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DECISION

THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548

FILE: B-181236 DATE: October 20, 1977

MATTER OF: Ritch Associates

DIGEST:

1. Lessor's claim for "indemnity rental" for damages resulting from Army's failure to remove Government property from premises and failing to restore and return premises to lessor at termination of lease as required by lease provisions may not be paid where District Court has held that Army properly condemned leasehold interest at lease's termination, since lessor has suffered no compensable damage. Court's determination is not unconstitutional "ex post facto law" or "impairment of contract."

2. Lessor's claim for interest on breach of lease agreement claim based on Army's failure to vacate leased premises at lease's termination and restoration of premises claim based on lease provisions cannot be paid even though interest is allowed by statute in settlement of condemnation claims, since parties executed lease agreement containing no provisions for interest.

3. Lessor's claim that property leased for Government's use diminished in market value due to lessor's inability to gain access to premises to reestablish ranch operation and effect restoration of premises cannot be paid pursuant to lease provision requiring Government to restore premises or make cash payment in lieu thereof not to exceed diminution in value of premises caused by Government's use, since lease gave Government all rights and privileges and reserved no access rights for lessor.

4. Lessor's claim based on alleged diminution in value of leased premises by Government's failure to restore grazing privileges on accompanying Federal lands granted under Taylor Grazing Act, 43 U.S.C. § 315 et seq., to lessor has no merit, since granting of grazing privileges is discretionary with Government and lessor had been compensated for revocation of privileges as part of 28 years of rental payments it received.

5. Lessor's claim for restoration of land based on lease provision requiring Government to restore premises at lease's termination or make cash payment cannot be paid at this time, since Government still properly occupies premises under condemned leasehold interest so land could be further damaged or restored, and intends to condemn premises in fee simple so that land restoration damages would probably duplicate "fair compensation" for acquisition. However, claim for restoration of totally destroyed improvements can be paid, since "unit rule" of valuation need not be applied where Government will not restore improvements.

6. Army's proposed settlement of claim for restoration of improvements on premises as required by lease based on improvements' reproduction costs as of lease's termination date less depreciation to account for reasonable wear and tear is proper and does not exceed premises' diminution in value caused by Government's use and occupancy.

7. Although revised schedule of improvements incorporated by supplementary agreement to lease omitted and varied conditions and description of improvements listed in original schedule in lease executed 2 years before, lessor is bound to have claim for restoration of improvements settled based on revised schedule which supplementary agreement stated superseded original schedule. Also, lessor did not meet burden of showing revised schedule was not accurate list of improvements extant at lease's beginning or that Government's appraisal was erroneous.

8. If lessor is willing to accept proffered cash settlement of Army's obligation to restore improvements on premises at end of lease, then payment should include full and complete release of that claim by lessor. If lessor will not settle now, settlement may be made when land, currently occupied by Government under condemned leasehold, is condemned in fee simple as eventually planned.

I. BACKGROUND

Mr. William G. Ritch has submitted a number of claims on behalf of Ritch Associates (Ritch)--an unincorporated association--arising out of Lease and Suspension Agreement No. DA-29-005-eng-62, dated October 15, 1949. Under the agreement, the Army leased certain lands encompassed in the White Sands Missile Range, New Mexico, from Ritch. The leased lands included land owned in fee simple by Ritch and its predecessors as well as State and Federal grazing lands used by Ritch.

The Army first occupied the land in question on February 1, 1942, by condemnation. A leasehold agreement dated October 17, 1942, covering the premises was executed and renewed under judicial auspices to June 30, 1948. On December 17, 1949, the parties agreed that Ritch would be paid $7,300 to satisfy the Government's obligation to restore destroyed improvements on the premises as of June 30, 1948.

The Army continued possession pursuant to court order to October 15, 1949. On that date, the subject lease agreement covering Tract No. 7 in the White Sands Missile Range was executed by the Army and the predecessors in interest of Ritch. The lease provided for a term commencing July 1, 1948, automatically renewable yearly until the Government gave an appropriate notice of termination, but in no event beyond June 30, 1970. The yearly rental for Tract No. 7 (which included Federal grazing lands leased by Ritch) was $8,930 to June 30, 1950, and $6,230 for the remainder of the lease's life. Articles 10 and 11 of the lease agreement, in pertinent part, provide:

> "10. * * * The Government shall surrender possession of the premises upon expiration or termination of this agreement and if required by the Grantor shall, prior to expiration or termination of this agreement, restore the premises to as good condition as that existing at the time of entering upon the same under this agreement, reasonable and ordinary wear and tear and damages by the elements or by circumstances over which the Government has no control, excepted: Provided the Government shall have the right and privilege of making a cash settlement with the Grantor in lieu of performance of its obligation, if any, to restore the real estate, personal property (if any be demised herein), or both real and personal property, which settlement shall in no event exceed the amount of any diminution in value of the premises resulting from the Government's use and occupancy; * * *. The kind, size, construction and condition of each artificial improvement is shown in detail on 'Schedule of Improvements for Lease and Suspension Agreement,' attached hereto and made a part of this agreement.
>
> "11. Provided that in the event any Government property is located on the demised premises at the termination date, the rental will continue until such property is removed, restoration completed as provided for in Article 10 hereof, or a cash settlement and possession tendered to the Grantor."

A schedule of the improvements on the property executed by Ritch's predecessors was attached to the agreement.

In early 1950, the Army acted to condemn Tract No. B-121 in the White Sands Missile Range. However, on June 30, 1950, Supplemental Agreement No. 1 to the lease agreement brought Tract No. B-121 under the lease and increased the annual rental to $6,747. A revised schedule of improvements--executed by Ritch's predecessors--was attached to the supplemental agreement.

After the Army was unsuccessful in obtaining a voluntary extension of this and other leases in the White Sands Missile Range area beyond June 30, 1970, the Army filed a Declaration of Taking in the United States District Court for the District of New Mexico (United States v. 40,021.64 Acres of Land, Civil Action No. 8527) pursuant to 10 U.S.C § 2663 (1970) and 40 U.S.C. §§ 257 and 258a (1970). Under the Declaration of Taking, the Army condemned a leasehold estate beginning July 1, 1970, and ending June 30, 1971, extendible by the Army for yearly periods until June 30, 1980. Pursuant to 40 U.S.C. § 258a (1970), the Government deposits with the court "just compensation" in the form of a yearly rental payable to Ritch.

Congress has authorized the fee simple acquisition of the White Sands Missile Range by section 104 of Public Law 91-511, 84 Stat. 1204, 1207 (October 26, 1970). Many of these lands are now owned by the Government, although the Ritch lands have not yet been acquired in fee simple due to the unavailability of funds.

On June 3, 1971, the New Mexico District Court denied challenges to the Government's condemnation action (including Civil Action No. 8527) by some White Sands Missile Range landholders. The court also determined:

> "Any claims against the United States for breaches of the lease and suspension agreement, if any, cannot be raised in this proceeding."

Ritch has made several claims based on the lease agreement. First, on the basis of articles 10 and 11 of the lease, Ritch claims "indemnity rental" accrued since June 30, 1970, at the rate of $6,747 per year, since the Government did not restore the premises by that date. Second, Ritch claims $320,000 in full satisfaction of the Government's duty to restore the premises under article 10 of the lease. Third, Ritch claims 6-percent interest per annum on the above claims from the date of the Government's alleged delinquencies.

The Army has asserted that Ritch's "indemnity rental" and interest claims are without merit and should be denied. However, the Army recommends that the "restoration" claim be settled in the amount of $53,113.50. This represents an estimated $80,205 for the cost of reproduction of the improvements listed on the supplemental agreement's schedule of improvements less 30 percent depreciation and $3,030 in previous restoration payments. The Army states that it is liable to make restoration payments for damage to the improvements on the leased land because the Government's use and occupancy during the lease term caused the improvements to be totally destroyed or deteriorated or to have been damaged beyond economical repair. The Army recommends that any claims based on restoration of the land itself be denied because they may duplicate the eventual fee simple condemnation compensation. The Army states that the vast majority of claims arising out of the White Sands Missile Range leases have already been settled on the foregoing basis.

Ritch declined an Army settlement offer on this basis. Consequently, the Army referred this matter to our Office for a decision. In addition, Ritch and the Department of Justice have submitted their views on the disposition of these claims.

II. "Indemnity Rental"

Ritch states that the Government breached articles 10 and 11 of the lease agreement by not removing Government property from the premises and by failing to restore and return the premises to Ritch by June 30, 1970. Ritch claims damages of $6,747 per year for this alleged breach by the Government, which Ritch asserts was the designated damage rate set forth in article 11.

The June 3, 1971, New Mexico District Court decision dealt with the argument of some White Sands Missile Range landowners that the Government could not condemn a leasehold estate in the lands because the lease agreements had been breached by the Government in that Government property had not been removed from the premises and the premises returned to the landowners by the June 30, 1970, termination date as required by articles 10 and 11 of the lease. The Court held:

> "It is the opinion of the Court that the United States holds the rights in the land in question by virtue of the condemnation proceedings and not by virtue of any lease and suspension agreements.

* * * * *

> "* * * The Court has examined the leases very carefully and is of the opinion that the lease and suspension agreements expired according to their terms on June 30, 1970, and there was no holding over and that the government had full right to condemn the land in question. Each of the condemnation actions was filed on or before the date when the lease expired and so there was no notice of holding over nor agreement, expressed or implied, that the government was holding over. * * *"

Ritch has alleged that this determination by the New Mexico District Court constituted an "ex post facto law or action" and was "impairing the obligations of a contract" in violation of the Constitution. This contention has no merit. The constitutional "ex post facto law" prohibition only pertains to criminal statutes (not to Federal court decisions). See Calder v. Bull, 3 U.S. 386 (1798); Beazel v. Ohio, 269 U.S. 167 (1925). Also, the constitutional prohibition against laws impairing contractual obligations is restricted to state action and is not directed against the action of Federal courts. See New York v. United States, 257 U.S. 591 (1922). However, the Constitution expressly recognizes that the Federal Government can take land for public use without the landowner's authorization so long as "just compensation" is paid. See Berman v. Parker, 348 U.S. 26 (1954).

Besides Ritch's land, the New Mexico District Court decision also applied to the lands leased by the plaintiff in D.I.Z. Livestock Co. et al. v. United States, 210 Ct. Cl. 708 (1976), cert. denied, 429 U.S. 1023 (1976). In D.I.Z. Livestock Co., the plaintiff--a White Sands Missile Range lessor--asserted a breach of contract claim for damages resulting from the Government's continued use and possession of the leased premises beyond the June 30, 1970, termination date in alleged violation of articles 10 and 11 of the lease. The Court of Claims ruled on this claim as follows:

> "The crux of plaintiffs' 'lease and suspension' agreement claims is that defendant was inalterably obligated under section 10 to restore plaintiffs to their lands upon termination of the agreements.

> Defendant did not restore plaintiffs, but instead condemned additional property rights. Plaintiffs now seek damages either for breach of section 10 or in lieu of specific performance of the same section.
>
> "It is quite apparent that defendant's failure to return plaintiffs' property constitutes a technical breach of section 10 of the 'lease and suspension' agreements. However, there is no appropriate remedy for such a technical breach because plaintiffs have suffered no damages. See, e.g., Microcord Corp. v. United States, 176 Ct. Cl. 46, 361 F.2d 1000 (1966). At the instant it was obligated to restore plaintiffs, defendant properly condemned an additional ten-year interest in plaintiffs' lands. We cannot say that plaintiffs have been harmed by the Government's failure to restore plaintiffs for the few seconds it would take to satisfy the 'lease and suspension' agreement provisions. To hold otherwise would compel defendant to make a useless gesture.
>
> "In short, while defendant is perhaps guilty of a technical breach of the 'lease and suspension' agreements, plaintiffs have suffered no compensable loss from this breach. Therefore, plaintiffs' contract claims cannot stand." (Footnote omitted.)

We believe the Court of Claims reasoning is equally applicable to Ritch's "indemnity rental" claim. Ritch has suffered no compensable damage because the use and occupancy by the Army of the leased lands beyond June 30, 1970, was legal and proper. Therefore, Ritch's "indemnity rental" claim is denied. In this regard, we note that Ritch already receives a yearly rental of $7,200 for the condemned leasehold estate in this land.

III. INTEREST

Ritch claims 6-percent interest per annum on the "indemnity rental" and "restoration" payment claims accrued from June 30, 1970, when the claims allegedly became due. However, interest cannot be recovered against the United States upon unpaid accounts or claims in the absence of an express provision in a relevant statute or contract. United States v. Goltra, 312 U.S. 203, 207 (1941); United States v. Thayer-West Point Hotel Co., 329 U.S. 585, 588 (1947). [illegible] is no provision in the Ritch lease agreement providing for payment of interest. Ritch asserts that the Government should pay interest because the occupation and use of the land was pursuant to the condemnation authority. Payment of interest is expressly allowed in the

settlement of condemnation claims. See 40 U.S.C. § 258a (1970); Seaboard Air Line Ry. v. United States, 261 U.S. 299, 306 (1923). However, the subject lease agreement was a voluntary agreement between Ritch and the Army rather than a condemnation. Consequently, although the Government may well have condemned the land if Ritch had not agreed to the lease, payment of interest on claims arising under the lease would be unauthorized. See Albrecht v. United States, 329 U.S. 599 (1947); United States v. Thayer-West Point Hotel Co., supra.

IV. RESTORATION DAMAGES

Ritch claims $320,000 in restoration damages pursuant to article 10 of the lease. Under this article, the Government is obligated at the termination of the lease term to restore the premises to as good a condition as that existing at the time of the lease's execution, reasonable wear and tear and circumstances beyond the Government's control excepted. In the alternative, the Government can make a cash payment in lieu of restoration so long as the payment does not exceed the diminution in value of the premises resulting from the Government's use and occupancy. Ritch breaks down the restoration claim as follows:

Related Damages to the Real Estate	$150,000
Physical Damage to the Real Estate	30,000
Damages to Improvements	140,000

A. Related Damages to the Real Estate

The "related damages to the real estate" are said to be (1) Ritch's restricted access to the premises; (2) Ritch's restricted opportunity to effect restoration of the premises; (3) Ritch's restricted opportunity to reinstate grazing privileges it had received from the Federal Government under the Taylor Grazing Act, 43 U.S.C. § 315 et seq. (1970); and (4) Ritch's restricted opportunity to reestablish ranch operations. Ritch stated that these restrictions resulted in the diminution in value of the premises as of June 30, 1970 in total market value "on the open market or lending agencies" of $150,000.

Although Ritch has not made clear the basis for the "related damages" claim, it would appear that Ritch is claiming that the property has diminished in market value because Ritch has been unable to restore the property and reestablish the preexistent ranch operations inasmuch as access to the property during the lease term was restricted. However, the lease agreement executed by Ritch gave the Government all rights and privileges Ritch possessed in the property for the Government's full and unrestricted use. No "access" rights were reserved to the lessor.

Article 10 only requires restoration of the premises and does not provide for payments to cover alleged diminution in market value of the premises resulting from the lessor's inability to gain access to the military installation to maintain the ranch operations it operated up to 1942. The fact that the premises may have diminished in value does not, in and of itself, create a Government liability to pay an amount equal to the diminution in value. Rather the "diminution in value of the premises resulting from the Government's use and occupancy" provision is merely the limit on the amount of any Government restoration payments.

If Ritch is claiming that the "related damages" resulted from the Government's failure to return the premises at the end of the lease term, then the discussion of the "indemnity rental" claim would be for application. Ritch has suffered no compensable damage under this theory inasmuch as the Goverment now properly occupies the land under the eminent domain authority.

1. Damages from Failure to Reinstate Grazing Privileges

Ritch had certain grazing privileges on Federal Government lands granted under the Taylor Grazing Act, 43 U.S.C. § 315 et seq. (1970), which were revoked when the Government took possession of the premises. Ritch has applied for reinstatement of these rights. Ritch apparently claims that the value of the real estate has diminished because its grazing privileges were not reinstated as of June 30, 1970.

Whether to grant grazing privileges on Federal lands under the Taylor Grazing Act is discretionary with the Federal Government. See 43 U.S.C. § 315 (1970). Since the lands have been condemned for military use, it is apparent that Ritch has suffered no compensable damage for not being permitted to reinstate these "privileges." Indeed, acting within the discretion vested by 43 U.S.C. § 315q-r (1970), the Govermnent compensated Ritch for revocation of the Taylor Grazing Act privileges as part of the 28 years of the rental payments (1942-1970) it received. See B-168378, January 28, 1970; Porter v. Resor, 415 F.2d 764 (10th Cir. 1969); D.I.Z. Livestock, supra.

B. Damage to the Real Estate

Ritch's damage claim for restoration of the land itself (apart from the improvements) cannot be paid at this time since the Government is still legally occupying the land under a condemned leasehold. See United States v. Gila River Pima-Maricopa Indian Community, 391 F.2d 53 (9th Cir. 1968), which held that, since the Government condemned a

leasehold interest in the land it had previously occupied under a lease agreement, the lessors of the land could not recover restoration damages under the lease until the Government's occupancy rights ended. Also see United States v. 14.4756 Acres of Land, 71 F. Supp. 1005 (D.C. Del. 1947); United States v. Westinghouse Electric & Manufacturing Co., 339 U.S. 261, 267-268 (1950); United States v. 266.33 Acres of Land, 96 F. Supp. 647 (D.W.D. Wash. 1951); Flood v. United States, 274 F.2d 483, 487 (9th Cir. 1960), cert. denied, 363 U.S. 805 (1960); United States v. 883.89 Acres of Land, 442 F.2d 262, 265 (3th Cir. 1971); 40 Comp. Gen. 300, 306-307 (1960), where this same principle has been applied. Contra, United States v. 60,000 Square Feet of Land, 53 F. Supp. 767 (D.N.D. Calif. 1943) (expressly disapproved in United States v. 14.4756 Acres of Land, supra). A claim based on restoration of the premises where the Government continues to legally occupy the premises is speculative as to amount. See United States v. 14.4756 Acres of Land, supra. This is so because the Government can restore or further destroy the premises so long as it is in occupation and it may well be a "vain and useless" exercise to settle such claims prior to the expiration of the Government's occupancy. See 40 Comp. Gen. 300 (1960). Since the Army has been expressly authorized to condemn this land in fee simple, there exists a probability of duplication of payments when the land is acquired inasmuch as any cost of restoring the damage to the land caused by the Government's use and occupancy directly relates to and seems inextricably intertwined with the "fair compensation" value of the land itself. In this regard, we understand that fee simple acquisitions of other tracts in the White Sands Missile Range were based on the current value of the land, without improvements, as if it was in an undamaged condition.

C. Damages to Improvements

1. Generally

On the other hand, since the improvements have been totally destroyed and the Army--intending to condemn a fee simple interest in the property--has indicated that it will not restore the premises, we believe the claim, insofar as it relates to restoration of the improvements on the premises, can be settled at this time as recommended by the Army. Under such circumstances, the considerations which mandate delaying settlement of claims for damage to the land itself do not exist with regard to the obligation to restore the improvements. Although the land with the improvements and appurtenances thereon is ordinarily considered a single unit for

valuation purposes, i.e., the "unit rule," departures from the "unit rule" have been permitted in appropriate circumstances. See United States v. City of New York, 165 F.2d 526, 528-529 (2d Cir. 1948); United States v. Corbin, 423 F.2d 821, 828 (10th Cir. 1970). An appropriate circumstance where improvements can be valued apart from the rest of the premises to settle a restoration claim is where the improvements have been completely lost or destroyed during a temporary occupation by the Federal Government. See Eyherabide v. United States, 345 F.2d 565 (Ct. Cl. 1965).

Since no further damage can be done to the improvements nor will they be restored by the Government, it would not be inappropriate to now compensate Ritch for the contribution in value the improvements added to the value of the premises. The vast majority of the White Sands Missile Range leases were settled on this basis. Moreover, the Department of Justice has stated that the fee simple condemnation proceedings would be simplified by valuing the real estate as it physically exists at the time condemned in fee simple. We understand that settlements of the fee simple condemnations of many White Sands Missile Range tracts were based on the current value of the land as if it were undamaged but without the destroyed improvements.

2. Value of Improvements

Ritch takes issue with the Army's valuation of the improvements on the premises of $80,205 in reproduction costs, as of June 30, 1970, less 30-percent depreciation for $56,143.50. Ritch claims that the reproduction costs of the improvements should have been valued at $140,000, and that no depreciation allowance should have been subtracted. Ritch and the Army prepared differing value schedules to support their respective positions. The Army's valuation was based on the June 30, 1950, supplemental agreement schedule of improvements. The schedule either downgraded, varied descriptions of or excluded the bulk of the improvements listed on the initial October 15, 1949, schedule of improvements. Ritch's valuation is based on the initial schedule, which it states more accurately reflects the improvements extant on the premises on July 1 1948.

Both the Army and Ritch agree that the claim for restoration of the improvements should be based on reproduction costs. This seems to be a logical basis to settle this claim so long as the settlement does not exceed the diminution in value of the premises resulting from the Government's use and occupancy. However, the parties agree on little else concerning the amount payable for restoration of the improvements.

a. Depreciation

Article 10 of the lease expressly exempts the Government from liability for "reasonable and ordinary wear and tear and damages by the elements." Therefore, to account for the ordinary wear and tear of approximately 20 years, it would be necessary to depreciate the improvements' replacement value where this value was determined as of the termination date of the lease as here so that the settlement amount reflects only the damage done by the Government to the improvements. Cf. United States v. Corbin, supra.

The straight line depreciation rate of 1-1/2 percent per annum for 20 years employed by the Army has been explained as follows:

> "The nature of the improvements varied greatly. Some were large well constructed buildings, wells, pipelines, concrete structures, etc., which would likely have long useful lives with little maintenance. Others were smaller, less well constructed buildings, corrals, fences, etc., which would have short lives and probably be substantially replaced in 20 to 25 years. Generally accepted ranges of depreciation for farm and ranch improvements are 1% to 5%. Since the greater proportion of the value attributed to improvements for each ranch was based on permanent type improvements 1-1/2% depreciation was considered a fair representative average figure. * * *"

Based on the record, we cannot disagree with this depreciation method.

b. Discrepancies in Schedules of Improvements

As Ritch has pointed out, there are discrepancies between the original lease's schedule of improvements and the supplemental agreement's schedule. Ritch has stated that only the "Hembrillo Spring" on Tract B-121 should have been added to the original schedule of improvements by the supplemental agreement since that was the only improvement on Tract B-121. Ritch states that the only purpose of the agreement was to bring Tract B-121 under the lease and that other changes or omissions in the descriptions or conditions of the improvements should be disregarded in favor of the original lease's schedule--which Ritch states accurately describes the July 1, 1948, improvements on the premises.

One notable discrepancy between the schedules is that many improvements on the revised schedule are designated as being in worse condition than designated on the original schedule. (For example, an improvement designated as being in "good" condition in the original schedule may have been redesignated as being in "poor" condition in the revised schedule.) However, the condition differences are not significant in view of the Army's proposed settlement basis. In determining the reproduction cost of the improvements as of the lease termination date, the designated condition was totally disregarded. (For example, the Army's settlement is not based on the June 30, 1970, construction price of an adobe house in "poor" condition; rather the settlement is based on the June 30, 1970, construction cost of a "new" adobe house as described in the revised schedule less 30-percent depreciation.)

Also, the descriptions of the improvements in the revised schedule vary somewhat from the original schedule's descriptions. For the most part, it appears that the description of the improvements is more complete in the revised schedule than it is in the original schedule. Moreover, for the bulk of the improvements, with several notable exceptions (discussed below), we cannot say that the Army would have valued the particular improvements any higher if its appraisal had been based on the original schedule rather than the revised schedule, notwithstanding that the values given these improvements by Ritch were higher for the most part than the Army's appraisal.

The most notable differences between the original and revised schedules are:

(1) Four pump assemblies (two at the Moore Well and two at the Headquarters Well) were apparently added to the first schedule in handwriting by Ritch's predecessors. These assemblies are not separately listed in the revised schedule and are valued by Ritch at $816.25.

(2) The Horse Camp Spring is described in the original schedule as having a watering trough and galvanized pipe, while the revised schedule expressly states that no trough or pipe exists at this spring. Ritch's valuation of the spring (including trough and pipe) is $800 while the Government's appraisal is $600.

(3) The privately owned telephone line is described as being 33 miles long in the original schedule and only 8.75 miles long in the revised schedule. Ritch's appraisal of the 33-mile line is $35,112 while the Army's appraisal of the 8.75-mile line is $9,310.

(4) In the original schedule, 22 miles of four-strand barbed wire fence and 24 miles of three-strand fence are listed. In the revised schedule, 10 miles of four-strand fence and 24 miles of three-strand fence are listed. Ritch's appraisal of the fence is $53,576 while the Army's appraisal is $39,600.

With regard to the pump assemblies and watering trough and pipe, the Army told Ritch on April 27, 1970, that these particular improvements "will certainly be inspected and form a part of your agreement with the Government insofar as restoration is concerned. Since these items were a part of the original lease agreement, they will be carried forward to the supplemental agreement and your interest thus protected." The Army apparently retreated from this position when it made its appraisal of the improvements. The Army has subsequently indicated that it believes that the pump assemblies were actually included in the revised schedule descriptions of the Moore Well and the Headquarters Well. The Army asserts that the "two" well listings for each site "are duplicatory or supplemental to each other," since only one working well at each site existed. Therefore, only the one pump assembly present at each well, as described in the revised schedule, was included as part of that well's appraisal. Moreover, Ritch's predecessors added the assemblies in handwriting to the original schedule and there is no indication that these additions were ratified by the Army at that time.

By letter dated May 22, 1970, the Army explained to Ritch the reasons for the differences between the schedules and why the revised schedule was controlling. In this letter, the Army stated that after the execution of the October 15, 1949, lease agreement with the original schedule attached, the Government's restoration obligations under the prior lease agreement which had terminated on June 30, 1948, were settled for $7,300 on December 17, 1949. Because of this payment, the Army explains that a new schedule of improvements was prepared as an attachment to the June 30, 1950, supplemental agreement to reflect the true condition of the improvements as of July 1, 1948.

From our review, notwithstanding the Army's protestations, it does not appear unlikely that the revised schedule reflects the improvements on the leased premises as of June 30, 1950, rather than June 30, 1948. Nevertheless, in view of the conflicting record and passage of time, we can only speculate regarding what improvements really existed on the premises on July 1, 1948, and can offer no explanation regarding the differences between the two schedules. The burden is on the claimant to establish its claim. 31 Comp. Gen. 340 (1952); Gene Peters, 56 Comp. Gen. 459 (1977), 77-1 CPD 225. Ritch has not established that the original schedule more accurately reflected the improvements on the premises as of July 1, 1948.

In any case, article 10 of the lease expressly incorporates by reference the attached schedule of improvements. This paragraph was retained by the supplemental agreement. Ritch's predecessors separately executed the revised schedule attached to the June 30, 1950, supplemental agreement as well as the agreement itself. Paragraph five of the supplemental agreement--which is on the same page where Ritch's predecessors signed--states:

> "Schedule of Improvements attached to said original Lease and Suspension Agreement shall be deleted in its entirety and there is substituted therefor a revised Schedule of Improvements which is specifically listed on the attached 'Schedule of Improvements for Lease and Suspension Agreement' attached hereto and made a part hereof."

There is nothing in the record to indicate that Ritch or its predecessors ever objected to the revised schedule or its possible use to settle restoration claims up until April 20, 1970 (almost 20 years later). Consequently, although the primary purpose of the supplemental agreement appears to be to incorporate Tract B-[illegible] into the lease, Ritch was contractually bound to the revised schedule of improvements as the basis of the restoration settlement, in the absence of any indication that Ritch's predecessors' execution of the supplemental agreement and the revised schedule was other than voluntary or a clear showing that the revised schedule was erroneous. See Gene Peters, supra. Therefore, the Army's use of the revised schedule to determine the restoration of the improvements settlement appears to be proper under the circumstances.

3. Summary

Ritch has not established that its appraised values for the improvements are more reflective of the actual reproduction costs than the Army's appraisal. Neither is there any probative evidence of record which demonstrates that the Army's appraisals are in error. In this regard, we note that the Army has settled the vast majority of White Sands Missile Range leases on this basis.

In view of the foregoing, we cannot disagree that the Army's reproduction cost less depreciation settlement basis was the fair value that the improvements contributed to the value of the premises. See United States v. Corbin, supra; United States v. Banning, 330 F.2d 527 (9th Cir. 1964). Neither can we disagree with the Army's determination that the proposed settlement

does not exceed the diminution in value of the premises (land and improvements) that was caused by the Government's use and occupancy under the lease, since the Government totally destroyed the improvements--and thereby the value the improvements contributed to the premises--and damaged the land as well.

V. PRIOR RESTORATION PAYMENT

Ritch asserts that the Army's deduction of $3,030 from the proposed settlement for prior restoration payments was improper. The Army now states that there is no documented evidence to support the deduction from the proposed $56,143.50 settlement.

VI. CONCLUSION

Accordingly, by this decision we are advising the Army that, if Ritch is willing to accept a $56,143.50 settlement for the Government's obligation to restore the improvements on the premises, it should make payment in that amount upon obtaining a full and complete release from Ritch that will prevent any subsequent or additional claims arising out of the improvements in the present leasehold condemnation, the planned fee simple condemnation, or under the Tucker Act, 28 U.S.C. § 1346, et seq. (1970). On the other hand, if Ritch is unwilling to settle the improvements' restoration claim on this basis now, settlement can be delayed until the land is acquired by the Government in fee simple. See United States v. Gila River Pima-Maricopa Indian Community, supra.

Milton J. Socolar

for Comptroller General
of the United States

COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

James Spannaus
PL 2

B-181236

October 20, 1977

The Honorable Pete V. Domenici
United States Senate

Dear Senator Domenici:

Reference is made to your letters dated January 27 and May 3, 1977, regarding the claim of Mr. William G. Ritch on behalf of Ritch Associates arising out of Lease and Suspension Agreement No. DA-29-005-eng-62 encompassing lands in the White Sands Missile Range.

Enclosed is a copy of our decision of today regarding the claim.

Sincerely yours,

Milton J. Socolar
for Comptroller General
of the United States

Enclosure