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Department of Legal Studies, Highway Research Board

LAND ACQUISITION MEMORANDUM #192

192-1 THE AWARDING OF ATTORNEYS' FEES AS AN ELEMENT OF JUST COMPENSATION 1/

The Government has been plagued by the mistaken notion of some courts that attorneys' fees are to be considered as an element of just compensation. This argument is still raised despite the clear precedent of Dohany v. Rogers, 281 U.S. 362, 368 (1930), holding that "attorneys' fees and expenses are not embraced within just compensation for land taken by eminent domain." 2/ This argument was disposed of in the recent case of United States v. 2,353.28 Acres of Land, Etc., No. 63-150 (U.S.D.C., Middle District of Florida, Orlando Division), not yet reported, where the court by order dated July 17, 1967, denied the landowner's claim that he was entitled to attorneys' fees as part of just compensation.

The court discussed Florida law which allows a landowner to recover attorneys' fees when the State is the condemnor, Jacksonville Expressway Authority v. Dupree, 108 So.2d 289 (1958), and expresses sympathy with the landowner but notes that "our system of rule by established law envisions judicial adherence to controlling precedent with the right to change the law being constitutionally vested in the legislative branch and not in this Court. On the point at issue, controlling precedent exists; * * * Dohany v. Rogers, 281 U.S. 362 (1930) * * *."

The Supreme Court recently reviewed the propriety of awarding attorneys' fees to the winning party under federal statutes in Fleischmann v. Maier Brewing (S.Ct., No. 214, May 8, 1967), not yet reported. This case involved a proceeding alleging deliberate infringement of a valid trademark under Section 35 of the Lanham Act, 60 Stat. 439, 15 U.S.C. sec. 1117, which reads in pertinent part:

> When a violation of any right of the registrant of a mark registered in the Patent Office shall have been established in

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1/ Land and Natural Resources Division Journal, U.S. Department of Justice, September 1967.

2/ The Government is presently appealing a case in which a district court directed the United States to pay attorneys' fees in an eminent domain proceeding. United States v. Gila River Pima-Maricopa Indian Community, et al., No. 21143 and 21144 (C.A. 9).

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> any civil action arising under this chapter, the plaintiff shall be entitled, subject to the provisions of sections 1111 and 1114 of this title, and subject to the principles of equity, to recover (1) defendant's profits, (2) any damages sustained by the plaintiff, and (3) the cost of the action. (Emphasis supplied.)

The Court saw the question in that case as "whether federal courts have power * * * to award reasonable attorneys' fees as a separate element of recovery in light of section 35 of the Act which enumerates the available compensatory remedies."

The Court discusses the English rule which authorizes the award of counsel fees to successful litigants, 1/ but rejected the English approach and stated:

> The rule here has long been (in the United States) that attorneys' fees are not ordinarily recoverable in the absence of a statute or enforceable contract providing therefor. This Court first announced that rule in Arcambel v. Wiseman, 3 Dall. 306 (1796), and adhered to it in later decisions. See, e.g., Hauenstein v. Lynham, 100 U.S. 483 (1880); Stewart v. Sonneborn, 98 U.S. 187 (1878); Oelrichs v. Spain, 15 Wall. 211 (1872); Day v. Woodworth, 13 How. 363 (1851).

The Court does recognize, however, that there have been several exceptions to that rule; in appropriate circumstances an admiralty plaintiff may be awarded counsel fees as an item of compensatory damages but not as a separate cost to be taxed, Vaughn v. Atkinson, 369 U.S. 527 (1962); as part of a fine in a civil contempt action occasioned by wilful disobedience of a court order, Toledo Scale Co. v. Computing Scale Co., 361 U.S. 399, 426-428 (1923); and where a plaintiff traced or created a common fund for the benefit of others as well as himself and analogous situations, Sprague v. Ticonic National Bank, 307 U.S. 161 (1939); Central R.R. & Banking Co. v. Pettus, 113 U.S. 116 (1885); Trustees v. Greenough, 105 U.S. 527 (1882). The Court concluded that these "recognized exceptions to the general rule were not, however, developed in the context of statutory causes of action for which the legislature had prescribed intricate remedies." 2/

1/ This remedy has been available in England since 1275. Statute of Gloucester, 1275, 6 Edw. I, c. 1 (for winning plaintiffs); Statute of Westminster, 1607, 4 Jac. I, c. 3 (for winning defendants).

2/ An additional exception is where the awarding of attorneys' fees is provided by contract. See Wolf v. Cohen (C.A. D.C., No. 20,429, May 8, 1967) not yet reported.

While the Fleischmann case could be distinguished on the grounds that it applies only to statutory causes of action, 1/ the language of the case is broad and can be read to include all causes of action. Indeed, the Court concludes that:

> the statutory (28 U.S.C. sec. 1920) definition of the term "costs" does not include attorney's fees, acceptance of petitioners' argument would require us to ascribe to Congress a purpose to vary the meaning of that term without either statutory language or legislative history to support the unusual construction.

28 U.S.C. sec. 1920, which enumerates the costs that can be taxed against a private party is referred to in 28 U.S.C. sec. 2412, recently amended on July 18, 1966, 199 (80 Stat. 308), which provides for the awarding of costs against the Government and specifically excludes attorney's fees:

> Except as otherwise specifically provided by statute, a judgment for costs, as enumerated in section 1920 of this title but not including the fees and expenses of attorneys may be awarded to the prevailing party in any civil action brought by or against the United States or any agency or official of the United States acting in his official capacity, in any court having jurisdiction of such action. A judgment for costs when taxed against the Government shall, in an amount established by statute or court rule or order, be limited to reimbursing in whole or in part the prevailing party for the costs incurred by him in the litigation. * * *
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> These amendments shall apply only to judgments entered in actions filed subsequent to the date of the enactment of this Act. (Emphasis supplied.)

While it would appear that the enactment of this amendment specifically excluding attorneys' fees would settle the controversy at least with respect to suits filed after June 12, 1966, virtually the same language excluding attorneys' fees appeared in the previous version of 28 U.S.C. section 2412 (62 Stat. 973).

1/ The Court also cites the other statutes where Congress has allowed attorney's fees by statute. See, e.g., Clayton Act, 38 Stat. 731, 15 U.S.C. sec. 15; Communications Act of 1934, 48 Stat. 1072, 47 U.S.C. sec. 206; Copyright Act, 17 U.S.C. sec. 116; Fair Labor Standards Act, 52 Stat. 1069, 29 U.S.C. sec. 216(b); Interstate Commerce Act, 34 Stat. 590, 49 U.S.C. sec. 16(2); Packers and Stockyards Act, 42 Stat. 166, 7 U.S.C. sec. 210(f); Perishable Agricultural Commodities Act, 46 Stat. 535, 7 U.S.C. sec. 499g(b); Railway Labor Act, 48 Stat. 1192, 45 U.S.C. sec. 153(p); Securities Act of 1933, 48 Stat. 907, 15 U.S.C. sec. 77k(e); Securities Exchange Act of 1934, 48 Stat. 890, 897, 15 U.S.C. sections 78i(e) and 78r(a); Servicemen's Readjustment Act, 38 U.S.C. sec. 1822(b); Trust Indenture Act, 53 Stat. 1176, 15 U.S.C. sec. 77www(a). See also Fed. Rules Civ. Proc., 37(a) and 56(g).

Although the Supreme Court in Dohany and in Fleischmann is quite clear that in the absence of statute, no recovery of attorneys' fees is permitted, neither of these cases refer to the federal rules. Previously, the fertile minds of attorneys have attempted to find authority for the award of attorneys' fees in Rule 71A(1). However, that argument was rejected in United States v. 1000 Acres in Plaquemines Parish, La. (Zander), 162 F. Supp. 219,224 (E.D. La. 1958).

The landowners in that case argued that Rule 71A(1) was "intended to change the existing jurisprudence to the effect that 'in the absence of a statute directly authorizing it, courts will not give judgment against the United States for costs or expenses.' United States v. Worley, 281 U.S. 339, 344, 50 S.Ct. 291, 293, 74 L.Ed. 887." The Court then goes on to state that this is not the purpose of Rule 71A(1) to quote the Notes of the Advisory Committee, Original Rule 71A:

> Without attempting to state what the rule on costs is, the effect of subdivision (1) is that costs shall be awarded in accordance with the law that has developed in condemnation cases. * * * Even if it were thought desirable to allow the property owner's costs to be taxed against the United States, this is a matter for legislation and not court rule. (Id., fn. 12, p. 224.)

The conclusion of the Advisory Committee, that the "taxing of costs against the United States is a matter of legislation and not court rule," merely follows the long line of cases and states the rule that express statutory authority and not statutory construction is required for the taxing of costs against the Government.

In United States v. Knowles' Estate, 58 F.2d 718, 721 (1932), and cases cited therein, the court stated that:

> In the absence of a statute directly and specifically so authorizing, costs cannot be assessed against the United States. This rule has been repeatedly stated by the Supreme Court, from the time of Chief Justice Marshall to the present day. (United States v. Hooe, et al., 3 Cranch 73, 92 (1805).)

See also United States v. Chemical Foundation, 272 U.S. 1, 20, 21 (1926); United States v. 1000 Acres in Plaquemines Parish, La. (Zander), 162 F.Supp. 219, 223-224 (E.D. La. 1958); Davis, etc. v. Corona Coal Co., 265 U.S. 219, 222 (1924), (The United States should not be held to have waived any sovereign right or privilege unless it was plainly so provided.")

"Since there is no statute specifically authorizing the assessment of such costs, (attorneys' fees) they may not be so assessed." United States v. 1000 Acres in Plaquemines Parish, La. (Zander), 162 F. Supp. 219, 224 (1958), and cases cited. See also United States v. 125.71 Acres of Land in Loyalhanna Tp., Westmoreland County, Pa., 54 F.Supp. 193, 195 (W.D. Pa. 1944); United States v. 19.3 Acres of Land (M.D. Pa. 1957), 158 F.Supp. 122, 125 ("defendants'

attorneys' fees and expenses are not embodied within just compensation nor land taken by eminent domain"). There is no mention in any of the cites in this paper of any federal statute or federal rule whatsoever allowing attorneys' fees in condemnation cases. Indeed F.R.Civ.P. 54(d) and 71A(h) expressly prohibit the award of costs against the Government in the absence of statute. United States v. 1000 Acres in Plaquemines Parish, La. (Zander), 162 F.Supp. 219, 224, fn. 12 (E.D. La. 1958). See also 7 Moore's Federal Practice (2d ed. 1966) sec. 71A.130(2) - (3), pp. 2808-2809; notes of the Advisory Committee on Rules, Original Report, Rule 71A(1) cited therein.

Conclusion

The desirability of granting attorneys' fees to landowners as an element of just compensation is beyond the scope of this paper. Certainly under present federal law, it cannot be granted. Assuming that legislation was enacted to include attorneys' fees as part of just compensation, a balance would have to be drawn between "the time, expense and difficulties of proof inherent in litigating the question (which) would pose substantial burdens for judicial administration." Fleischmann v. Maier Brewing (S.Ct., No. 214, May 8, 1967), as well as the cost of additional litigation instead of settlement which would probably occur if landowners assumed that they could gain their attorneys' fees after a successful trial, and the cost to the individual "who is put to expense (of condemnation) through no desire or fault of his own." Jacksonville Expressway Authority v. Dupree, 108 So.2d 289, 292 (1958). However, if the landowner has nothing to lose by litigating, an element of just compensation will be lost for just compensation also means just to the Government. Certainly, to avoid an enormous increase in useless litigation, the Government should have the right to obtain its legal fees when a court's award is no greater than the compensation originally offered by the Government. But "since litigation is at best uncertain one should not be penalized for merely defending or prosecuting a lawsuit, and * * * the poor might be unjustly discouraged from instituting actions to vindicate their rights if the penalty for losing included the fees of their opponents' counsel." Fleischmann v. Maier Brewing, supra.

Thus, it appears that the American practice of not awarding counsel fees to the winning party, while possibly not the best of all practices, seems to have worked adequately throughout our history without creating great hardships.

192-2 FAIRNESS AND THE CRISIS IN ACQUISITION OF RECREATION LANDS FOR PUBLIC USE 1/

The House Appropriations Committee recently warned that it might be forced to cut off funds for purchase of public recreation lands if land

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1/ Assistant United States Attorney General Edwin L. Weisl, Jr., with the assistance of William M. Cohen, appellate attorney for the Land and Natural Resources Division, presented this discussion as part of a speech delivered on September 14, 1967, to the Eighth Institute on Eminent Domain in Dallas, Texas. Source: Land and Natural Resources Division Journal, U.S. Department of Justice, September 1967.

speculators do not stop boosting prices. 1/ The Committee charged that land prices had soared 200 to 300 percent in some cases where the Government has created national parks or indicated an intention to do so. As soon as a site is designated for park purposes, a boom in land prices seems inevitable. Indeed, prices often begin to soar while the creation of a national park is under discussion in Congress, as is the case with Redwood National Park in northern California. The effect of spiraling prices resulted in the Administration's decision to draw the boundaries considerably tighter than many lawmakers and nature-lovers would like.

A real estate developer, to promote sales of land within a recreation project area, recently ran an advertisement in a leading New Jersey newspaper 2/ which began in big bold letters: "How You Can Make Money at Blue Mt. Lakes." That location is within the Delaware Water Gap National Recreation Area. The advertisement asserted that the United States "will acquire all lots and land not later than 1969. Persons purchasing land now may expect to earn a profit between their purchase price and the 'fair market value' which the Government must pay at the time of acquisition. Land prices have been going up throughout Sussex County and are expected to continue this upward trend." This amounts to an audacious appeal to potential buyers to speculate and profit at public expense. The advertising appeal is the most eloquently stated argument yet advanced for vigorous administration of a land acquisition program that would forestall profiteering at taxpayer expense.

President Johnson, in his recent conservation message to Congress, warned that "land for the use of the general public should not be burdened with the increased price resulting from speculative activities." 3/ This concern extends over land costs which are soaring wherever new national parks, seashores and other federal recreation sites are proposed and gain congressional authorization. Congressional approval of new projects, followed by delayed acquisition of the necessary land, which then may take place on a piece-meal basis, only increases the upward pressure on values. Once a project is authorized, the necessary land should be acquired promptly. In this way the speculative escalation of land prices in a project area can be curbed.

Point Reyes National Seashore in California is a case in point. When Congress approved this admirable addition to the national parks system in 1962, it authorized the spending of $14 million for land acquisition. That sum has now been spent for only about one-third of the land marked for taking, and this is largely land on which concentrated recreational activities are not contemplated. The National Park Service's new price tag on the land needed for Point Reyes is $57½ million, although $9 million of this may be recovered from the resale of land in the private development zone. Prompt acquisition is a solution. Greater uniformity and equality of treatment would result not only to the Government, but also to the landowners themselves.

1/ The Washington Post, April 1, 1966.
2/ Newark Sunday News, August 28, 1966.
3/ The Washington Post, March 4, 1966.