite values of the potential farmland areas in Parcel B-1 and Parcel C. The Commission has already assigned a 1944 value of $10.00 per acre for unimproved potential farmland acreage in Parcel B. This same figure is applicable to the potential farmland acreage in Parcel B-1 and Parcel C.

In addition, we see no reason to assign any post campsite value to the potential farmland areas adversely affected by the defendant's failure to restore the campsites. Although Mr. Armer assigned a nominal $1.00 per acre value to the unrestored campsite, he did state in his appraisal report that the post campsite conditions of Parcel B-1 and Parcel C indicated a "near zero value" for the affected areas.[8/]

In remanding this case back to the Commission, the Court of Claims asked us to reconsider our prior ruling wherein we denied the defendant any offset credit for the cost of completing a 7.25 mile stretch of road from old Campsite No. 1 (Parcel C) to Arizona State Highway No. 187. It was not the denial of the offset that concerned the court but the reason given, namely, that this road did not benefit the tribe. On reconsideration, we find nothing to contradict or improve on the conclusion of the court that the road was equally beneficial to both parties.

A review of the original memorandum of understanding, plus the other evidence of record which would throw some light on the role this road would play in the scheme of things (particularly as understood by the Indians), has persuaded the Commission that this particular road was never intended to be consideration specifically for the lease of Parcel B. Rather, we find that the construction of this road was intended to be part of the overall compensation for the use

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8/ Def. Ex. 36, p. 42.

of all the reservation lands and facilities contracted for by the War Relocation Authority. The plaintiff was promised both the road and the subjugation of Parcel B, and it is entitled to the performance of both promises.[9/] Since we have found this particular expenditure to be consideration, it is unnecessary to consider the question of gratuity.

Conclusion

The plaintiff tribe in Docket 236-A is entitled to recover from the defendant the difference in the market value of Parcel B as unimproved potential farmland and its estimated value if it had been subjugated. The accepted date of valuation in each instance is March 17, 1944. In calculating the award to the plaintiff the Commission has concluded that there were 8,259.98 acres of irrigable land in Parcel B; that, as potential farmland, Parcel B was worth $10.00 per acre; and, if it had been subjugated, it would have been worth $200.00 per acre. The plaintiff in Docket 236-A is therefore entitled to an award of $1,569,396.20, less any offsets.

In Docket 236-B, the plaintiff is entitled to an award measured by the diminution in value of Parcel B-1 and Parcel C resulting from the defendant's failure to restore these two campsite areas to their prelease conditions by April 30, 1947. The Commission has concluded that, as of April 30, 1947, the 380.77 acres of potential farmland in

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9/ Plaintiff offers the analogy that a horse and a cow were offered for the use of plaintiff's lands, that defendant delivered the horse but not the cow, that plaintiff sues for the value of the cow, but needn't sue for the horse nor have it credited against the cow. Approaching this simplification with proper suspicion, on reflection we can but embrace both cow and horse and hope the issue is now settled.

Parcel B-1 had a prelease value of $10.00 per acre and a zero dollar post campsite value. The decrease in the value of Parcel B-1 was $3,807.70.

Parcel C contained 226.20 acres of potential farmland that was adversely affected by the defendant's failure to restore the campsite. It had a prelease value of $10.00 per acre and a zero dollar post campsite value. The diminution in value for Parcel C was $2,262.00. Plaintiff's award in Docket 236-B for Parcel B-1 and Parcel C is $6,069.70 less any offsets.

Since we have denied as a payment on the claim in Docket 236-A the cost to the defendant of constructing a 7.25 stretch of road from Parcel C to Arizona State Highway 187 as inapplicable to the claim asserted therein, both of these dockets shall now proceed as expeditiously as possible for a determination of any gratuitous offsets the defendant may present as well as all other matters bearing upon the question of defendant's liability to the plaintiff.

Richard W. Yarborough, Commissioner

We Concur:

Jerome K. Kuykendall, Chairman

John T. Vance, Commissioner

Margaret H. Pierce, Commissioner

Brantley Blue, Commissioner