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In the

Supreme Court of the United States

ALMOTA FARMERS ELEVATOR AND WAREHOUSE COMPANY,

Petitioner,

vs.

UNITED STATES

No. 71-951

Washington, D. C.
October 18, 1972

Pages 1 thru 42

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v.	:	No. 71-951
UNITED STATES	:	

Washington, D. C.

Wednesday, October 18, 1972

The above-entitled matter came on for argument at 1:40 o'clock, p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

LAWRENCE EARL HICKMAN, ESQ., E. 116 Spring Street, Colfax, Washington 99111 for the Petitioner

KENT FRIZZELL, ESQ., Assistant Attorney General, Department of Justice, Washington, D.C. for the Respondent

C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 71-951, Almota Farmers Elevator against the United States.

Mr. Hickman.

ORAL ARGUMENT OF LAWRENCE EARL HICKMAN, ESQ.,

ON BEHALF OF THE PETITIONER

MR. HICKMAN: Mr. Chief Justice, and may it please the Court:

This is a condemnation action to acquire the leasehold interest of the Almota Farmers Elevator and Warehouse Company in a tract of land required for the Little Goose Lock and Dam project, a Corps of Engineers projeet on the Snake River in Eastern Washington.

The fee owner, the railroad in this case, was not joined. For many years the OWR&M Company had owned and operated a railroad on the north bank of the Snake River which ran through the little village of Almota.

Almota Elevator Company, in 1919, went to the railroad and they leased 0.75, 3/4ths of an acre of bare unimproved land, absolutely nothing on it, and under various consecutive leases from that day forward, to the date of taking, on May the 26th, 1967, the Almota Company continued to hold this lease.

At the time of the taking they held it under a

20-year lease which had a term to expire on October the 12th,

Q And they had held it how long, did you say?

MR. HICKMAN: The date of taking was May the 26th, 1967. It was to expire October the 12th --

Q '74.

MR. HICKMAN: -- 1974.

Q And how long had it been?

MR. HICKMAN: It had been a 20-year lease.

Q And had there been a lease prior to that?

MR. HICKMAN: Oh, yes, there had been various short-term leases.

Q Back how far?

MR. HICKMAN: Since 1919.

Q 1919, that is what I wanted to know.

MR. HICKMAN: Consecutive. Continuously.

Q Were they all 20-year leases? Or varying?

MR. HICKMAN: No, it started out with five-year leases. In fact, the 20-year lease is the longest lease the company ever had. There was no renewal option in this lease.

Now, what is actually involved in the taking in this case, and if it was only this bare, unimproved land that was involved here, we would not have any problem because the Almota Company is not arguing on the

point that the valuation of this bare leasehold is its use value for the length of the term remaining on the lease less the agreed rent. We have no argument over that.

But shortly after the company acquired this property, in 1919, they went out on the property and they built a warehouse on this property to handle grain and some years afterwards, they built three crib elevators on this property and at some time later, they put up a concrete tank on the property.

Now, it is all of those improvements that are involved in what is before the Court.

Q What does the lease provide with respect to those improvements at the term if the lease is not renewed?

MR. HICKMAN: All through the period that these improvements were on there, these improvements, under the terms of the lease and the treatment of the parties, were the personal property of the Elevator Company. The Elevator Company owned these improvements and it had the right to take the improvements at the end of the term. But since those improvements were physically a part of this plant, they were part of what the government had to take in this condemnation action.

Now, the real problem as we see it here in this matter is the valuation of these improvements, not the valuation of this bare leasehold. There is a basic difference

here in the duration of Almota's property interests in this basic leasehold and in the improvements that is essential to the understanding of this case.

In the leasehold it is obvious that at the end of the term, there isn't anything there left. There is no property right to be valued, but the improvements at the end of the term. Almota still owned those improvements.

Q Now, when you speak to the value of those improvements, are you speaking of their current use value or their salvage value to the lessee?

MR. HICKMAN: I'll get to that point, Mr. Chief Justice, in just a moment.

Q Very well.

MR. HICKMAN: What I am pointing out now is that there is a difference between bare leasehold and the improvements. The Ninth Circuit did not appreciate that. In the one case, at the end of the term, all the rights are extinguished. In the other case, you are still the full fee owner of these building improvements for their full lifetime, as long as they exist. What you do with them, that is part of the valuation problem.

Q Under the law of your state, are those improvements part of the real estate?

MR. HICKMAN: For the purpose of what the government has to take, the Seagren case cited in our opening brief says

they are part of the real estate, but under the law of the State of Washington -- and we have cited authority for that -- they are the personal property of the tenant and we have a very confusing situation here.

If the government is taking real estate, you have got to value it as real estate and yet what the tenant actually owns is personal property and you are going to have to value it and his ownership continues when the lease is up. The government has treated this as though he had no further rights in the property at that time.

Q Well, I thought that -- well, perhaps you will enlighten me. Certainly, the court didn't just disregard entirely that value. Didn't it give a value to those improvements in terms of their salvage value at the termination of the lease?

MR. HICKMAN: That is the argument of the government. I would like to get an answer to that later and if I don't, I would appreciate going back to that again.

Q All right, fine.

Q Who was the trial judge?

MR. HICKMAN: Judge Powells, in the District Court in Spokane.

In other words, the valuation of these improvements at the end of the term of the lease at the time of the taking is vastly different than the manner of valuation of the bare

leasehold itself where the rights are limited by the duration of the term.

Q Mr. Hickman, there is no dispute, is there, that upon the government's taking, your client is obligated to sever the improvements, that he can't leave them in place and continue to use them?

MR. HICKMAN: He had no legal rights to continue to use them in place. On the other hand, I would like to make equally clear that the government owned no legal right to determine that the company not use them in place. This is not like the Fuller case, where it is a revocable permit. The government did not own the fee at the time of the taking. The Oregon-Washington Railroad and Navigation Company owned this fee.

Q Well, they had a right to use them under the lease for seven more years, approximately, didn't they?

MR. HICKMAN: That is right. That is right.

Q Well, the condemnation vested full right in the government, did it not, subject to the obligation to pay just compensation?

MR. HICKMAN: Yes, it vested full right in the leasehold and the improvements, but, mind, the government did not condemn the rights of the fee owner. This was still property of the fee owner and only the fee owner could terminate this lease and refuse to renew.

Q So you say then the government could not insist, under the way it took the land, that you remove those buildings? Just because it --

MR. HICKMAN: It had no right to insist because the government was not acquiring the fee. This is not like the Fuller case in that respect, /the government where could have said we have a legal right and at the end of the term you're just not going to stay there.

Q Well, Mr. Hickman, I am confused, now. You say the government did not acquire the fee to the three-fourths acre of land?

MR. HICKMAN: No, the fee owner was not joined in this case and so far as I know, to this date the government still does not own the fee to this property.

Q Well, I am confused as others apparently are. What did the government -- why did it take just the leasehold interest then?

MR. HICKMAN: Well, of course, it is not a part of the record but I can inform you that it is the policy of the government in these relocation cases where they relocate the railroad to enter into an agreement with the railroad and they do not acquire the fee, they trade. The fact of the matter is that at the time this was done, no such agreement existed with the railroad. This has to be considered as the facts were at the time. That they did not own the fee. The

railroad did own the fee and that is very important in this case.

Q Yes, but what was the government -- what was the purpose for which the government was acquiring this?

MR. HICKMAN: For the Little Goose Lock and Dam project. It would be flooded.

Q And why would the leasehold interest be enough for that?

MR. HICKMAN: Well, they expected to acquire the fees by making a deal with railroad, but they had not made a deal yet.

Q You mean, by a negotiated purchase?

MR. HICKMAN: That's right.

Q What about trading, by making --

MR. HICKMAN: That's right, they relocated the railroad higher up on a hill and went ahead. Now, there was not any substantial factual dispute in this case.

Q Mr. Hickman, just before you proceed, if the government had first acquired the fee, you would hardly have any case at all, would you, because the government then would have been your lessor.

MR. HICKMAN: Your Honor, I would agree with you. The government would have the right at the end of the term to say, "Sorry, boys --"

Q Right.

MR. HICKMAN: -- "we're not going to renew." But the thing is, we have had to take the facts in this case as the law. The government should not do that and in the stipulation that is entered here -- we did enter into a stipulation for the reason that the only difference between us ultimately was: How do you value these improvements? So we simply got together and we stipulated on the facts and if it was to be valued as determined by the government, the value was said to be $130,000. If it was to be valued the way we contended, it was to be $274,625.

Q And did that difference in turn, in the valuation, depend upon whether or not consideration was given to the possibility of renewal of the lease?

MR. HICKMAN: Actually it ultimately boils down to that, but I would like to get at it in a little bit and in a different way, really.

In both cases, on both valuations, stipulated values, it was the same property involved. I want you to understand that because there are some contentions in here in the argument of the government in the brief that would lead you to the contrary but the stipulation was that the value of the land and improvements -- that is, the leasehold and improvements -- in one case was 130 ($130,000) and the value of the same thing on the other is $274,625. Now, we get, really, to the crux of the thing.

And that is, the reason for this difference in values was a difference of opinion as to what elements of value were entitled to be considered in determining the value of these improvements. There was not any argument over this bare leasehold.

Now, the question is, what should be considered when it comes to determining the value of these improvements? Now, in the opening brief, we cited quite a number of cases on the proposition that in determining the fair market value of any property, that you must consider all elements of value. You must consider all reasonable probable uses of property that affect the fair market value.

Now, they don't disagree with that, but they don't apply the rule. Now, I cited the Olson case, in which this Court here lays down in very good language exactly what I said and I had intended to read it, but in the interests of saving time, I'll proceed.

Now, at this point, in determining what these buildings could be used for and determining what the elements of value that should be considered (are), I think you need to pretty well understand the structural nature of these facilities.

Now, I mentioned that there were three crib buildings that were put up on the property. If you understand what a crib elevator building is, it is a wooden

structure. It is made of cribbing. You take, well, for example, 2 by 12 planks and they spike one on top of the other and you continue that type of structure clear to the top of the bins.

Now, each one of these structures would hold 125,000 bushels. That is enough to fill 62 and a half 125,000-capacity grain car , to give you an idea of the size of this thing.

Now, there were three buildings like that.

To top that off, there was a concrete tank which would hold 148,000 bushels. That would take 74 railroad cars of the same size to fill that.

Now, you can realize and appreciate that there had to be very substantial and permanent foundations under these structures so, when you get to the matter here of selling this property and determining fair market value, what is the first and most important thing the buyer is going to ask?

He is going to ask what are the probabilities, what are the chances of continuing to use these structures right where they are. Why? Because he knows there is little or no value whatsoever to attempt to move them, probably nothing but junk value to try and move these buildings. That is where the difference arises between the government and ourselves in this case and that is, in Almota's view, at that stage of the case Almota has contended that there should be

taken into consideration that the probable use of these improvements right where they were was very great, that it was a reasonably probable use. You will find in the stipulations that there were facts -- in other words, it was stipulated that there was evidence to the effect that the railroad as a general policy never refused to renew one of these leases where railroad traffic was being produced for the railroad.

Q What if the railroad, somewhere toward the end of the seven years remaining in the lease, decided for their own reasons to move the tracks to high ground, as in case of flooding or move it anywhere else?

MR. HICKMAN: Your Honor, that is one of the risks that any buyer takes.

Q Well, the buyer, or the --

MR. HICKMAN: You might improve property, for example, and you take the risk that the party between you and the view might build a high-rise apartment.

Q Isn't that a risk?

MR. HICKMAN: It's a risk, yes.

Q Isn't that a risk that your client took when he built the property on that land under that lease?

MR. HICKMAN: Yes, but the thing is, your Honor, the government here would have this valued as though it was a certainty that it is not going to be renewed at the end of

the term. We say that it was reasonably probable that it would be renewed at the end of the term and that that is an element of value that is considered by the market and should be taken into consideration in this case and with the stipulation, that was actually the case because that is the only difference between the two values. The government recognizes that the market was valuing this probability of renewal at approximately $144,625 because that is the only difference between the two values. They recognized that if you let a buyer use his own devices in determining for himself what the probabilities of renewal were that he finally in hardnosed bargaining would come up and say, "okay, it is worth $274,625."

Q If the lease had had in it a clause that automatically terminated the lease if the property were condemned?

MR. HICKMAN: You are talking of a problem there, your Honor, that does not apply in this case. There was no condemnation clause in the lease and Almota in this case, by -- is entitled to the full value of these structures, whatever it may be. Now --

Q Mr. Hickman, did I understand you correctly to say that at the time of the commencement of the condemnation case the railroads still owned the fee?

MR. HICKMAN: That is absolutely correct, your

Honor. Now, there has been some remarks made in the briefs that would lead you to the contrary.

Q I have before me, I think, the opinion of the Circuit Court of Appeals for the Ninth Circuit which says, "Prior to the commencement of the condemnation action under review, the United States had settled with the fee owner, the railroad, for the railroad's interest in the land in question."

MR. HICKMAN: I realize that that is in the opinion and there had been some contention of that type in some of the briefs. There is absolutely no truth to it. That is an erroneous conclusion on the part of the trial court and the only answer -- I mean, of the Ninth Circuit Court -- the only answer I can come up with was that there was a footnote to that effect in one of the government briefs. No citation has ever been made to anything in the record that that is true and it actually is not factual. That did not happen as I have mentioned to you. They don't yet own the fee.

Q Mr. Hickman, is the record silent on this issue?

MR. HICKMAN: It is. It is but it was tried in the trial court on the basis that the railroad owned this property and the government did not. The government is absolutely not in a position in this case to have held out till 1974 and then said, "Gentlemen, we are not renewing.

Take your elevator and go." And yet, that is what they would do. They would value this as though that was the certain result at the end of the term. We say that is for the market to determine what the probabilities are of that happening.

Q Well, had the government acquired the fee either by condemnation or negotiation, it would have been certain that the lease would not have been renewed.

MR. HICKMAN: Well, now, except for this, your Honor, and that is I don't think it is exactly the law, and it isn't in here and I haven't argued.You know, when we ask for compensation, we can't ask for the benefits of the project in value.

Q Right.

MR. HICKMAN: And the trial judge was of the opinion that the government can't assert the government to its detriments, either.

Q I think that is correct.

MR. HICKMAN: In other words, that they have got to take the title as it was at the time you are taking this and at that time the government didn't own it.

Now, you see, where this renewal of the lease comes in, it isn't really renewal of the lease. It comes in in determining what the probabilities are that at the end of this term this personal property can continue to be used right where it is. If it can continue to be used there, it is

of great value. If it can't be, it is probably nothing but junk.

Now, I want to point out here that the argument the government has made here, actually, they are really only allowing/us junk value for this. If you want to refer to the Carlock case, it is cited in the brief, and I didn't cite the case for that purpose, but it says that, and that is, "Under the facts,/there the tenant did not own the building improvements. Yet --" and that is a Washington, D.C. circuit case --"Yet, in that case, the court held that the owner was entitled to the use value of those improvements for the entire period of the lease."

Now, here, all the government would give us is the use value of these improvements for the term.

I am pointing out that in the Carlock case, the Court has held that you can get that without owning it.

Now, all the government would give us in addition in this case to what the party in the Carlock case got, who didn't own the improvements, is that they would give us this junk value for these improvements.

What are you going to get out of a concrete tank when you go to try and move it or tear it down? Just a bunch of rubbish, that's all. And that is all they will allow us in addition to what was allowed the owner in the Carlock case is just the junk value of these improvements.

I might also call attention that we are only arguing and have only argued that it is/taken into consideration to be only the probability of the renewal of this lease at the end of the term.

In other words, the probability that we can continue to use it there. Now, I've cited in the brief the Manhattan case and the Upper Allegheny case, Second Circuit cases. Those cases go one step further than what we are arguing here. They would have valued it as used property in place, for use in place without proving any probability of renewal.

Q Were most of these buildings put up since 1954, or a large proportion of them?

MR. HICKMAN: The concrete tank was put up about 1954, and the rest had been put up about 1940 and the flat house about 1919.

Q The most expensive piece, I suppose, is the concrete tank?

MR. HICKMAN: Not necessarily. Not necessarily.

Q But it is the one on which you have the least salvage?

MR. HICKMAN: Well, there is no salvage to that.

Q In any of it, really.

MR. HICKMAN: Really not. When you start tearing down planks spiked together, I'll leave it to your judgment what you are going to have left.

Q Is this perhaps the explanation why the earlier leases were five years, for example and the final lease is 20?

MR. HICKMAN: I think not, your Honor. It is simply the policy of the railroad to want to control these properties to assure that there is a freight going to the railroad.

Q Would a prudent businessman in 1954 go to the expense of building that concrete tank if he had only a five-year lease?

MR. HICKMAN: Your Honor, that is just a point I am trying to make. A prudent businessman and you have got to assume that a prudent buyer -- you have got to assume that the government in agreeing to this $274,000 valuation was considering the prudent buyer willing to pay that, they have admitted that buyers on the market, if you left them to their own devices would let them examine all of this. It would have come up at that figure.

Q Well, that is not quite the question I was driving at.

Would a prudent man build an expensive concrete tank on which there would be no salvage or portable value on land on which he had a five-year lease or would he want something more than that?

MR. HICKMAN: He would want something more than

that.

Q So he got a 20-year lease the last time?

MR. HICKMAN: He would do it with the railroad in the type of leases that were being written and it is done quite regularly. It is not uncommon at all and the reason is, the railroads are after freight traffic and they will continue renewing those leases time after time without any question and that is why the market makes a difference of $144,625. If this was so speculative and so uncertain, the market would have said, "Well, we'll give you $1,000 more," and that is all. But this thing, there is more than twice the difference in value between the government's contention and our own in this case.

Q Mr. Hickman, it may be of no consequence, but the annual rental under the lease was $114.20, a year?

MR. HICKMAN: That is right.

Q Had it always been at that figure?

MR. HICKMAN: It had never been more than that.

Q It was never any more?

MR. HICKMAN: I suspect that it may have been a little less at one time.

Q A typical nominal railroad lease?

MR. HICKMAN: That's right. That's right. The railroad saves these properties for just this purpose and they continue to lease them. The only thing they want

control of is that if the lessee goes to doing business with someone else and does not produce any more freight traffic, then they had better watch out.

I want to call attention that the government has gone against the unit rule cases and they are against and in conflict with the Second Circuit cases. The Washington, D.C. circuit case in our opinion is in line with the Second Circuit, although it doesn't specifically so state and they are also in convlict with a statute of Congress that was enacted in the first part of 1971 which now recognizes that just compensation is more than what the government is arguing in this case and by policy of the Congress now, that in this case they would award full value if those improvements add to the whole value of the property.

I should like to save the rest of my time, if you please.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Hickman.

Mr. Attorney General.

ORAL ARGUMENT OF KENT FRIZZELL, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. FRIZZELL: Mr. Chief Justice, and may it please the Court:

I should like to discuss two or three essential matters with you if I may. First, let us establish that if we were to adopt Appellant's position and viewpoint urged

upon us, it will necessarily and clearly dictate and require that this Court overrule the established law of just compensation as set forth 26 years ago by this Court in the United States versus Petty Motor Company.

Secondly, I'd like to share with you why the rule, as enunciated in Petty is the proper rule and thereby why it should not be set aside and overruled and,

Lastly, I'd like to deal with some of the specific arguments and questions raised by the Petitioner, Almota.

Let us turn our attention, if we may then, to the United States versus Petty Motor Company case, cited in our brief. This Court, in Petty, held that a tenant's expectancy -- that its leaseholds would be renewed upon expiration even though its lease did not provide for renewal -- is not a compensable element of value under the Fifth Amendment.

The Court further held that each tenant in that case was entitled to compensation measured solely on the basis of the remainder of its term, which existed after its ouster.

This Court said the fact that some tenants have occupied their leaseholds by mutual consent for long periods of years does not add to their rights.

Now, the question arises, is Petty binding in this case or is it distinguishable? Petitioner contends that it

is distinguishable and therefore is not binding.

I submit that the Petty Motor case is directly in point despite the efforts of the Petitioners to distinguish it. In substance, the facts are the same. The difference is pointed out by Appellant. That difference is as follows:

He says, "Well, after all, the tenants in the Petty case had no improvements considered part of the fee as is present in the instant case." But that does not change the legal principles involved. They are identical.

This Court in Petty held that the possibility of renewal is not a convinceable element and made clear that this was because such a prospect of renewal expectancy does not add to the tenants' rights, with or without improvements.

Generally, the only value that any buildings have to be used in connection with leasehold interests is their use in place. We are willing to pay the Petitioner here for the buildings and their use in place for the remaining term of the lease. But we are not willing to pay Petitioner based on the speculation or the mere expectation of those buildings in place where there is no renewal of the lease contained in that lease, but a mere expectation. The decision in Petty was based upon pure property law.

Basically, it was not decided with any control and considerations of fairness or lack of fairness. I submit that in many instances, condemnation law is harsh law. In

the instant case, the government admits that the renewal expectancy is there and it is true that such expectancy has been frustrated by the government taking. This occurs frequently. It occurs with frustration of contract rights, it occurs with frustration of business profits. But the remedy, if desiredshould lie with Congress.

Q Mr. Frizzell?

MR. FRIZZELL: Yes.

Q You refer to this holding in Petty as to the expectancies of a tenant for years. If that was such an important holding, why is it just in a footnote?

MR. FRIZZELL: We discussed it in our brief further than merely a footnote.

Q No, but I mean, it was a footnote in Petty as I read Petty.

It is not in the body of the opinion. It is a footnote. It is on page 380.

MR. FRIZZELL: (No response.)

Q But isn't a part of the holding to the same effect that you -- in Petty -- that you can't get the costs of removal and replacement, relocation? Doesn't that have the same bite?

MR. FIRZZELL: Sorry, Mr. Justice, I was reading when I should have been listening.

Q That's all right. You go ahead.

MR. FRIZZELL: Mr. Justice, may I bring your attention to page 381, the page following the footnote that you referred to? There the last sentence recites: "The measure of damages is the value of the use and occupancy of the leasehold for the remainder of the tenant's term, plus the value of the right to renew the lease of Petty less the agreed rent which the tenant would pay for such use and occupancy."

Q When the Court used the language, "The right to renew the lease of Petty," do you say the Court meant a right which is a legal right enforceable under some option?

MR. FRIZZELL: And that was the instance with that one defendant in Petty. There was a renewal right in that particular instance.

Q That reference is not to an expectancy or a hope or a custom of renewing the lease independent of some option to renew it, is it?

MR. FRIZZELL: Not at all. "Nor allowed that mere expectancy to rise to the level of a legal property right or interest," and that is clearly what Petty held, that you can't allow a mere expectancy, a right, a hope, of a renewal of a lease to rise to the status of a legal, compensable right under condemnation.

Now, what are the alternatives? If we stay with the decision in Petty, Congress can go either way. If we reverse

Petty, we freeze into the Constitution one rigid concept that may be just in one case but will likely result in inflamed and swollen verdicts in hundreds of others.

We are not making the law for a particular case but for the whole range of eminent domain cases.

When you look at Petitioner's argument realistically, shift and sift the chaff from the wheat, it is appealing on the surface, but it is in truth and fact one of form over substance. It is, I submit, a distinction without a difference. The Petitioner is trying to convert a non-property right, the renewal expectancy, into a compensable interest. They are asking the Court to rewrite the lease with the railroad for them and insert therein a compensable legal right, a right of renewal in the lease with the railroad.

In effect, what they are asking is that the Court, this Court, amend the Constitution and make the Fifth Amendment read, "Nor shall private property nor reasonable expectations be taken without just compensation."

Q You don't think we could rule against you without doing that?

MR. FRIZZELL: Not at all, your Honor, not at all.

Q All right.

Q Are you familiar with the decision of this Court -- it is cited, but only in a footnote in your brief --

the United States against Virginia Electric and Power Company, Volume 365 of the United States reports?

MR. FRIZZELL: I am not, your Honor.

Q In that case the Court held that the valuation of an easement would depend upon the valuating the likelihood of its being exercised and that is not, certainly, very far away from evaluating the expectancy of a lease being renewed. You cited for a different point for a dictum in passing, but --

MR. FRIZZELL: An easement would be a legal interest, properly compensable.

Q Yes, I know, there is no question about the compensability of the easement, nor is there any question about the compensability of the remaining limitation of property in this case, but in evaluating it, the evaluation depended upon predictability of the expectancy of its being exercised and that, as I say, is not maybe far away from the Petitioner's claim here, evaluating the expectancy or the probability or lack of it of a lease being renewed.

If you are not familiar with the case, there is no point in continuing the colloquy.

MR. FRIZZELL: Let's turn our attention, because I think it is a logical question and a logical interest to take and that is, how does the government justify the Petitioner in this instance getting something less than the

$274,000. In fact, the Petitioner repeats that in his brief several times. He says anything less than that is not just compensation under the Fifth Amendment.

Well, first of all, let me point out that $130,000 of that $274,000 represents compensation to the Petitioner for its remaining seven and a half years under the lease.

Now, the reason the Petitioner gets less than the $274,000 is because the remaining $144,625 is not part of the value of the leasehold owned by the Petitioner and condemned by the government. That much of the $274,000 represents the value the Petitioner desires to add on, based on the mere expectancy, i.e., renewal of its lease, a nonproperty expectation and, I hasten to add that the lease -- that the lease would be renewed.

If the government were to pay Almota for such expectancy, we would be acquiescing in their attempt to convert a nonproperty interest into a compensable item.

Why should the government be put in a different position than any other private fee owner that would have acquired the fee in this instance? Why should we be required to pay more than the United States Steel or G.E., had they acquired the railroad fee here? What would have happened if they would have acquired rather than the government? You have got to remember that the government, under the case law, should pay no more for public purpose in condemnation of

property than private interest would pay.

G.E. owns this fee now. They have two options. They can sit the seven and a half years out under the lease and pay absolutely nothing. So could the government.

We could have acquired the fee from the railroad, sat out seven and a half years, and we would not have owed one cent to Petitioner. Or G.E. could say to the Petitioner, look, we would like to build seven and a half years before your lease expires. What would G.E. have paid for the remaining term of that lease? Would they have paid for an expectancy of the lease renewal? No, indeed. Nor should the government be required to do so.

Petitioners assumed a risk when they signed that lease 20 years ago -- almost, in 1954 -- and they now want to transfer that risk to the government and have us pay them for it. It is not a legally recognized right in the property and therefore is not compensable under the Fifth Amendment.

I think I should deal directly with some of the Petitioners comments here today. He said , well, after all, under Washington law, between the lessor and the lessee, the property improvements is considered personal. But when the government condemns, it is considered real estate.

Members of this Court, we value -- we, the government, value the improvements as real estate for the remaining term of the lease, that is, seven and a half years.

Q Mr. Frizzell?

MR. FRIZZELL: Yes.

Q May I go back to your illustration? You said the government could have acquired the fee and waited seven and a half years. I suppose Almota could have gone to the railroad and obtained a new 20-year lease and you would have had to pay something more.

MR. FRIZZELL: Had they, in fact, acquired more than a seven and a half year lease -- 20-year, whatever, we would have had to pay them for their legal interest in the property condemned, the leasehold interest, but not any expectancy.

Q Would that necessarily be true if they acquired that 20-year extension after notice of the taking?

MR. FRIZZELL: No, that would not be true in that event because the compensation to be paid is as of the date of taking and the interest taken as of that date, not as subsequently acquired by the Petitioner through its own efforts withthe railroad.

To answera question that came up earlier, what really happened here? It is true that in these type of situations the government generally relocates the railroad and they exchange deeds as of the date of taking. In this instance those deeds had not been exchanged.

That is why he says that"as of the date of taking"--we don't disagree, as of the date of taking the government did not actually have possession of the exchange deed from the railroad.

Q And at the date of trial you didn't have it?

MR. FRIZZELL: No, sir. No, sir.

Q And at the appeal, you didn't have it?

MR. FRIZZELL: I think not. I think not.

Q Well, how should we weigh that circumstance? The record before us is no taking, is it not? The exchange was never consummated so far as this record indicates.

MR. FRIZZELL: That is not in the record, no, sir. Our position of the government is that it makes no difference whether the government owned the fee on the date of taking or whether the railroad did. We, in fact, have settled with the railroad. They are not a party to this action. It was settled before the necessity of filing condemnation proceedings arose. That only left us with the obligation to acquire the remaining interest of Petitioners, the leasehold interest, and we did, in fact, in May of 1967, file that condemnation proceeding to obtain the remaining legal interest in the property.

Q And that taking was effective as of that filing date?

MR. FRIZZELL: As of that date.

Q And the money deposited in the usual way?

MR. FRIZZELL: Yes. Yes.

Q The amount you deposited is the $130,000?

MR. FRIZZELL: Yes.

Q The smaller of the two stipulated amounts?

MR. FRIZZELL: Yes.

Q Mr. Frizzell, how was the settlement between the government and the railroad evidenced? Was there a contract?

MR. FRIZZELL: The specific information I have here, Mr. Justice. This declaration of taking in the Almota case was May 26, 1967, as set out in the brief. There was, in direct answer to your question, a relocation contract between the government and the railroad and it is dated August 30, 1966. The deeds were not exchanged, however, between the railroad and the government under that relocation contract as of the date of taking, as of the Circuit Court of Appeals, the Ninth Circuit hearing.

Q Is that information in the record?

MR. FRIZZELL: No, sir, it is not.

Q Let me back up, Mr. Frizzell. On May 26, 1967, is that the date of taking of the leasehold interest?

MR. FRIZZELL: Yes.

Q That is of record and in this record.

MR. FRIZZELL: Indeed it is.

Q So as of that date, the title passed?

MR. FRIZZELL: As between Petitioner and the government, yes.

Q The leasehold interest, whatever its value, passed to the government.

MR. FRIZZELL: Whatever it is, whatever its value is, passed to the government as of May of 1967, leaving a remaining approximately seven and one half year term for the government to compensate Petitioner for under his original 20-year lease, dating back to 1954 and expiring in 1974.

I think one other point that the Petitioner made should be cleared up at this time and that is his statement that the government is only, in essence, allowing junk value for these improvements. I refer you to our brief, but let me point out again that the value of the improvements at the end of the term of this lease is not any longer an issue in this case. Why? Because, by stipulation here again -- a lot was stipulated to in this case. One of those stipulations was that the right of removal, under the lease, was revested by the government in Petitioner, giving him the exact same rights he had under the original lease with the railroad and giving him ample time to remove the improvements.

I think, in conclusion -- yes?

Q Well, I understand his position is that, practically, you cannot remove them, except as junk.

MR. FRIZZELL: I would submit that that would generally be true with most permanent type of improvements after 13 years since they're -- well, these were erected in 1940, some of them, I think he said. After approximately 20-some years the removal right is somewhat of an empty gesture.

Q Yes, it may be even a code word for the government saying that we will insist that you get them off.

MR. FRIZZELL: This lease provided, by the way, that if the Petitioner did not remove them, that the railroad had the right to do so and charge Petitioner.

Q And you could do the same?

MR. FRIZZELL: Yes, as we accede to the rights of the fee railroad owner.

Q Mr. Frizzell, do you think there is any basic inconsistency between the Ninth Circuit decisions in this case and in the Fuller case, the preceding one?

MR. FRIZZELL: Well, I disagree with the Ninth Circuit decision in the Fuller case but, of course, as you well know, since it has just been argued, that is different to the extent that in that instance the expectancy was based on a license revocable by the government whereas in this instance there was no renewal right in the lease, but a mere expectancy that Petitioner desires to rise to the level of a legal interest in the lease and therefore be

compensated.

I would like to conclude, and I can think of no more fitting conclusions for argument in this case than the words of Mr. Justice Douglas concurring in part in United States versus General Motors Company. At that time he stated, "Consequential losses or injuries resulting from the taking are not compensable under the Fifth Amendment. If we allow consequential damages to be shown here and awarded here, I do not see why almost any type might not be in the future.

"If we take that step, we demonstrate that hard cases do indeed make bad law. We give the Constitution an interpretation which promises swollen verdicts which no act of Congress can cure."

Q What type of damages were being referred to under the head of"consequential" damages in Mr. Justice Douglas' opinion there?

MR. FRIZZELL: That was an instance where General Motors Corporation desired to remove leasehold improvements in the matter of machinery and buildings.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Frizzell.

You have four minutes remaining, Mr. Hickman.

REBUTTAL ARGUMENT OF LAWRENCE EARL HICKMAN, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. HICKMAN: Mr. Chief Justice, about the Petty case, we have dealt with that at length in the briefs and

if reference is made to that, I think that the matter is fully answered, but again I repeat, in the Petty case, there was only the bare leasehold, the value in that case. There were no tenant-owned building improvements. The Court did not purport to be talking about tenant-owned building improvements in any sense whatsoever.

Also, I would like to point this out, that Counsel and in the briefs has argued at great length about this matter of property rights. The only property rights we are really talking about in this case is the bare leasehold about which we have no disagreement and the building improvements and machinery that we are disagreeing about.

There is no property right that we are claiming in the leasehold expectancy. We have not asked for payment of a property right in the leasehold expectancy.

What we do say is that in the valuation of those building improvements, that we are entitled to the consideration of all elements that lend value to those improvements upon the market. We are entitled to the consideration of all reasonably probable uses of that property.

Q Isn't that seven or seven and a half years' use?

MR. HICKMAN: Oh, but that is not limited by the seven and a half years because, as I have pointed out, at the end of the seven and a half years we still own these buildings. What are they worth then? Counsel would have

them worth nothing.

Q Well, that is what you said earlier, didn't you?

MR. HICKMAN: I said that if you took their view, they would be worth nothing. Under our view, considering all elements of value and the fact that in all probability they could continue to be used in place, they have great value.

Q Because of the probability of renewal?

MR. HICKMAN: Because of the probability of continuing to use them right where they are. What are you going to use those buildings for at the end of the term? Counsel would say there is only one use you can consider and that is to tear them down and remove them but the market says, look, there is a reasonable probability that we can use them right where we are. This Court in the Olson case has said, "All reasonable probabilities are to be taken into consideration." The Court says, "In making that estimate, there should be taken into account all considerations that might be brought forward and reasonably be given substantial weight in such bargaining."

Now, the government by their view says, "We'll take everything into consideration but this one element, which values at $144,625. You have got to exclude that."

Q Isn't that quotation you read from directed primarily at the highest and best use concept?

MR. HICKMAN: Well, coming to the highest and best use concept, what is the highest and best use of this particular elevator at the end of the term? To use it right where it is, isn't it? And there is a reasonable probability of using it there.

Q Well -- well, go ahead, I am sorry.

MR. HICKMAN: And the Second Circuit says, "We don't care what the probabilities are. It is not just compensation to pay these people off at junk or salvage value on this property because there is other things that enter into this, just common decency on the part of the landlord. The fellow that has got the lease has got the inside track and if it adds value upon the market, it should be paid for, and that is our point. This is an element of value. We have never contended that as a property right we are entitled to a single dime for this leasehold expectancy.

Q Under your theory, Mr. Hickman, could a witness testify at the condemnate-evaluation hearing that your client had had a falling out with the railroad and therefore in this particular case it was very unlikely that the lease would be renewed?

MR. HICKMAN: I suppose it would be pertinent, however, we could point out that the railroad was perfectly willing to take on some other client we might sell to and give him a lease renewal.

Q Yes, but what if the United States puts on a witness and says, "We are going to take the fee, obviously, and we will guarantee we will not renew it at the end of seven years?"

MR. HICKMAN: Gentlemen of the Court, if you feel, in this case, that this matter of whether the government owned the fee in this or did not own it is the crux of this case, then this case should be remanded to try that matter of fact in the trial court. That was never tried. It was never argued in the trial court and in this case if they repeat that that was the case, we will certainly contest that matter, because we have plenty, I am sure, of evidence that this fee was in the railroad yet and there was no agreement. What I know about it is outside the record but if that is in your minds, this should be remanded to find out what the fact is. It should not now be decided on that fact.

Q What difference does that really make, Mr. Hickman, when there was a separate taking of the leasehold interest in 1967, a proceeding directed only at your client and at the interest of your client, which was then seven and a half years?

MR. HICKMAN: Well, the thing is that at the end of the --

Q Who cares, in other words, where the fee title was at that time?

MR. HICKMAN: Well, it has to do with the probability of removal. I would have to recognize, your Honor, that if the government had owned this all the time and we had a lease from the government, that if they wanted to cut us off at the end of the term, there would not be anything we could do about it.

Q That is what Justice White was suggesting to you, wasn't he, in his question?

MR. HICKMAN: Well, then the thing is, there would be no probability of a renewal, would there? In our case we are simply asking, let the market judge the probability of renewal. Don't tell the market that there is going to be no renewal. We are entitled to that, no more, no less.

Q Mr. Hickman?

MR. HICKMAN: Yes?

Q The agreed facts state that the property was being acquired for public use in connection with a dam project. Does the record show whether or not this particular parcel of land would be flooded by the dam project or affected by it directly?

MR. HICKMAN: The record is silent on that but for what benefit it may be to you, I am quite sure that the reason for the taking was that the flooding line would be so close to the foundations of the elevators that they would not hold up any more and, consequently, they felt they had to

take this property.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Hickman. Thank you, gentlemen.

The case is submitted.

(Whereupon, at 2:33 o'clock p.m., the case was submitted.)