NGARCHELONG STATE GOVERNMENT,
Plaintiff,

v.

CHILDREN OF REHUHER TARIMEL, namely LALII REHUHER, ANNA REHUHER, MARIA REHUHER, ALBINA REHUHER, REMOKET REHUHER, and FAUSTINA R. MARUGG,
Defendants.

CIVIL ACTION NO. 10-144

Supreme Court, Trial Division
Republic of Palau

Decided: August 24, 2011

[1] **Property:** Takings

The general rule for compensation is that the date of filing a declaration of taking fixes the time of taking and valuation of the property. In instances where the power of eminent domain is effected by enactment of a statute, the time of the taking and valuation is the effective date of the statute, not the time an appraisal is made.

[2] **Property:** Takings

When the government condemns privately owned water, it must provide just compensation.

[3] **Property:** Takings

An owner is entitled to compensation for the diminution in value of the remainder of his or her land as a result of a taking based on the difference between the fair market value of the entire tract immediately prior to the taking and the fair market value of the remainder immediately after the taking.

ARTHUR NGIRAKLSONG, Chief Justice:

This matter is before the Court on Ngarchelong State Government's Complaint for Condemnation filed on August 20, 2010. In the Complaint, brought pursuant to NSGPL No. 10-30, Ngarchelong State Government ("Government"), represented by Governor Browny Salvador, identified the subject property as the public water dam in Ngarchelong State, and requested that the Court condemn the subject property, Lot 048 F 07C. The Government stated that it needed possession of the property to maintain public use of the water dam. The Declaration stated that the Government paid $6,400.00 to the Clerk of Courts as payment of the fair market value of the property. It attached a May 25, 2010, Order in Aid of Judgment directing Defendants Children of Rehuher off the subject property.

The Children of Rehuher, represented by Maria Rehuher, filed an Answer on September 9, 2010. In it, Rehuher states as an affirmative defense that Plaintiff did not pay what she considers to be just compensation for the property. Rehuher also states that condemning Cadastral Lot No. 048 F 07 will render their land located north and northwest of the dam useless.

Prior to trial, the parties filed a Joint Pretrial Statement listing the following stipulated facts. The Government seeks to condemn Lot 048 F 07C, which is a portion of land described as Cadastral Lot No. 048 F 07. Cadastral Lot No. 048 F 07 contains the water collected at the dam the Government built on the southern end of the lot, described as Lot 048 F 07C, but also Lots 048 F 07B (consisting of 70 square meters) and 048 F 07D (consisting of 507 square meters), because the condemnation reduced the value of these lots. The parties agreed that the real property is valued at $5.00 per square meter. Thus, the appraised value of Lot 048 F 07C is $6,355.00 without considering the water, and $7,290.00 taking into account the value of the water.

Following a half-day trial, the Court requested the parties to file briefs on two legal issues arising from trial. Those issues are (1) who owns the water in the subject land of this condemnation proceeding; and (2) whether the government must also take the remaining two lots, 048 F 07D and 048 F 07B. This Decision resolves these issues.[1]

The Government presents two arguments that it owns the water. First, it argues that the Constitution provides that the state owns the water. *See* ROP Const., art. I, § 2 ("Each State shall have exclusive ownership of all living and non-living

[1] Despite the Court's July 20, 2011, deadline for filing briefs, Defendants filed a Supplement to Oral Closing Argument on July 25, 2011. In it, Defendants request that the Court award 3% annual interest rather than the 1.7% annual interest the parties stipulated to in their Joint Pretrial Statement. They also request that the Court award them attorney fees and other expenses. The request for 3% interest is denied because the parties are bound by their stipulation, and the request for attorney fees is denied because NSGPL No. 10-30 provides only for payment of costs, not attorney fees.

resources, except highly migratory fish, from the land to twelve (12) nautical miles seaward from the traditional baselines; provided, however, that traditional fishing rights and practices shall not be impaired."). That argument fails. The Constitution provides that the states own everything "from the land" to 12 miles seaward. That does not mean that the states own everything on the land. If it did, as Defendants note, that would mean that no private property exists in Palau. That is simply not the case, so the Government's constitutional argument fails.

Second, the Government argues that because it built the dam inside the Defendants' land and routed it into the dam, the Government owns the water. In support, Salvador cites an exception to the general rule that waters normally belong to the owner of the land, that "the proprietor of a dam may use the ponded water for his own purposes . . . . As between the owner of the pond and the landowner, it is the duty of the former to exercise his rights in a reasonable manner, and to exercise due care to cause no unnecessary injury to the latter." 78 Am. Jur. 2d Waters § 256. According to the Government, it built the dam and brought the water to the land, so Defendants never owned the water and should not be paid for it.

The Children of Rehuher respond that they own the water. They contend that because the water is on their land, they own it and should receive compensation for it, regardless of the fact that the Government created the water. They correctly point out that the Government's citation to United States law was incomplete, namely, that "[w]here a lake or pond is wholly man-made or 'artificial,' the record titleholders own the waters and all life within them . . . whether the lake or pond has been built for commercial drainage, recreation or aesthetic reasons." *Id.*

[1, 2] The general rule for compensation is that the date of filing a declaration of taking fixes the time of taking and valuation of the property. 26 Am. Jur. 2d Eminent Domain § 114. In instances where "the power of eminent domain is effected by enactment of a statute, the time of the taking and valuation is the effective date of the statute, not the time an appraisal is made." *Id*. When the government condemns privately owned water, it must provide just compensation. 26 Am. Jur. 2d Eminent Domain § 186 ("The waters of a private pond or private watercourse are private property and cannot be taken for public use without compensation.").

Based on these principles and the parties' arguments, the Children of Rehuher own the water. Ngarchelong's condemnation statute was not effective until July 6, 2010, so that is the effective date of the taking here. Well before that time, in the 1980s, the Government constructed the water dam which has become the main water source for the people of Ngarchelong State, with the exception of Ollei Hamlet residents. The Government did not have the authority to condemn the land at that point.

In 2003, a stipulated judgment was entered, where the parties agreed that the Government would pay $40,000 to the Children of Rehuher "to fully compensate the Rehuher family for Ngarchelong State's occupation and use for public water reservoir purposes . . . from December 1986 through August 26, 2003." (Tr. Ex. 10.) The stipulated judgment stated that "[t]he Property has been adjudged to be owned by the Rehuher family." (*Id.*) This payment was for the use of the land, and did not transfer ownership. The Government did not subsequently purchase or lease the land from the Children of Rehuher. Thus, on the effective date of the taking, July 6, 2010, the Children of Rehuher still owned the entirety of the land, including the water the Government brought to the land, and the proper measure of compensation includes the value of the water.

[3] Turning to the issue of compensation for the surrounding lots, an owner is entitled to compensation for the diminution in value of the remainder of his or her land as a result of the taking. 26 Am. Jur. 2d Eminent Domain § 329. Specifically, the owner should be compensated for the "difference between the fair market value of the entire tract immediately prior to the taking and the fair market value of the remainder immediately after the taking." *Id*. § 284. However, [t]here is no compensation due as severance damages where a partial taking has no effect on the market value of the remainder." *Id.*

The Children of Rehuher presented two witnesses to support their position that they deserve compensation for Lot Nos. 048 F 07B and 048 F 07D. They called Jackson Henry, an expert witness in eminent domain practice in Guam. He testified that in Guam, the practice in eminent domain proceedings is to condemn the remaining land out of fairness. He stated that the parties should do that here as well. Also, Maria Rehuher testified that as a result of the taking, Lot 048 F 07D is useless or has diminished in value. She also testified that because Lot 048 F 07B is only 70 square meters, it is of no value.

On the other hand, the Government argues that it should not have to pay for Lot 048 F 07B because Maria Rehuher agrees that the lot is unusable and has little or no value. As to Lot 048 F 07D, the Government points out that Maria Rehuher admitted that she still can use the lot for gardens or small houses, and that the Children of Rehuher can still access it from both sides. Therefore, according to the Government, the taking does not affect the value of Lot 048 F 07D.

The Government should not pay the value of either lot. As to Lot 048 F 07B, which is only 70 square meters, the evidence does not show that the land had value before the Government came to the property. Thus, the Government argues that it has no value that the Government must pay for. *See* 26 Am. Jur. 2d Eminent Domain § 284. As to Lot 048 F 07D, the evidence showed that the Children of Rehuher can still access the land and can still make use of the land. That does not automatically mean that the fair market value of the land has not changed as a result of the dam. However, the Children of Rehuher did not present evidence that the fair market value of that land changed as a result of the taking. Thus, given that they can still access the land, build on the land, and use the land, the Court is not persuaded that the value of the land changed.

Having resolved those issues, the Court concludes the following: (1) the Children of Rehuher are entitled to the appraised value of the land including the value of the water, which is $7,290.00; and (2) as Lots 048 F 07B and 048 F 07D did not change as a result of the taking, the Government need not compensate the Children of Rehuher for the fair market value of those lots.