

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.)

Docket Nos. 30-A and 48-A

THE UNITED STATES OF AMERICA,)
))
Defendant.)

Decided: June 9, 1971

ADDITIONAL FINDINGS OF FACT

By the findings of fact numbered 1 to 15, inclusive, and the opinion entered herein on June 28, 1968, 19 Ind. Cl. Comm. 212, the Commission determined that the defendant, on September 4, 1886, acquired, without the payment of any compensation, the Fort Sill Apache Tribe's Indian title to certain lands in southwestern New Mexico and southeastern Arizona. It was ordered that this case proceed to a determination of the acreage and the fair market value of the tract described in Finding of Fact 13(a), as of September 4, 1886, exclusive of the confirmed

Spanish-Mexican land grants within said tract. The Commission makes the following findings of fact which are supplemental to those previously made herein.

16. Acreage of the Tract. On October 17, 1968, the attorneys for the parties stipulated in pertinent part that, (1) the area of the tract described in the Commission's Finding of Fact 13(a) consists of 14,858,051 acres, and, (2) confirmed Spanish-Mexican land grants wholly or partially within the said area, and which are to be excluded from the award as provided in paragraph 3 of the Commission's order dated June 28, 1968, aggregate 55,664 acres. We find that the tract of land described in Finding of Fact 13(a) contains a net of 14,802,387 acres.

17. New Mexico and Arizona Territories. Congress created the Territory of New Mexico by Act of September 9, 1850, 9 Stat. 446. On September 4, 1886, the valuation date, the New Mexico portion of the tract included all of Grant County, part of Socorro County, and those portions of Sierra and Dona Ana counties situated west of the Rio Grande River. All of the Territory of New Mexico lying west of the line running due south, from the point where the southwest corner of the Territory of Colorado joined the northern boundary of the Territory of New Mexico, to the southern boundary line of the Territory of New Mexico was detached and organized as the Territory of Arizona by the Act of February 24, 1863, 12 Stat. 664. The Arizona lands to be valued included a substantial portion of Cochise County and a small part of Graham County on the valuation date.

18. Population and Settlements. Based upon federal and territorial census figures a reasonable estimate of the 1886 population of the subject tract, exclusive of Indians, was approximately 26,000 with about 20,000 in the New Mexico portion and some 6,000 in the Arizona portion. The 1880 Census showed the population of the New Mexico Territory as 119,565 and that of the Arizona Territory as 40,440. According to the Census of 1890, the respective populations were 153,593 and 59,620.

In 1886, there were numerous settlements within the subject tract. Most of these settlements relied upon the mining industry for their existence and growth. Some of the larger settlements, the growth of which was intimately tied to mining, were Tombstone and Bisbee in Arizona and Silver City in New Mexico. There were other towns, however, which because of location and absence of dependence on mining, would have been considered at the valuation date as permanent. Among these were Mesilla, in the fertile Mesilla Valley on the Rio Grande River, and towns such as Deming, New Mexico, and Benson and Wilcox, Arizona, which were located on the railroad.

19. Transportation and Communication. As of the 1886 valuation date, the tract possessed excellent railroad facilities. That part of the Southern Pacific Railroad that was completed within the tract in 1881 entered the southeastern corner of the subject area from El Paso, Texas, across the Rio Grande River. It followed a generally westward route through Deming and Lordsburg, New Mexico and Bowie, Wilcox and Benson, Arizona, and then to Yuma, Arizona, west of the tract. The main line

of the Atchison, Topeka & Santa Fe generally followed the east bank of the Rio Grande River (the river being the eastern border of the tract) from Albuquerque to El Paso. Branch lines extended into the tract to Magdalena in the northeastern corner (from Socorro across the Rio Grande) and to Deming (from Rincon on the east bank of the Rio Grande) where the Atchison Topeka and Santa Fe met the Southern Pacific. Further branch lines within the tract connected Deming with Silver City, Lordsburg with Clifton (outside the tract to the northwest) and Nutt, New Mexico with Lake Valley, New Mexico.

Prior to the building of the railroads, the bulk of the commerce, mail and passenger travel was carried on by pack trains, wagons and stagecoach.

At the 1886 valuation date, the major towns in the tract had telegraph facilities.

20. Topography, Vegetation and Soil. Most of the tract consisted of elevated plains ranging from isolated barren areas to substantial grasslands. These plains were covered principally by soils classified as White House-Tumacocori and Mohave-Reeves-Anthony. White House-Tumacocori soils supported a rather thin short-grass or bunch-grass vegetation with scattered shrubs and small trees, especially mesquite. These soils had high inherent fertility but, because of the arid climate, they were largely unsuited to dry farming. Most of this land was, therefore, of value only for grazing. The Mohave-Reeves-Anthony soils were covered with desert shrub, mostly cresote bush. Small short-lived annual herbs and grasses

therein which the parties may prove were within confirmed Spanish or Mexican land grants, as of May 29, 1873, less such offsets, if any, to which defendant may be entitled under the provisions of the Indian Claims Commission Act.

By Interlocutory Order of July 7, 1966, the Commission directed that the case proceed for the determination of the acreage of the area as set forth in its Finding No. 37 and for the determination of the value of said lands as of May 29, 1873, and what offsets, if any defendant is entitled to under the provisions of the Indian Claims Commission Act.

Counsel for the parties thereafter commenced discussions concerning a final settlement of the said aboriginal land claim in Docket No. 22-B as well as the settlement of the claims brought by the plaintiffs in Count I of their pending petition (Second Amended Petition filed on October 14, 1959) in Docket No. 22-G. In said Count I, plaintiffs claimed damages for trespasses upon their aboriginal lands. In Count II of said petition in Docket No. 22-G, plaintiffs sued for a general accounting with respect to the management and disposition of plaintiffs' funds and other property. However, the accounting claim was not involved in the settlement.

The parties ultimately agreed to a proposed settlement providing for (a) the entry in Docket No. 22-B of a final judgment in the sum of \$8,500,000.00, in favor of the plaintiff, the Apache Tribe of the Mescalero Reservation, on behalf of the Mescalero Apache Tribe, and (b) the entry of a consent final order dismissing with prejudice the

small parts of the valleys, crops can be raised only with irrigation.

23. The Cattle Industry in the Subject Tract. The completion of the railroad in the tract prior to the valuation date had brought the subject tract into prominence as a livestock producing area. It has been estimated that, as of September 4, 1886, there were 425,000 head of cattle grazing on the subject tract. During this period the range was overcrowded. This led to both a decline in the value per head of cattle and the long-term depletion of the western range. However, this range depletion had just begun in 1886. The parties are in substantial agreement that the cattle carrying capacity of the subject tract was approximately 14.3 head of cattle per section or 320,000 head overall.

Until about 1880, extensive fee simple ownership of the range was unnecessary. Cattlemen would buy enough land for headquarter camps and to control surface water. Such free use of the public domain (free range) created little demand for unwatered land by the cattle industry, but created a substantial demand for the small units of land controlling water holes and access to water. By the mid-1880's the westward migration and the use of the newly invented windmill and drilled well, combined with the cattle boom of the early 1880's, increased the demand for all lands. Lands without surface water, which in past years had been used by cattlemen freely and without ownership, were being purchased for stock raising.

24. Comparable Sales Data: There is no evidence in this case of sales of an area strictly comparable in size to the huge subject tract. However, evidence of some large land transactions provides some sales data indicative of value.

(a) Ranch Sales.

The XIT Ranch. This 3,000,000 acre ranch was located in the western part of the Texas Panhandle. The XIT lands had a carrying capacity of 20 head of cattle per section. In 1882 the State of Texas entered into a contract with the Capitol Company whereby the company agreed to build the Texas Capitol Building in return for 3,000,000 acres eventually selected as the XIT Ranch. The original estimate of the construction cost was \$1,500,000. The construction was completed in 1888 at a final cost of \$3,224,593.45.

Texas Sales to Mr. Charles Goodnight. Mr. Goodnight reported that he purchased 140,000 acres in the Texas Panhandle in 1882 for \$0.22 per acre. He also reported that in 1883 he purchased 170,000 acres in the same area for \$0.20 per acre. The record, however, offers no substantial evidence to authenticate Mr. Goodnight's statements. We do not have any written record of the sales, any information concerning the terms, or the identity of the vendors.

The Francklyn Land & Cattle Company. In 1882, the New York and Texas Land Company sold 637,440 acres of land in the Texas Panhandle to the Francklyn Land & Cattle Company for \$887,654.40 or approximately \$1.39 per acre. There were interspersed within the 637,440 acres about

100,000 acres of usable state-owned school lands. The purchase price was to be paid in installments over a five-year period at the interest rate of 5%.

Matador Land and Cattle Company. In 1882 the Matador Land Company sold 100,000 acres of land in the Texas Panhandle to the Matador Land and Cattle Company, a Scottish company, for \$1,250,000. This sale included fencing, improvements, 265 horses, 40,000 head of cattle, and range privileges for approximately 1,400,000 acres. The sellers received 10,000 shares of the Matador company, valued at \$49 per share, and the balance in cash. By the end of 1883, the company had acquired 374,717 acres of fee lands which were shown on the books as costing an average of \$1.50 per acre.

(b) Railroad Lands. Between 1884 and 1890, the Atlantic and Pacific Railroad Company sold seven large tracts of land in northern Arizona, consisting of a total of 1,513,168 acres. These sales were as follows:

<u>No.</u>	<u>Date</u>	<u>Parties</u>	<u>Amount</u>	<u>Size</u>	<u>Unit Price</u>
1	4-21-1884	A & P to Stephen G. Little	\$ 75,748	75,748	\$1
2	12-27-1884	A & P to Aztec Land & Cattle Co.	529,280	1,058,560	50¢
3	6-6-1885	A & P to Arizona Cattle Co.	120,000	120,000	\$1
4	1-12-1886	A & P to E. B. Perrin	22,500	30,000	70¢
5	4-16-1886	A & P to E. B. Perrin	123,600	176,700	70¢
6	7-1-1887	A & P to E. B. Perrin	20,834	29,120	70¢
7	1-10-1890	A & P to E. B. Perrin	17,280	23,040 (net after trade)	75¢

These lands, like the subject tract, had access characteristics dominated by the existence of the railroad and had about the same cattle carrying capacity. The Atlantic and Pacific lands were made up of alternate sections in a checker-board pattern.

(c) Spanish-Mexican Land Grant Sales. In 1887, the Pedro Armendaris Grant of 443,035.18 acres was sold for \$150,000. These lands were located in New Mexico, northeast of the subject tract. The Rio Grande River runs through these lands, and the Atchison, Topeka and Santa Fe Railroad to El Paso traversed them.

25. Mineral Resources. By September 4, 1886, the mineral wealth of the tract was well established. Although its mineral resources had been known to exist for a long time, large scale mining activity did not start until 1877 with the discovery of the Tombstone silver mining district in Arizona. The Bisbee copper deposits were discovered within a few months thereafter. At about the same time, major mineral finds were made in New Mexico. Tombstone and Bisbee in Arizona, and Lordsburg, Silver City, Santa Rita and Magdalena in New Mexico, became the principal mining communities from which prospectors spread out over the entire area. By 1886, some 61 mining districts had been organized, encompassing 60,000 acres of the tract's surface. By this time, practically all of the mining districts that were ever worked had been discovered and developed. Silver, copper and lead were the principal minerals being extracted from the mines as of the 1886 valuation date.

26. The Mining Industry in 1886. In 1886, the price of silver was declining. On September 11, 1886, the Tombstone Mill and Mining Company

reported that it was receiving \$0.91 per troy ounce for silver, and that this low price might necessitate a temporary suspension in mining operations. The United States had begun converting to the gold standard with the Act of February 21, 1853, 10 Stat. 160. From then until 1872 the price had fluctuated between \$1.36 and \$1.32 per troy ounce. By the Act of February 12, 1873, 17 Stat. 424, 427, Congress omitted orders for coinage of silver dollars and substituted trade-dollars in their place. At this point the marked decline began. Between 1872 and 1886, the price per troy ounce had steadily declined from an average \$1.33 to an average \$0.99.

The price of copper was also on the decline in 1886. The price of copper had been \$0.55 per pound twenty-two years before, in 1864. By 1880 the price had fallen off to \$0.20 per pound, and in 1886 had declined further to \$0.10 per pound for pure Lake copper and roughly \$0.08 per pound for Arizona black copper. The decline in the price of copper in the early 1880's can be attributed primarily to the increase in the world supply of copper that was brought on by development of the United States mines. United States copper production had tripled between 1879 and 1886. Because of the low copper prices in 1886, mines began to cut back production, and many of them, including the Copper Queen mine in the subject tract, temporarily suspended production.

27. Tombstone and Bisbee Mining Districts. The two richest mining districts within the subject tract were the Tombstone District, famous for silver, and the Bisbee or Warren District, where the well-known

Copper Queen mine was located. The plaintiffs' mineral appraiser, Mr. Full, estimated that these two districts contained 37.5 percent of the mineral value of the tract. Mr. Oberbillig, the defendant's mineral appraiser, attributed 69 percent of the tract's mineral value to these two districts.

Aggregate production of silver in the Tombstone District during the period 1881 to 1886 totaled \$16,877,175 while the price of silver declined from \$1.14 to \$0.90 per troy ounce. In 1886, the aggregate production in the Tombstone District was slightly over \$1,000,000. By 1886, the bonanza ore was gone, some water was being encountered in the mines, and the ores had become more difficult to handle as the depth of the shafts increased. Nevertheless, the Tombstone District could still be operated profitably for many years. In fact, production in the district from 1887 to 1911, totaled over \$10,000,000.

The Bisbee (Warren) District was a foremost producer of copper in 1886, the principal mineral property being the famous Copper Queen mine. The first mineral locations in this district were made in August 1877. By 1880 the Copper Queen mine was under development and its smelter began operations late in that year. For the six month period ending April 1, 1881, the stated yield of the Copper Queen was over 300,000 pounds of bullion, returning a net profit of eight cents per pound. In 1881, the Copper Queen was sold to New York capitalists for a cash consideration of \$1,250,000. From April 2, 1881 to April 15, 1884, operating profits totalled \$1,384,974.58. In early 1884 it was reported that the ore body was nearly exhausted. Further prospecting resulted in the discovery of a very rich ore body on the dividing line between the Copper Queen and

Atlanta properties. The two companies then merged into the Copper Queen Consolidated Mining Company, which was incorporated in 1885 with capital stock of \$1,400,000. In 1886 the copper market toppled with the price of Arizona black copper falling at one point to under \$0.09 per pound. At this point, the Copper Queen was temporarily closed, and a new smelter with a monthly capacity of 1,000,000 to 1,250,000 pounds of copper was completed. Aggregate copper production at the Copper Queen from 1880 through 1885 amounted to 34,847,179 pounds. Copper production had jumped from 1,379,940 pounds in 1880 to 6,663,782 pounds in 1885.

28. Expert Witnesses and their Estimates of Value. For the plaintiffs, Mr. Donald D. Myers submitted a valuation report and testified as an expert regarding the surface value of the tract, while Mr. Roy P. Full submitted a report and testified as an expert on the valuation of the tract's mineral resources. The plaintiffs' experts valued the subject tract as follows:

Agriculture	175,000 Acres	\$ 875,000
Grazing	14,064,887 "	10,500,000
Timber	500,000 "	1,250,000
Townsites	2,500 "	699,000
Minerals	60,000 "	<u>10,763,478</u>
Totals	<u>14,802,387</u>	<u>\$24,087,478</u>

Plaintiffs rounded off their total estimate of fair market value to \$23,250,000.00.

Mr. Harley M. McDowell was the defendant's expert witness on surface valuation and Mr. Ernest Oberbillig testified as an expert for the defendant regarding the tract's mineral resources. The defendant's

experts valued the subject tract as follows:

Agriculture	135,887	\$ 693,024.00
Grazing (including enhancement for timber and townsites)	14,666,500	4,339,787.00
Minerals	(no acreage figure)	<u>3,023,265.00</u>
Totals	14,802,387	\$8,056,076.00

Mr. Full's mineral appraisal method involved a district by district analysis of the subject tract. His valuation is based upon income from foreseeable future production. As stated by Mr. Full his method takes into account:

- (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. From the above four factors the annual net return and the expected life of operation can be readily determined.

In his analysis of each district in order to determine annual net return and expected life of operation, Mr. Full considered such other factors as the size of the claim or extent of known mineralization, the interest in the property as expressed by sales or other reports, the extent of development of the mine by 1886, the amount and grade of production by 1886, the mineral composition and its effect on recovery and marketing, the future potential of the deposit and the operating records and financial positions of the various mining companies as of that period.

After having determined annual net return, Mr. Full calculated the 1886 value of the mineral resources by using the Inwood valuation premise, a formula which reflects the proper multiple of annual net return based upon a compound interest rate that takes into account the risk associated with the development of a specific deposit.

The defendant's mineral appraiser, Mr. Oberbillig, relied upon three valuation methods. The first was a capitalization of a share of profits or a royalty on estimated value of production for a period of years at a compound interest rate determined after careful consideration of all factors affecting profit. Under this method his basic premise was that under all the circumstances existing on the date of valuation, an owner of commercially valuable mineral lands could reasonably expect to lease such lands to a mining company for a royalty of 10% of the gross production from the mine, i.e., 10% of the gross income from the sale of minerals without deducting any mining, transportation or milling costs.

Mr. Oberbillig's second method consisted of an analysis of sales of mining properties immediately prior to the valuation date as determined from county deed records and other publicized sales data. An analysis of such sales required an evaluation of the capitalized expenditures making up a part of the sale price.

Mr. Oberbillig termed his third method one of comparability and interpretation. This method was used to arrive at a value determination

where specific data necessary to apply either of his first two methods was lacking and where interpretation and comparability of all appraisal factors used in arriving at a valuation of other mineral properties or districts in the region was the only available means of computing a value figure.

Mr. Oberbillig examined and reported the known information as to each mining district existing in the tract on the 1886 valuation date, and applied one or more of these three valuation methods.

29. Highest and Best Use. The Commission finds that, as of September 4, 1886, the subject tract had a highest and best use as follows:

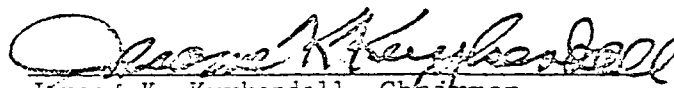
Grazing Lands	14,742,387 acres
Mining	60,000 acres

CONCLUSIONS OF LAW

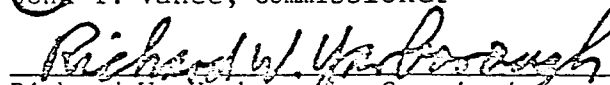
Based upon the foregoing findings of fact and all the evidence of record, the Commission concludes as a matter of law that:

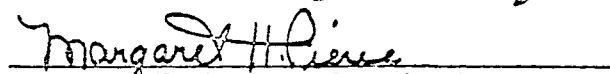
1. Consistent with a highest and best use for mining, 60,000 acres of the Chiricahua Tract had a fair market value as of September 4, 1886, of \$6,375,000.
2. Consistent with a highest and best use as grazing lands, 14,742,387 acres of the Chiricahua Tract, constituting the remaining surface area thereof, had a fair market value as of September 4, 1886, of \$9,600,000 including the enhancement value to the tract's surface of the timber, townsites and farmlands located therein.

3. Since the United States deprived the plaintiffs of their aboriginal lands within the Chiricahua Tract on September 4, 1886, without the payment of any compensation, the plaintiffs are entitled to a judgment against the defendant in the amount of \$15,975,000, less allowable gratuitous offsets, if any.


Jerome K. Kuykendall, Chairman


John T. Vance, Commissioner


Richard W. Yarborough, Commissioner


Margaret H. Pierce, Commissioner


Brantley Blue, Commissioner