BEFORE THE INDIAN CLAIMS COMMISSION

THE FORT SILL APACHE TRIBE OF THE STATE OF OKLAHOMA,

THE CHIRICAHUA APACHE TRIBE, EX REL. SAN HAOZOUS, BENEDICT JOHZE, JAMES KAYWAYKLA, ROBERT GOODAY, DAVID CHINNEY,

THE WARM SPRINGS APACHE BAND, EX REL. SAM HAOZOUS, BENEDICT JOHZE, RAYMOND JOHN LOCO,

THE CHIRICAHUA APACHE BAND, EX REL. ROBERT GOODAY, DAVID CHINNEY, CASPER CALIO,

Plaintiffs,

v.

THE UNITED STATES OF AMERICA,

Defendant.

Docket Nos. 30-A and 48-A

Decided: June 9, 1971

Appearances:

Abe W. Weissbrodt, Attorney for Plaintiffs, Weissbrodt & Weissbrodt, I. S. Weissbrodt, Ruth W. Duhl, Roy T. Mobley, Guy Martin, James L. Kunen, and Rodney, Dickason, Sloan, Akin & Robb were on the briefs.

Howard G. Campbell, with whom was Mr. Assistant Attorney General Shiro Kashiwa, Attorneys for the Defendant.

OPINION OF THE COMMISSION

Kuykendall, Chairman, delivered the opinion of the Commission.

This case is now before the Commission for a decision on the fair market value of lands which the Commission has previously determined

were taken by defendant, without payment of compensation, from the plaintiff tribes on September 4, 1886. See 19 Ind. Cl. Comm. 212 (1968).

The area to be valued consists of 14,802,387 acres net after exclusion of certain Spanish-Mexican land grants within the perimeter of the tract. The subject tract was located within what were then the counties of Grant, Socorro, Sierra and Dona Ana in the southwestern portion of the Territory of New Mexico and Cochise and Graham counties in the southeastern part of the Arizona Territory.

Because of the huge size of the subject tract the topography is varied. There are several isolated mountain ranges, as well as fertile valleys along the rivers within the tract. Most of the land consists of semi-arid and desert plains with short-grass, bunch-grass and desert shrub vegetation. Water is not plentiful with the average annual rainfall varying between 8 and 22 inches. The climate is mild except at the higher elevations.

By 1886, the white population of the tract was approximately 26,000. There were numerous towns and settlements, the more important ones being situated on the main line of the Southern Pacific Railroad and on the spur lines of the Southern Pacific and the Atchison, Topeka and Santa Fe railroads which ran within the tract. Rail transportation was good and telegraph lines connected the towns and settlements.

The Commission has concluded that as of September 4, 1886, there were 14,742,387 acres of the subject tract which had an overall highest

and best use for grazing cattle. Interspersed through the grazing lands were approximately 150,000 acres suitable for farming. There were also substantial forests located in relatively inaccessible areas where there was very little commercial timber activity. The remaining 60,000 acres of the tract had an overall highest and best use for mining. Many of the towns and settlements, but not all, were mining towns.

Both parties have valued the farmlands separately. Both agree that the acreage suitable for farming was worth about $5.00 per acre in 1886, based upon recorded sales within the tract and comparable sales outside. We believe $5.00 per acre is accurate. Our 150,000 acre figure is based upon the fact that there was some tillable land so remote and scattered that it would not have been in demand as farmland in 1886. Our total surface valuation reflects the value of the farmlands.

Plaintiffs' expert, Mr. Donald D. Myers, valued 500,000 acres of land at $2.50 per acre as timber land. With this conclusion we do not agree. We have found that in 1886 there were approximately 1,000,000 acres of forested lands within the subject tract. However, these forests were in the higher, relatively inaccessible areas where commercial timber operations were impractical. There were no sales of timberlands within the tract prior to 1886. What little demand there was for timber was local and mainly for mining purposes. We feel that a prospective purchaser of a tract of this size would have looked on the timber as an enhancement to his purchase, but not as a separate increment. Its presence would enhance the land's value to a certain extent, but not above

a value otherwise within the market range for grazing lands. See Tlingit and Haida Indians v. United States, 182 Ct. Cl. 137, 150, 389 F.2d 778, 783 (1968), and Northern Paiute Nation v. United States, 16 Ind. Cl. Comm. 215, 317, 318 (1965), aff'd, 183 Ct. Cl. 321, 393 F.2d 786 (1968).

We believe that the value of the subject tract was enhanced by the existence of townsites therein, but not to the extent suggested by Mr. Myers who valued the townsites separately. Many of the towns and settlements within the subject tract at the valuation date were mining camps, the growth and permanence of which depended entirely upon the operation of the mines. Tombstone, in particular, among the larger towns, was dependent upon the mines and miners. Copper and silver prices were falling in 1886 and activity at the mines had correspondingly slowed compared with the immediately preceding years. Mr. Myers' method of valuing the townsites based upon average recorded sales in 1884, 1885 and 1886 does not properly reflect the marked decline in demand in 1886 for lots in Tombstone and Wilcox. This decline is evidenced by the fact that of the sales considered by Mr. Myers, only 10 of 114 in Tombstone and 2 of 25 in Wilcox took place in 1886. However, those towns in agricultural areas, such as Mesilla, and those on the railroad lines, which were developing as centers of shipping, would have been considered permanent. We have enhanced our total surface valuation to reflect the value of the townsites in 1886.

We now turn to consideration of the 14,742,387 acres of grazing lands. We have found the value of these lands to be $9,600,000, including the

enhancement value of the farmlands, timber, and townsites therein. Basic to our determination of the value of these grazing lands is our finding (with which the expert witnesses are substantially in agreement) that the acreage had, in 1886, a cattle carrying capacity of approximately 320,000 head.

In Hualapai Tribe v. United States, 17 Ind. Cl. Comm. 456 (1966), this Commission valued an area of 4,459,500 acres in northwestern Arizona as of January 4, 1883. Mr. Myers, who testified for the plaintiff in the Hualapai case, used the same two methods of appraising the grazing lands in that case as he used here. The first method was an income analysis approach which involved a hypothetical cattle operation on the tract at the valuation date. The other method was a comparable sales approach under which the lands involved in the sales were compared qualitatively with the subject tract by means of cattle carrying capacity figures. Except for a detailed analysis of the extent of range depletion since the valuation date and certain adjustments in carrying capacity to reflect the depletion of the range, Mr. Myers' methods are the same, including the same comparative sales.

In the Hualapai case, supra, at 520 through 529, the Commission approved Mr. Myers' comparable sales approach. The Commission's opinion in the Hualapai case also took into consideration the checkerboard pattern of the Atlantic and Pacific Railroad lands used by Mr. Myers under his comparable sales approach. We will not repeat here our extensive discussion there. We have adhered substantially to our views therein expressed in our consideration of Mr. Myers' valuation and testimony

in the present case and in reaching our conclusions regarding the value of the grazing lands in the Chiricahua Tract as of September 4, 1886.

Defendant's expert surface appraiser, Mr. Harley M. McDowell, valued the surface lands at $5,032,811.00. He used a comparable sales method based upon the sale of several large grazing areas outside the subject tract. We are unable to accept as comparable many of the sales he has used. For example, this Commission has held the XIT sale not to represent a bona fide sale. Blackfeet and Gros Ventre Tribes of Indians v. United States, 18 Ind. Cl. Comm. 241, 336 (1967). In addition, the comparable value of the land in Texas which was sold to Mr. Charles Goodnight was questioned by the Commission in the Hualapai case, supra, at 531-532, because the authenticity of the sales was supported only by the unsubstantiated statement of Mr. Goodnight in his biography. There are no written records of the sales, no information concerning the terms, nor are the vendors identified. The 1882 sale to the Matador Land and Cattle Company involved only 100,000 acres in the Texas Panhandle. The sale included improvements, as well as stock and range privileges to additional lands. Additional purchases by the Matador company during 1882 and 1883 involved the purchase of small tracts, including many of one section of land. The remaining Texas sales were somewhat comparable, but we do not find the claims made by Mr. McDowell, particularly as to carrying capacity, to be supported by substantial evidence. Mr. McDowell also relied upon the 1884 sale of 1,000,000 acres of Atlantic and Pacific Railroad lands in Arizona to the Aztec Land and Cattle Company for

$500,000. The Commission has previously found, however, that this sale was made under distressed conditions because the railroad needed funds to repay loans to its parent company. See Jicarilla Apache Tribe v. United States, 24 Ind. Cl. Comm. 123, 129 (1970). In addition, Mr. McDowell minimized the higher priced sales of Atlantic and Pacific lands to E. B. Perrin in 1886, 1887 and 1890 on the ground that Perrin was able to select irregularly shaped tracts that included the best lands and omitted some of the worst. In the Hualapai case, supra, at 525, the Commission noted that while E. B. Perrin selected his acreage as Mr. McDowell described, this same sale reserved for 15 years the railroad's right to cut down and remove timber on the land. In addition, the sale excepted all springs and water supplies being used by the railroad.

Finally, Mr. McDowell relied upon two Spanish-Mexican land grant sales. The first of these was the Pedro Armendaris Grant, consisting of 443,035 acres, which was sold in 1887 for $150,000 or about $0.34 per acre. This tract was located in New Mexico northeast of the subject tract. While we have taken into account the sale of the Pedro Armendaris Grant in our valuation, there is little evidence in the record, except Mr. McDowell's own statements, whereby the cattle grazing capacity can be compared with that of the subject tract.

The second land grant sale was the San Rafael del Valle Grant of 17,474 acres in Arizona immediately adjacent to the southwest corner of the subject tract. This grant was sold in 1887 for $1,071.45 or $0.06

per acre. We believe that Mr. Myers' testimony at the trial regarding his investigation of the sale of this grant, particularly as to the discrepancies revealed by the title search, makes this sale of little probative value. See Tr. at 374-376.

The principal evidence of the value of the 60,000 acres of mining lands in 1886, is contained in the testimony and appraisal reports of plaintiffs' mineral expert, Mr. Roy P. Full, and defendant's mineral expert, Mr. Ernest Oberbillig. Mr. Full valued the mineral lands at $10,763,478, while Mr. Oberbillig's valuation was $3,023,265.

Mr. Full's method involved a district-by-district appraisal based upon income from foreseeable future production. This method takes into consideration the following factors:

(1) Tons and grade of ore that can reasonably be expected from a mine or mineral area,

(2) Daily and annual rate for efficient extraction from the deposit under consideration,

(3) Pre-production costs, including development, mill construction, and surface and underground installations,

(4) Operating costs, including mining, milling and marketing.

Many of the facts in Mr. Full's mine-by-mine analysis came from contemporary newspaper reports and from historical writings, technical journals, and Government and state publications which were written many years after the valuation date. In his calculations he often used what we believe to be unreasonably low risk rates. Furthermore, he unduly

minimized the relatively depressed conditions of the copper and silver industries in 1886. For this period, Mr. Full calculated profits from copper production based on a price of $0.12 per pound when, in fact, copper prices were declining, and black copper was selling at no more than $0.09 per pound.

Mr. Oberbillig stated in his valuation report that he relied upon three different valuation methods. With the exception of the Warren (Bisbee) district, where his appraisal was based upon the 1885 terms of merger of the adjoining Copper Queen and Atlanta mines, Mr. Oberbillig relied almost exclusively on a capitalized royalty method. In this method he fixed the royalty at ten percent. It is the Commission's opinion that the fair market value of the minerals cannot be based only upon the value of a hypothetical lessor's interest in the production of the mines, but that "[p]roof either of actual profits from an existing mine or of prospective profits from a potential mineral area establishes the mineral value of the area." See Tlingit and Haida Indians v. United States, supra, at 148.

It was and still is common practice in the mining industry to operate on a lease basis with the lessor collecting royalties. Nevertheless, the anticipated return to a lessor consistent with prevailing practices within the mining industry is not the same as fair market value of a fee simple title. Although defendant's valuation method is not tantamount to valuing the mineral lands in terms of their subsistence value to the Indians, we do believe that Mr. McDowell's royalty method may be more appropriately likened to the rejected "value in use" theory of valuing

Indian lands. See Caddo Tribe of Oklahoma v. United States, 8 Ind. Cl. Comm. 354, 388 (1960). We are of the opinion that Mr. Full's method is significantly more probative on the question of fair market value as of September 4, 1886, but we have found his mine-by-mine results overstated.

After considering all of the evidence in the record, and based upon the additional findings of fact herein entered and for the reasons set forth above, we have concluded that the fair market value of the 60,000 acres of mineral lands within the Chiricahua Tract on September 4, 1886, was $6,375,000 which, when added to the sum of $9,600,000 that we have found to be the fair market value of the surface lands, results in a total valuation of $15,975,000 for the Chiricahua Tract. Accordingly, the plaintiffs are entitled to recover the sum of $15,975,000, less any allowable offsets.

The Commission has also considered the stipulation entered into between the parties and filed with the Commission on September 4, 1970, under Dockets 30 and 48 and 30-A and 48-A. The parties stipulated as follows:

> 1. The tract of land described in Finding No. 14 of the Commission's Findings of Fact entered in Docket Nos. 30 and 48 on April 1, 1970, comprises 804,000 acres. Said tract is hereinafter referred to as "Tract A."
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> 2. The fair market value of "Tract A," as of September 4, 1886, shall be calculated by multiplying 804,000 by the amount which the Commission determines to be the per acre value of the surface of the tract (hereinafter called "Tract B"), described in Finding No. 13(a) of the Commission's Findings of Fact entered in Docket Nos. 30-A and 48-A on June 28, 1968.

3. As used in this stipulation, the per acre value of the surface of "Tract B" described in said Finding No. 13(a), means the fair market value, as determined by the Commission, of the aggregate number of acres in "Tract B," excluding any amount attributable to minerals, divided by the said aggregate number of acres in "Tract B." For purpose of this stipulation, the aggregate number of acres in "Tract B" is 14,802,387.

The parties further agreed that the stipulation would be effective only if the Commission determined separate values for the surface and minerals in "Tract B," and that the parties reserved their rights to seek review of and to appeal from the Commission's determinations of the fair market value of the lands involved in Docket Nos. 30-A and 48-A.

The Commission is of the opinion that this stipulation is fair and is in the interests of the parties and the Commission hereby approves and adopts said stipulation. The Commission has determined separate values for the surface and minerals in the tract involved in Dockets 30-A and 48-A (described in the stipulation as "Tract B"). Pursuant to the terms of the stipulation, the Commission will this day issue an order under Docket Nos. 30 and 48 awarding the plaintiffs thereunder the sum of $521,796, less any gratuitous offsets which may be allowed in subsequent proceedings before the Commission under Docket Nos. 30 and 48.

Jerome K. Kuykendall, Chairman

We Concur:

John T. Vance, Commissioner

Richard W. Yarborough, Commissioner

Margaret H. Pierce, Commissioner

Brantley Blue, Commissioner