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B-184782, Feb 26, 1976

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(1) UNITED STATES INCURS VALID OBLIGATION UNDER 31 U.S.C. SEC. 200(A)(1) TO PAY LAND COMMISSIONERS APPOINTED IN LAND CONDEMNATION CASES, DESPITE FACT THAT COURT ORDER APPOINTING COMMISSIONERS DOES NOT CHARGE UNITED STATES WITH SUCH COSTS, SINCE COURT CASES AND COMMITTEE NOTE TO FED. R. CIV. PROC. RECOGNIZE THAT SUCH COSTS MUST BE CHARGED TO UNITED STATES RATHER THAN CONDEMNEE, PURSUANT TO CONSTITUTIONAL REQUIREMENT THAT PRIVATE PROPERTY SHALL NOT BE TAKEN FOR PUBLIC USE WITHOUT JUST COMPENSATION. (2) LAND COMMISSIONERS, APPOINTED IN LAND CONDEMNATION CASES IN FISCAL YEAR 1975, WHO PERFORM SERVICES IN FISCAL YEAR 1976, MAY BE PAID OUT OF FISCAL YEAR 1975 APPROPRIATIONS AT RATES NOT LIMITED BY PUB. L. NO. 94-121, RESTRICTING RATES OF COMPENSATION TO LAND COMMISSIONERS IN FISCAL YEAR 1976, SINCE CONTRACTUAL OBLIGATION FOR PAYMENT ARISES AT TIME OF APPOINTMENT, EVEN THOUGH EXACT AMOUNT OF OBLIGATION REMAINS UNCERTAIN UNTIL PRESIDING JUDGE SETS COMPENSATION BASED UPON AMOUNT OF SERVICES RENDERED AND DAILY RATE AS DETERMINED WITHIN HIS DISCRETION.

DEPARTMENT OF JUSTICE-LAND COMMISSIONERS:

THIS DECISION TO THE ATTORNEY GENERAL OF THE UNITED STATES, RESPONDS TO A REQUEST BY GLEN E. POMMERENING, ASSISTANT ATTORNEY GENERAL FOR ADMINISTRATION, FOR OUR VIEWS AS TO WHETHER FISCAL YEAR 1975 APPROPRIATIONS MAY BE CHARGED WITH THE COSTS OF COMPENSATION PAID TO LAND COMMISSIONERS APPOINTED IN LAND CONDEMNATION CASES IN FISCAL YEAR 1975 UNDER FED. R. CIV. PROC. 71AH), WHO DO NOT PERFORM THEIR SERVICES UNTIL FISCAL YEAR 1976.

THE SUBMISSION INDICATES THAT TWO REQUESTS HAVE BEEN RECEIVED RECENTLY BY THE ATTORNEY GENERAL FOR THE OBLIGATION OF FISCAL YEAR 1975 APPROPRIATIONS FOR SERVICES PERFORMED BY LAND COMMISSIONERS DURING FISCAL YEAR 1976. JUNE 4, 1975, THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN ENTERED AN ORDER APPOINTING A THREE-MEMBER COMMISSION IN A LAND CONDEMNATION CASE. WHILE NO DAILY COMPENSATION IS STATED IN THE COURT'S ORDER, THE STANDARD COMPENSATION IN THAT DISTRICT IS $250 PER DAY FOR EACH MEMBER OF THE COMMISSION. A SECOND ORDER WAS ISSUED ON JUNE 20, 1975, BY THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA, PROVIDING COMPENSATION AT THE RATE OF $150 PER DAY FOR THE CHAIRMAN OF THE COMMISSION AND $125 PER DAY FOR THE REMAINING MEMBERS.

IT IS SUGGESTED, HOWEVER, THAT PUB. L. NO. 94-121, 89 STAT. 611, 618, APPROVED OCTOBER 21, 1975, MAKING APPROPRIATIONS FOR FISCAL YEAR 1976 FOR THE DEPARTMENTS OF STATE, JUSTICE, AND COMMERCE, THE JUDICIARY, AND RELATED AGENCIES, MAY LIMIT THE COMPENSATION PAYABLE. THIS ACT PROVIDES IN PERTINENT PART THAT:

"*** NO PART OF THE SUM HEREIN APPROPRIATED SHALL BE USED FOR THE PAYMENT OF THE

COMPENSATION OF LAND COMMISSIONERS AT A DAILY RATE IN EXCESS OF THE EQUIVALENT DAILY RATE OF COMPENSATION PAID A GRADE 18 ON THE GENERAL SCHEDULE."

THE DAILY RATE OF PAY OF A GS-18 WAS $138.48 UNTIL SEPTEMBER 30, 1975; THIS RATE WAS INCREASED TO $145.36 AS OF OCTOBER 1, 1975. SINCE THE DEPARTMENT OF JUSTICE WILL BE OPERATING UNDER THIS LIMITATION ON COMPENSATION FOR LAND COMMISSIONERS IN FISCAL YEAR 1976, THE LEVEL OF PAYMENT APPLICABLE IN THE TWO ABOVE-MENTIONED CASES WILL DEPEND UPON WHETHER THE TWO COURT ORDERS IN QUESTION CONSTITUTE OBLIGATIONS OF FISCAL YEAR 1975 OR FISCAL YEAR 1976 APPROPRIATIONS.

AS TO WHETHER THE COURT ORDER APPOINTING THE LAND COMMISSIONERS CONSTITUTED A VALID OBLIGATION OF THE UNITED STATES, IT IS PROVIDED IN SECTION 1311 OF THE SUPPLEMENTAL APPROPRIATION ACT, 1955, AS AMENDED, 31 U.S.C. SEC. 200(A) (1970) THAT:

"(A) *** NO AMOUNT SHALL BE RECORDED AS AN OBLIGATION OF THE GOVERNMENT OF THE UNITED STATES UNLESS IT IS SUPPORTED BY DOCUMENTARY EVIDENCE OF -

"(1) A BINDING AGREEMENT IN WRITING BETWEEN THE PARTIES THERETO, INCLUDING GOVERNMENT AGENCIES, IN A MANNER AND FORM AND FOR A PURPOSE AUTHORIZED BY LAW, EXECUTED BEFORE THE EXPIRATION OF THE PERIOD OF AVAILABILITY FOR OBLIGATION OF THE APPROPRIATION OR FUND CONCERNED FOR SPECIFIC GOODS TO BE DELIVERED, REAL PROPERTY TO BE PURCHASED OR LEASED, OR WORK OR SERVICES TO BE PERFORMED; ***."

AN EXAMINATION OF THE COURT ORDERS APPOINTING THE LAND COMMISSIONERS IN THE TWO SUBJECT CASES REVEALS THAT NEITHER ACTUALLY CHARGES THE COSTS OF COMPENSATION AGAINST THE UNITED STATES. SEVERAL COURT CASES HAVE HELD, HOWEVER, THAT CONSTITUTIONAL PROVISIONS REQUIRING THAT JUST COMPENSATION BE PAID TO OWNERS OF PROPERTY TAKEN BY GOVERNMENTAL UNITS PROHIBITS CHARGING THE COSTS OF LAND COMMISSIONERS AGAINST THE CONDEMNEE. IN THIS REGARD, U.S. CONST. AMEND. V PROVIDES, INTER ALIA, THAT PRIVATE PROPERTY SHALL NOT BE TAKEN FOR PUBLIC USE WITHOUT JUST COMPENSATION. IN GRAND RIVER DAM AUTHORITY V. JARVIS, 124 F.2D 914, 916 (10TH CIR. 1942), A CASE INVOLVING A SIMILAR PROVISION IN THE OKLAHOMA CONSTITUTION, THE COURT STATED:

"WITHOUT EXCEPTION, THE DECISIONS HOLD THAT IN AN ORIGINAL PROCEEDING FOR THE CONDEMNATION OF LAND THE COSTS ARISING IN THAT PROCEEDING FALL ON THE CONDEMNOR. THE REASON THEREFOR IS THAT TO TAKE THE LAND AGAINST THE LANDOWNER'S WISHES AND THEN CHARGE HIM FOR THE COST OF TAKING WOULD VIOLATE THE CONSTITUTIONAL PROHIBITION AGAINST THE TAKING OF PRIVATE PROPERTY WITHOUT JUST COMPENSATION. LEWIS ON EMINENT DOMAIN, 3RD ED., SEC. 812, STATES THE RULE AS FOLLOWS: 'IT SEEMS TO US THAT COURTS SHOULD BE GUIDED BY THE FOLLOWING PRINCIPLES AND CONSIDERATION IN THE MATTER OF COSTS. BY THE CONSTITUTION THE OWNER IS ENTITLED TO JUST COMPENSATION FOR HIS PROPERTY TAKEN FOR PUBLIC USE. HE IS ENTITLED TO RECEIVE THIS COMPENSATION BEFORE HIS PROPERTY IS TAKEN OR HIS POSSESSION DISTURBED. THE PARTIES CANNOT AGREE UPON THE AMOUNT, IT MUST BE ASCERTAINED IN THE MANNER PROVIDED BY LAW. AS THE PROPERTY CANNOT BE TAKEN UNTIL THE COMPENSATION IS PAID, AND AS IT CANNOT BE PAID UNTIL IT IS ASCERTAINED, THE DUTY OF ASCERTAINING THE AMOUNT IS NECESSARILY CAST UPON THE PARTY SEEKING TO CONDEMN THE PROPERTY, AND HE SHOULD PAY ALL THE EXPENSES WHICH ATTACH TO THE PROCESS.'"

THE COMMITTEE NOTE TO THE MAY 1948 DRAFT OF FED. R. CIV. PROC. 71A(1) CITED TO THIS CASE APPROVINGLY, AND INDICATED:

"SINCE THE CONDEMNOR WILL NORMALLY BE THE PREVAILING PARTY AND SINCE HE SHOULD

NOT RECOVER HIS COSTS AGAINST THE PROPERTY OWNER, RULE 54(D), WHICH PROVIDES GENERALLY THAT COSTS SHALL GO TO THE PREVAILING PARTY, IS MADE INAPPLICABLE. 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. THIS HAS BEEN SUMMARIZED AS FOLLOWS: 'COST OF CONDEMNATION PROCEEDINGS ARE NOT ASSESSABLE AGAINST THE CONDEMNEE, UNLESS BY STIPULATION HE AGREES TO ASSUME SOME OR ALL OF THEM. SUCH NORMAL EXPENSES OF THE PROCEEDING AS BILLS FOR PUBLICATION OF NOTICE, COMMISSIONERS' FEES, THE COST OF TRANSPORTING COMMISSIONERS AND JURORS TO TAKE A VIEW, FEES FOR ATTORNEYS TO REPRESENT DEFENDANTS WHO HAVE FAILED TO ANSWER, AND WITNESS' FEES, ARE PROPERLY CHARGED TO THE GOVERNMENT, THOUGH NOT TAXED AS COSTS. SIMILARLY, IF IT IS NECESSARY THAT A CONVEYANCE BE EXECUTED BY A COMMISSIONER, THE UNITED STATES PAY HIS FEES AND THOSE FOR RECORDING THE DEED. HOWEVER, THE DISTRIBUTION OF THE AWARD IS A MATTER IN WHICH THE UNITED STATES HAS NO LEGAL INTEREST. EXPENSES INCURRED IN ASCERTAINING THE IDENTITY OF DISTRIBUTEES AND DECIDING BETWEEN CONFLICTING CLAIMANTS ARE PROPERLY CHARGEABLE AGAINST THE AWARD, NOT AGAINST THE UNITED STATES, ALTHOUGH UNITED STATES ATTORNEYS ARE EXPECTED TO AID IN THE COURT IN SUCH MATTERS AS AMICI CURIAO.' LANDS DIVISION MANUAL 861. FOR OTHER DISCUSSION AND CITATIONS, SEE GRAND RIVER DAM AUTHORITY V. JARVIS (CCA10TH, 1942) 124 F2D 914. ***"

THE REASON THAT THE UNITED STATES SHOULD PAY THE COSTS OF THE LAND COMMISSIONERS IS THAT CONSTITUTIONALLY THE CONDEMNOR MUST PAY JUST COMPENSATION FOR THE PROPERTY TAKEN, AND IF HE COULD RECOVER HIS COSTS OF THE ORIGINAL PROCEEDING, OF WHICH THE COMMISSION IS A PART (SEE FED. R. CIV. PROC. 71AH), FROM THE PROPERTY OWNERS, THE COMPENSATION WOULD BE LESS THAN JUST COMPENSATION BY THE AMOUNT OF SUCH COSTS RECOVERED. GRAND RIVER DAM AUTHORITY V. JARVIS, SUPRA. THEREFORE, SINCE THE ONLY FUNCTION OF THE LAND COMMISSIONERS IS TO DETERMINE THE JUST COMPENSATION FOR THE PARCEL OF PROPERTY TAKEN, THE COSTS OF THEIR COMPENSATION MUST AS A GENERAL PROPOSITION BE CHARGED AGAINST THE UNITED STATES. MOORE'S FEDERAL PRACTICE PARA. 71A.130(3).

IN VIEW OF THE FOREGOING, WE BELIEVE THAT AT THE TIME OF THE COURT ORDER APPOINTING LAND COMMISSIONERS, A VALID OBLIGATION AGAINST APPROPRIATIONS THEN CURRENT HAS BEEN CREATED. SUCH OBLIGATION IS IN THE NATURE OF A CONTRACT FOR SERVICES WITHIN THE MEANING OF 31 U.S.C. SEC. 200(A)(1), SUPRA, ANALOGOUS TO THE COURT APPOINTMENT OF ATTORNEYS TO REPRESENT DEFENDANTS IN FEDERAL CRIMINAL CASES CONSIDERED IN OUR DECISION AT 50 COMP.GEN. 589 (1971). IN OUR 1971 DECISION WE HELD THAT AT THE TIME OF APPOINTMENT OF SUCH ATTORNEYS, A CONTRACTUAL OBLIGATION IS CREATED ON THE PART OF THE GOVERNMENT TO PAY THE REASONABLE COSTS OF THE REPRESENTATION, ALTHOUGH THE EXACT AMOUNT OF SUCH OBLIGATION REMAINS TO BE DETERMINED, AND THAT SUCH OBLIGATION MUST, THEREFORE, BE CHARGED AGAINST THE APPROPRIATIONS CURRENT AT THE TIME OF APPOINTMENT. ID. AT 590-91.

WHILE THE LAND COMMISSIONERS HERE INVOLVED DID NOT ACTUALLY PERFORM SERVICES UNTIL FISCAL YEAR 1976, WE HAVE LONG HELD THAT A CLAIM AGAINST AN ANNUAL APPROPRIATION, WHEN OTHERWISE PROPER, IS CHARGEABLE TO THE APPROPRIATION FOR THE FISCAL YEAR IN WHICH THE CONTRACT WAS ENTERED INTO, I.E., FISCAL YEAR 1975 IN THIS CASE. CF. 50 COMP.GEN. 589, 591, SUPRA. THE GENERAL RULE RELATIVE TO THE OBLIGATION OF A FISCAL YEAR APPROPRIATION BY CONTRACT IS THAT THE CONTRACT WHICH IMPOSES THE OBLIGATION MUST BE MADE WITHIN THE FISCAL YEAR COVERED BY THE APPROPRIATION SOUGHT TO BE CHARGED AND MUST CONCERN A BONA FIDE NEED ARISING WITHIN THAT FISCAL YEAR. SEE, E.G., 33 COMP.GEN. 57, 61 (1953). DETERMINATION OF WHAT CONSTITUTES A BONA FIDE NEED OF A PARTICULAR FISCAL YEAR DEPENDS IN LARGE MEASURE UPON THE CIRCUMSTANCES OF THE PARTICULAR CASE, THERE BEING NO GENERAL

RULE FOR APPLICATION TO ALL SITUATIONS WHICH MAY ARISE. 44 COMP.GEN. 399, 401 (1965); 37 ID. 155, 159 (1957). HOWEVER, IN THE INSTANT CASE, THE PENDENCY OF CONDEMNATION ACTIONS IN FISCAL YEAR 1975 IS SUFFICIENT TO SUPPORT THE NEED FOR APPOINTMENT OF COMMISSIONERS IN THAT FISCAL YEAR.

ACCORDINGLY, THE COSTS OF THE COMPENSATION TO BE PAID TO THE SUBJECT LAND COMMISSIONERS MAY BE CHARGED AGAINST FISCAL YEAR 1975 APPROPRIATIONS, AND THEIR RATE OF COMPENSATION IS NOT SUBJECT TO THE LIMITATION IN PUB. L. NO. 94-121, SUPRA.