BEFORE THE INDIAN CLAIMS COMMISSION

GOSHUTE TRIBE OR IDENTIFIABLE GROUP, REPRESENTED BY THE CONFEDERATED TRIBES OF THE GOSHUTE RESERVATION, Plaintiff,	)	
v.	)	Docket No. 326-J
THE UNITED STATES OF AMERICA, Defendant.	)	

Decided: August 9, 1973

Appearances:

Robert W. Barker of the law firm of Wilkinson, Cragun & Barker, Attorney for Plaintiff. John S. Boyden, Hugh J. Yarrington, and Foster DeReitzes were on the briefs.

Dean K. Dunsmore, with whom was Assistant Attorney General Shiro Kashiwa, Attorneys for Defendant.

OPINION OF THE COMMISSION

Blue, Commissioner, delivered the opinion of the Commission.

This case is now before the Commission for determination of the date upon which the plaintiff's aboriginal title was extinguished, the fair market value of its aboriginal lands on that date, and its entitlement to recover damages for minerals removed from its lands prior to the valuation date. The Commission has previously determined that the Goshute Tribe or identifiable group of Indians exclusively used,

occupied and held Indian title to the tract of land described in finding 22, 11 Ind. Cl. Comm. 387, 413 (1962).[1/] It was also determined that the Goshute's Indian title was extinguished by the gradual encroachment of whites, settlers and others, and the acquisition, disposition or taking of the lands by the United States for its own use and benefit, or the use and benefit of its citizens, all of which disrupted the Indians' way of life and deprived them of their lands. Since the plaintiff's Indian title was extinguished without payment of any compensation, its claim for such extinguishment is brought under Clause 4, Section 2 of the Indian Claims Commission Act, 60 Stat. 1049, 1050. The claim for damages resulting from the removal of minerals prior to the valuation date is asserted under Clause 5, Section 2 of the Act.

A hearing was held on September 11, 1969, on the "date of taking" issue at which time plaintiff introduced an historical report prepared by Messrs. James B. Allen and Ted J. Warner, Associate Professors of History at Brigham Young University. Based on that report, the evidence of record and pursuant to Rule 26 of the Rules of the Indian Claims Commission, 25 C.F.R. §503.26, a Report of the Commissioner was entered, on October 13, 1969, reporting the Commissioner's preliminary decision that the lands described in finding 22 had been taken by the defendant on January 1, 1875. No

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1/ That decision was entered in Dockets 326 and 367. By Commission Order of August 16, 1967, the claim of the Goshute Tribe was severed from the claims filed in Docket 326 by the Shoshone Indian groups, and the Goshute Tribe's claim was designated Docket 326-J.

exceptions to that report were filed by either party, and the lands have been valued by the appraisers as of January 1, 1875.

In finding 27 the Commission has set forth the evidentiary findings which detail the history of white encroachment and actions by the United States which disrupted the Goshute Tribe's way of life and deprived the Indians of virtually all of the lands which they had aboriginally used and occupied. Based on those findings we determine that the Goshute Indians, as of January 1, 1875, had become concentrated at two locations known as Deep Creek and Skull Valley and, after that date, no longer used and occupied the remainder of their ancestral lands. Accordingly, as of January 1, 1875, the plaintiff's aboriginal title to the lands described in finding 22, with the exception of two small areas at Deep Creek and at Skull Valley, was extinguished. Therefore, the valuation date in this case is January 1, 1875.

The gross acreage of the lands described in finding 22 is 5,952,000. The areas at Deep Creek and Skull Valley have been set aside as Executive order reservations for the Goshutes, and their acreages, totaling 128,196.35, are deducted from the lands to be valued. The balance of 5,823,803.65 acres is the net acreage involved in this valuation.

The lands to be valued are located in the western part of the State of Utah and the eastern portion of the State of Nevada. It is a semiarid country with no large rivers in the area. The land is generally classified as rangeland. Stands of timber were scattered throughout the tract, but those areas were also used for grazing. A few locations had land suitable for the growing of crops.

The first non-Indian settlements in the Goshute tract were established by Mormons about 1849. However, there was no real development in the area until after the discovery of silver and other valuable minerals in 1863. The tract was accessible by land routes from all directions. In 1869 the transcontinental rail line was completed and by 1875 a feeder line had been constructed to connect Tooele Valley (a principal mining area) with Salt Lake City.

As mining operations expanded after the end of the Civil War, the demand for fresh meat resulted in an accelerated growth of livestock ranching. There was a rapid increase in the number of cattle grazed on the lands, and the natural vegetation was seriously depleted. The development of agriculture was greatly encouraged when Union troops came to the area during the Civil War and through increased mining activity. There was a strong demand for the small amount of land which was suited for farming. The timber in the area was used for local consumption in the building of homes, barns, fencing, and for railroad ties. In addition lumber was used for charcoal for mineral smelting.

The principal use for the surface land within the Goshute tract was for livestock grazing. There were small areas of valuable agricultural land in the area, much of which required irrigation. From the experts' opinions and supporting data we have concluded that about 100,000 acres had a highest and best use as agricultural land. We believe that the evidence supports the plaintiff's contention as to the acreage of the timbered portions of the tract. Defendant has relied

on the acreage within the national forests, which acreage has then been reduced by 57.8 per cent because that percentage has been listed as nonforested in a 1967 Forest Service inventory. We cannot adopt the 1967 data as reflecting forestation in 1875. We believe that plaintiff's computations are more closely related to conditions as they existed in 1875, and we find that 250,000 acres were forested and should be valued as timbered grazing land. Only about 1,800 acres would have represented townsite land, with approximately 10,000 acres taken up by mining activities. This leaves some 5,462,003.65 acres in the overall grazing land category.

The plaintiff's appraisal of the surface areas of the tract was made by Mr. Mont H. Saunderson. The values which he placed on the various land use areas totaled $6,880,500.00.

Mr. Saunderson's appraisal methods are detailed in finding 41. He used three approaches to value the rangelands. The most valid of the three methods involved a comparison of sales in the Humboldt River Valley. He used animal unit production capacity value to relate those sales to the grazing land in the Goshute tract. Finding that the Humboldt River Valley land would have maintained six times as many cattle as the choicest category of Goshute grazing land, he reduced the $5.95 average price of the sales in the Humboldt River Valley to arrive at a $1.00 per acre value for the sagebrush-grass category of Goshute tract rangeland. However, the lands in the Humboldt River Valley can scarcely be considered "rangeland." Mr. Saunderson called the land "ranching hay base land" and estimated that they produced around half a ton of hay per acre.

In fact Mr. Saunderson found the Humboldt River Valley land most comparable to the tillable lands in the subject tract and he used the sales as the basis for his agricultural land appraisal. The sales of tillable land do not provide a sound basis for estimating the fair market value of grazing land.

The other two appraisal methods used by Mr. Saunderson do not provide an acceptable means for determining the fair market value of the Goshute lands. His calculations of an estimated ranch land investment based on an average value per head of cattle, the animal unit capacity for the land, and a percentage allocation of the elements involved in a ranch investment are very speculative and do not take into consideration the factors which would have been involved in fixing the 1875 fair market value of the subject area's grazing land. The percentage allocation was based on data assembled in 1927, some 52 years after the valuation date.

The comparison of a rangeland sale in 1901 in Alberta, Canada, utilized a transaction which is too remote in distance and time to be validly related to the value of Utah and Nevada grazing land in 1875. Similarly the reliance on an 1882 newspaper report of a "sale" of grazing land in Montana cannot be relied upon as an indication of the value of lands in this case.

Mr. Saunderson's timberland appraisal was based on the average stumpage price for timber in 1900 in Idaho and his calculations of the probable number of board feet within various categories of timber acreage in the subject area. The data relied upon is too remote with respect

to both time and location to be compared to the subject area. The evidence does not support a conclusion that the Goshute tract had timber which would have served more than a local market. Further, we have consistently held that determinations of fair market value cannot be reached by a process of multiplying stumpage figures by a given price per unit. See, e.g., Nooksack Tribe v. United States, 6 Ind. Cl. Comm. 578, 600-601 (1958), aff'd, 162 Ct. Cl. 712 (1963), cert. denied, 375 U.S. 993 (1964).

In appraising the agricultural lands Mr. Saunderson relied on sales of tillable lands in Nevada and Utah. He relied on sales by the Central Pacific Railroad in Elko County, Nevada, at an average price of $4.20. The transactions occurred between 1877 and 1879. He also considered the Humboldt River Valley sales in the late 1870's and early 1880's at prices averaging $5.95. We believe that these sales involved land which was quite comparable to the tillable land in the Goshute tract. The transactions were made just a few years after the 1875 valuation date in this case.

In appraising townsite land Mr. Saunderson adjusted reported sales of improved urban land to arrive at an estimated $50.00 per acre valuation for unimproved town lots. This resulted in a townsite valuation of $100,000.00 for the 2000 acres which he placed in this land use category.

The defendant's appraisal of the surface area of the subject tract was made by Mr. Harley M. McDowell. He evaluated the various categories for which the surface lands were best suited and arrived at a total valuation of $2,500,000.00.

Mr. McDowell's appraisal methods are detailed in finding 42. His primary approach to valuing the rangeland was based on sales which he considered comparable to the grazing land in the Goshute tract. He related those sales to the subject land on the basis of cattle carrying capacities. The three sales upon which he placed the most reliance involved two Spanish land grants and a sale to the Aztec Land and Cattle Company. In 1877 the 100,000 acre Baca Float No. 4, in Colorado, was sold for about 52 cents an acre. In 1874 Baca Float No. 5, in Arizona and containing slightly less than 100,000 acres, was sold for about 50.3 cents per acre. In 1884 the Atlantic Pacific Railroad sold some 1,058,560 acres of its lands in northern Arizona to the Aztec Land and Cattle Company for a consideration of about 50 cents per acre.

The land involved in all three of the sales was better grazing land (roughly 40 acres per animal unit yearlong) than the rangeland in the subject area (59.2 acres per animal unit yearlong). Therefore, Mr. McDowell applied an appropriate factor to reduce the average prices to an indicated value of 35 cents per acre for the rangelands in the Goshute tract. While we believe that these sales provide some indication of the 1875 fair market value of rangeland in the subject area, we have noted that the three sales are a considerable distance from the Goshute tract. The sale of Baca Float No. 5 appears to have been a family transaction, and the sale of Baca Float No. 4 was a promotional sale. The Atlantic Pacific Railroad sale to the Aztec Land and Cattle Company was made under distressed conditions because the railroad needed funds to repay loans to its parent

company. See Fort Sill Apache Tribe v. United States. 25 Ind. Cl. Comm. 352, 357-58 (1971).

Mr. McDowell noted a fourth sale but did not use it in his comparable sales analysis. While it involved lands very close to the Goshute tract, he did not rely on it because the rangelands were superior to those in the subject area. The sale made in 1885 was by the Central Pacific Railroad to George Crocker. The land was in northeastern Box Elder County, Utah, and involved 352,641.15 acres for a consideration of 78 cents per acre. Reducing this price by the appropriate factor to account for the higher cattle carrying capacity of the railroad lands would give an indicated value of 55 cents an acre for the subject tract. This transaction was 10 years after the valuation date, and George Crocker was a member of the Board of Directors of the Central Pacific Railroad.

Mr. McDowell also valued the subject rangelands by estimating the amount of money a hypothetical buyer would have paid for forage for each animal unit. This method utilized sales of the same properties used in the comparable sales analysis. Since we believe that the sales analysis, as discussed above, represents a more valid means of relating those grazing land sales to the rangelands of the subject area, we have not relied on this second appraisal method. Likewise we have not based our determination on Mr. McDowell's last appraisal method which involved a capitalization, at 3 per cent, of estimated net earnings which might have been derived by leasing the land. His assumed lease rate (one

cent per acre) is quite speculative, and any slight change would drastically alter the resulting value indication. His research showed lease rates ranging from 1/2 cent to 5 cents per acre. Had he used a one and one-half cents per acre lease rate in his calculations, the resulting value would have jumped from 33 cents to 50 cents per acre. The 3% capitalization rate is also a rather arbitrary assumption which likewise could be changed very slightly to produce vastly differing values.

Mr. McDowell believed that the timber in the Goshute tract was scattered and of poor quality, and it had a value for local use only. The lands which were timbered were used as summer pasture. In 1888 the Atlantic-Pacific Railroad sold timber only on 120,000 acres for 16.7 cents per acre. Accordingly, he added a 15-cent increment to his grazing land value to account for the enhancement which timber added to the area.

In valuing the tillable land Mr. McDowell relied on sales of smaller tracts in both Utah and Nevada. The sales averaged $2.41 an acre in Nevada and $4.37 an acre in Utah. He reduced both averages by 40% to reflect a discount for size. And he reduced the Nevada sales by an additional 25% because he considered that the sales involved better quality lands in more favorable locations. His resulting values were $1.08 per acre for Nevada agricultural land and $2.62 for Utah agricultural land. While we agree that the sales data relied on by Mr. McDowell provides an indication of the fair market value of the agricultural land, we do not agree that a 40% discount for size is warranted. We likewise do not agree with the 25% discount for the "superior qualities" of the Nevada lands.

The last category in the defendant's surface appraisal was the land to be used for townsites. Based on comparable sales made between 1871 and 1879 he valued the townsite lands at $199,800.00.

The Commission concludes that the January 1, 1875, fair market value of the surface of the Goshute tract was $3,250,000.00. We have based this determination on a consideration of four basic uses for the lands. The values of those components are:

Use	Acreage	Value
Grazing	5,462,003.65	$2,500,000.00
Timbered grazing	250,000	150,000.00
Agricultural	100,000	400,000.00
Townsites	1,800	200,000.00
	Total	$3,250,000.00
Mineral lands	10,000	
Total	5,823,803.65	

The principal highest and best use for the surface area of the Goshute tract was for grazing. In valuing the almost 5 1/2 million acres of grazing land the Commission has recognized that only the better grazing land would have had a significant market value in 1875. Because the open Federal range could be used by ranchers without cost, the usual practice of livestock operators was to purchase only watered areas. The value of the free range privilege enhanced the value of the private ranch lands.

We have considered the valuation reports of the two experts. As

we have noted the plaintiff's expert relied primarily on sales of agricultural land which we do not believe can be related to the value of grazing land in this case. We have placed most of our reliance of the sales data considered by defendant's expert. We have considered the three sales which he found gave an indicated value of 35 cents per acre for the grazing land in the Goshute tract. And we have considered the fourth sale which, although ten years after our valuation date, indicated a value of 55 cents an acre for the rangelands under consideration. Our conclusion of a $2,500,000.00 value for the 5,462,003.65 acres of grazing lands represents an average value of 46 cents an acre.

In appraising the timbered areas we have adopted Mr. McDowell's appraisal that such areas were about 15 cents more valuable than their use for grazing land. Thus an average value of 60 cents per acre for the timbered grazing areas has produced a total value of $150,000.00 for those lands.

We have considered the tillable land sales in the Humboldt River Valley relied on by Mr. Saunderson. They averaged $5.95 an acre, a price which we believe was the maximum for the best agricultural land. We have considered also Mr. Saunderson's Elko County sales averaging $4.20 per acre. We have taken into account Mr. McDowell's data which indicates values of $2.41 per acre for less desirable Nevada agricultural land and $4.37 per acre for the higher regarded Utah agricultural land. From these comparable sales we have concluded that $4.00 per acre would best represent the average value of the 100,000 acres of tillable land in the Goshute tract.

Finally we have adopted the defendant's $200,000.00 appraisal of the townsite lands, which accounted for 1,800 acres of the Goshute tract.

Following the 1863 discovery of silver ore in the subject area, the exploitation of minerals became the most significant activity in the Goshute tract. While mining operations developed slowly because of inadequate transportation and the high costs of refining silver ore, these obstacles were overcome in the early 1870's. The two most important mining districts in the Utah portion of the Goshute tract were the Rush Valley and Ophir Districts in Tooele County. In finding 44 we have set forth some of the significant factors in the early development of those areas. In the Nevada portion of the subject area the Cherry Creek District was the most productive area, and its development is outlined in our finding 45.

Mr. Roy P. Full, an expert geologist and qualified mineral appraiser, prepared a report and testified for the plaintiff on mineral values. He has prepared a most comprehensive report which has detailed the factors which relate to a valuation of the minerals in this case. We have placed much reliance on Mr. Full's report and his opinions.

Mr. Full considered each mining district in the area and based his value conclusions primarily upon a determination of the anticipated profits which a prospective purchaser would have envisioned for those districts in 1875. He concluded that the 1875 value of the minerals in the Goshute tract was $3,157,108.00.

Mr. Ernest Oberbillig, an expert mining engineer and qualified mineral appraiser, prepared a report and testified for defendant on the value of the minerals in the Goshute tract. He valued each mining district in the area, relying in most instances on contemporaneous sales of interests in mining properties. However, since fire had destroyed the deed records in White Pine County, Nevada, Mr. Oberbillig used other methods for the two districts in that county. It was his conclusion that the 1875 value of the minerals in the subject area was $1,962,153.00.

Although they employed different methods, the district by district conclusions reached by Mr. Full and Mr. Oberbillig were very close.[2/] The disparity in their total valuations resulted from differing conclusions as to the value of the Cherry Creek District. Mr. Full valued it at $1,744,360.00 while Mr. Oberbillig assigned a value of only $200,000.00. Mr. Oberbillig, using a capitalized royalty appraisal method in the White Pine District, assumed that the total production after 1875 would have been at the annual rate of $500,000.00. He applied a 10% royalty rate and capitalized this amount ($50,000.00) by 25% in perpetuity to compute an 1875 fair market value of $200,000.00. We believe that the $500,000.00 yearly production figure is too low. An 1875 prospective purchaser of the Goshute tract would have been aware of the

2/ For comparison purposes we have set forth in finding 46 a tabulation of the valuations by Mr. Full and Mr. Oberbillig for each district which they considered.

very promising prospects for the Cherry Creek District. Three principal mines in the district were producing at nearly their peak rates immediately prior to January 1, 1875. In one month, December 1874, the Star mine alone produced $60,000.00 in silver ore. While the early production records were destroyed by fires in the 1880's geologists and mineralogists have made various estimates of the yields from the district. Based on the available evidence we believe a prospective purchaser would have envisioned a higher annual production for the Cherry Creek District. We also believe that Mr. Oberbillig's 10% royalty figure is too low. We therefore have not followed the defendant's contentions in valuing the Cherry Creek District.

We consider that most of Mr. Full's appraisal of the Cherry Creek District was based on valid assumptions, and, with some modification, we have followed it in reaching our value determinations. We agree that the evidence supports a finding that a prospective purchaser in 1875 would have been justified in projecting as optimistic an estimate as the $900,000.00 annual production which Mr. Full used. And we agree also that Mr. Full's average yield, cost of production, expected life of operation, and pre-production costs are reasonable estimates.

However, we do not believe that Mr. Full has adequately taken into account the hazards and unforeseen risks in a mining operation in 1875 in the Cherry Creek District of Nevada. The production and cost figures which Mr. Full has assumed are, quite frankly, optimistic. The annual net profit figure which he projected for five years was based on factors

any one of which could have been adversely affected by unforeseen circumstances. The profit to be derived from mining gold and silver was subject to constant fluctuation. Difficulties such as the encountering of water in the shafts could cause lengthy shut-downs which would increase costs. In fact the Exchequer mine in the Cherry Creek District struck water which filled the shaft in 1875, and pumping works had to be installed. The richness of the ore deposits was never constant, and there was always a risk that silver recovery would diminish as the mining on a vein of ore progressed. It was known in 1874 that work on one ledge of the Exchequer mine had been discontinued because of the low grade ore. Mining was also delayed because of bad ventilation in the tunnel. In 1874 it was reported that bad weather was restricting the mill which was working ore from the Teacup mine. Therefore the so-called "hazards of the operation" represent an important factor to be considered in a mine valuation.

There are a number of methods which appraisers employ to allow for the hazard factor. The individual items upon which the valuation is based may be discounted to account for the element of doubt involved in each of them. Or the appraiser may choose to apply a discount to the overall computation by applying a percentage factor which will reflect an appropriate hazard discount. This is often accomplished by the application of a mine evaluation formula which incorporates a hazard discount. One such formula was devised by H. D. Hoskold, a British mining engineer.

In R. Parks, Examination and Valuation of Mineral Property (1949) at pages 222-3 Roland D. Parks explains Hoskold's risk factor as follows:

> Hoskold used the interest rate to express all the hazards of an enterprise. That he realized the difficulty in determining the proper rate to express the risk is shown by the following quotation from his Engineers' Valuing Assistant (1877).
>
> > Every purchaser of mining property should have ample allowance made upon his purchase, but the amount of such an allowance, as a percentage, must depend upon a point difficult to calculate --
> >
> > In the case of unopened mines it has been my practice in deducing the present value deferred, to allow 20 per cent. to a present purchaser, and redeem capital at 3 per cent. per annum; which I consider in a general way is a safe mode of dealing with any mine with average prospects; although in special cases, where a mine has a more certain character, I have allowed a percentage as low as 14, and in some of less certainty, as high as 25.
> >
> > A rule cannot be laid down expressing the attendant risk of mining adventure, as nearly all mines exist under circumstances differing widely from each other. It is a matter of experiment; each mine must, therefore, stand upon its own merits, and the amount of percentage to be allowed must also be varied according to the circumstances of each particular case.
>
> Again in 1902 Hoskold says:
>
> > In England, where the valuation of mines has long been practiced, it has been customary to allow the purchaser of mining property a high annual rate of interest. Upon collieries, for instance, the rate is from 14 to 20 per cent. per annum; and upon metalliferous mines still higher because the risk is greater. For foreign mines, the details of management, economy and profit are further removed from control, and

> consequently as the risk is proportionately increased, the purchaser should reckon upon the allowance of a far higher rate, depending upon class and character of the mine, and probably from 25 to 35 per cent. (Plaintiff's Exhibit F-1, Vol. 1, pp. 13-14.)

In this case Mr. Full has capitalized the projected yearly profits to compute an 1875 value for the Cherry Creek District. He has used a straight 20% compound interest factor (Inwood valuation premise). This method, which utilizes a single interest rate, differs from the Hoskold mine-valuation formula which is a combination of two rates of interest--speculative or hazard rate on invested capital and safe rate on return of capital. The Inwood single-rate equation may be compared to the Hoskold equation by examining the resulting "factors" for each equation. The factor for the 20% Inwood discount method, which Mr. Full applied, is 2.9906. An equivalent factor under the Hoskold formula would be slightly less than a rate of 15% on the investment and 3% on redemption of capital.[3/]

The selection of the appropriate interest rate depends to a great extent on the degree of optimism or of conservatism used in making the estimates upon which the projected net profit figure has been based. In view of the relatively optimistic estimates which have been used in arriving at an annual production figure of $900,000.00 and a projected net profit of $600,000.00, we do not consider that an Inwood discount factor of 20% (equivalent to a Hoskold double rate of about 15% and 3%)

3/ The factor for the Hoskold double rates of 15% and 3% is 2.9555. The factor for 12% and 3% is 3.2430.

can serve to adequately reflect the hazards in 1875 which would have been involved in a prospective mining operation.

We have determined that the best method to adjust the valuation to adequately reflect the hazard and unforeseen risk factor would be to adopt Mr. Full's estimates leading to the projected $600,000.00 net profit figure and apply thereto an interest rate which we believe will allow for both the speculative features and hazards of the operation. This we may do by using the factor under the Hoskold formula for 20% return on the investment and 3% on the redemption of capital. This results in an estimated value of $1,495,000.00 for the Cherry Creek District, a figure which is some $249,360.00 less than Mr. Full's computation based on the 20% Inwood single interest rate formula. We have concluded that an estimated value of $1,495,000.00 adequately reflects all of the factors, including a discount for hazards, which a prospective purchaser would have considered in valuing the Cherry Creek District in 1875.

Mr. Full used the Inwood method to capitalize anticipated net profits in four other districts, Camp Floyd, Ophir, Rush Valley, and Salt Marsh Lake. For the same reasons as we have just outlined we do not believe that Mr. Full adequately allowed for hazards in computing his values for those districts. Accordingly, we have computed an estimated value which would result from the application of the Hoskold formula using the discount rate adopted by Mr. Full (with redemption of capital at 3% in each case) but using his estimated net profit figure. We have made

no adjustment for the five remaining districts which were not valued by means of a discounting of future profits. As set forth in finding 49, the total indicated value is $2,730,122.00. We find that this sum represents the January 1, 1875, fair market value of the minerals in the Goshute tract.

In determining the propriety of thus reducing Mr. Full's total mineral appraisal from $3,157,108.00 to the $2,730,122.00 figure, we have observed his method of appraisal in the case of the Western Shoshone Indians, Docket 326-K. That claim which was originally another part of the claim involved in this case under then Docket 326, concerned the neighboring Shoshone band and required a mineral valuation of districts in Nevada adjoining the Goshute tract to the west. The valuation date in that case was July 1, 1872. Mr. Full used the Hoskold formula in that appraisal, noting:

> . . . . Utilizing these data, the present value (July 1, 1872) of the mineral potential has been calculated on the basis of the Hoskold formula where the invested capital is returned over the life of the operation and is placed in a sinking-fund with interest accumulating at 3 percent. The element of risk in each district and type of deposits have been considered in the rate of return on investment, and the indicated value of the productive potential of the property has been reduced by the estimated pre-production costs.
>
> A more common practice of evaluation within the mining industry considers the reinvestment of earning in similar mining ventures where comparable returns can be expected. The Hoskold method has been used in the following evaluation in the interest of conservatism, even though an increase in indicated value of from approximately 5

> percent to near 20 percent would result from the use of standard compound interest rates . . . . (Docket 326-K, Appraisal Report of Roy P. Full, Plaintiff's Exhibit F-1, p. 8.)

In addition to the claim for the fair market value of the Goshute tract, the plaintiff asserts that it is entitled to recover for the value of minerals removed from the tract prior to the January 1, 1875, valuation date. The Goshute Treaty of October 12, 1863, 13 Stat. 681, provided, in Article IV that the tribe's country might be explored for gold and silver and other minerals and, when discovered, they might be mined. That article also provided for the establishment of mining and agricultural settlements as well as the erection of mills and taking of timber for such use. In consideration therefor the United States agreed to pay a 20-year annuity of $1,000.00 per year. While the Goshute Treaty was not a treaty of cession whereby the Indians' aboriginal title was extinguished, the treaty did permit activities which led to the removal of minerals from the Goshute tract. After the execution of the treaty in 1863 and prior to January 1, 1875, when the plaintiff's aboriginal title was extinguished, many areas within the Goshute tract were prospected and mined. As previously related in this opinion there had been considerable activity in several mining districts and valuable minerals were removed prior to the valuation date. Some mines, such as the Mono in the Ophir District, had realized a substantial portion of their total production prior to 1875.

Mr. Full, for the plaintiff, has estimated that minerals with a gross value of $6,365,000.00 were mined within the Goshute tract prior

to 1875. In finding 51 we have set forth the estimated figures for each of the mining districts involved. We have determined that Mr. Full's figures are supported by the evidence, and, accordingly, we find that the gross value of minerals removed from the subject area prior to January 1, 1875, was $6,365,000.00.

Plaintiff contends that a 40% royalty ($2,546,000.00) would represent the owner's interest in the minerals which had been removed. Support for this figure is found in Mr. Full's statement that the average net profit resulting from pre-1875 production was a minimum of 40% of the gross product. If Mr. Full meant that the total net profit, including both the owner's and the operator's shares, was 40%, we would agree that this figure is reasonable. But we cannot agree with plaintiff's contention that a 40% royalty would represent a fair percentage of the owner's share in the gross product. Such a figure is not supported by the evidence.

In the case of the neighboring Western Shoshone Indians, Docket 326-J, to which we have already referred, Mr. Full, to corroborate his valuation, used a discounted royalty computation on the gross value of all minerals produced in the area. In determining the proper royalty figure to apply, he considered the knowledge that existed by 1872 and the general trends within the mining industry. In his appraisal report Mr. Full stated, "With the knowledge of the time, it is believed that an average royalty of 15 percent of the gross production would have been considered equitable to both parties." (Docket 326-K, Plaintiff's Exhibit F-1, p. 8.) In that case the Western Shoshone plaintiff

argued for a 25% royalty as a means of computing the value of the minerals removed prior to the 1872 valuation date. The Commission found that a 20% royalty on gross production represented a fair determination of the owner's share of the profits derived from the pre-evaluation date mining. Western Shoshone v. United States, Docket 326-K, 29 Ind. Cl. Comm. 5, 56 (1972).

In this case we realize that much of the higher grade ore was mined during the pre-1875 period. But it is also true that there were expenses and greater risks involved in the initial stages of mining operations in the Goshute tract. We concluded that a 20% royalty on the gross production of $6,365,000.00 is an appropriate measure of the owner's profit on ore mined before 1875. This results in a figure of $1,273,000.00.

The Goshute tract has been valued without the minerals which were removed before January 1, 1875. The minerals thus removed were mined in the area with the approval of the United States following the 1863 Treaty, supra, which the United States entered into with the Goshutes. That treaty contemplated such mining and other related activities. As consideration for such, the United States agreed to pay a consideration of $20,000.00. The Commission finds that the removal of minerals, the owner's share of the profit from which is valued at $1,273,000.00, following an agreement which provided a consideration of only $20,000.00, was unfair and dishonorable, within the contemplation of Clause 5, Section 2 of the Indian Claims Commission Act, supra.

Defendant has opposed plaintiff's claim for the value of minerals removed prior to the valuation date. It is argued that because the Indians had

aboriginal title to the area there can be no damages for a "trespass." Much of its argument is directed toward Washoe Tribe v. United States, Docket 288, 21 Ind. Cl. Comm. 447 (1969), which involved a determination of liability for minerals removed prior to the date of valuation. Defendant contends that decision was in error and complains that the Commission in Washoe failed to explain why it did not premise liability on a legal trespass concept. The Washoe case involved aboriginal title land. In such cases all legal rights of ownership are in the United States, and the United States could not be held liable, under a trespass theory, for the removal of minerals from its own lands. See Kash-Ke-Quon Indians v. United States, 137 Ct. Cl. 372 (1957). Therefore, the Commission concluded that there could be no liability founded on a legal trespass theory under Clause 2, Section 2 of the Indian Claims Commission Act, supra. However, Clause 5, Section 2 of the Act contemplates "claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity." Finding that the United States encouraged and protected miners who removed minerals from the Washoe tract prior to the extinguishment of that tribe's aboriginal title, the Commission determined that the defendant had failed to deal fairly and honorably with the Washoe and that the Indians were entitled to recover damages resulting from such conduct.

We do not agree with defendant's position that any so-called "trespass" in this case was per se an act of extinguishment of the Goshute's aboriginal title. As we have indicated, the 1863 Treaty with the Goshutes

permitted the exploration for and mining of gold, silver, and other minerals. That treaty was not a treaty of cession, and the defendant so concedes in its brief.[4/] The treaty permitted the removal of minerals. The entry of miners and prospectors on the Goshute lands after 1863 was contemplated and bargained for in the treaty. Thus, the entry of miners in the various districts was accomplished under the agreement between the United States and the Indians, and we fail to see any basis for the argument that each such entry was a Government termination or extinguishment of the Goshutes' aboriginal title. Nor do we see any basis for the defendant's argument that the right to remove the minerals having already been granted, the United States cannot be held liable for the removal thereof. It is true, as defendant argues, that the right to remove minerals had been granted and in consideration therefor a payment of $20,000.00 was promised. But we find that the removal of $6,365,000.00 of minerals, some $1,273,000.00 of which represented the Indians's fair share, for a consideration of only $20,000.00, was conduct which was less than fair and honorable. Thus the plaintiff is entitled to recover on this claim under Clause 5, Section 2 of the Act.

Defendant has pressed various other arguments which contest the appropriateness of the valuation date and suggest that somehow it has been deprived of an opportunity to introduce evidence as to the value of the minerals removed prior to 1875 and to present argument on the proper measure of damages. The Commission has considered all of

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4/ Initially defendant did contend that the Goshute's aboriginal title was extinguished in 1864, when the 1863 Treaty was ratified.

defendant's contentions concerning the extinguishment of the plaintiff's aboriginal title and our findings have been entered in accordance with our view of the evidence and for the reasons set forth in this opinion.

Defendant states it had no knowledge of the claim for preevaluation removal of minerals until the parties exchanged appraisal reports. With respect to the argument that this claim was not asserted in plaintiff's petition we have concluded that the petition was sufficiently broad to encompass a claim for the value of minerals removed prior to the valuation date. The petition alleges a violation of the right or title or ownership or occupancy recognized by the Treaty of Tuilla Valley of October 12, 1863, supra. It alleges that without compensation or without the compensation agreed to defendant disposed of a large part of the Goshute lands to settlers and others and converted a large part of the said lands to its own use and benefit. Alternatively, plaintiff alleges that defendant has not dealt fairly or honorably with the Goshute. The plaintiff seeks compensation which would be due had defendant dealt fairly and honorably. The petition states that the plaintiff was damaged through being denied or precluded from the use or occupancy or ownership or rental values or proceeds of the said lands. These allegations are sufficiently broad to encompass a claim for loss incurred by the removal of minerals prior to the valuation date.

The nature of the proof upon which plaintiff was to rely was set forth in detail in the appraisal report which defendant received in January 1971. We believe defendant has had ample opportunity to move to supplement the record in this case with any evidence it deemed

pertinent as well as to present arguments on the proper measure of damages.

In summary our determinations on value in this case are as follows:

Surface value (finding 42)	$3,250,000.00
Mineral enhancement (finding 49)	2,730,122.00
Value of minerals removed prior to January 1, 1875 (finding 52)	1,273,000.00
Total	$7,253,122.00

The above amount will be subject to deductions for payments which defendant may prove were made under the 1863 Treaty, *supra*. The defendant will also be entitled to credit for gratuitous offsets, if any, which may be allowable under the Indian Claims Commission Act, *supra*.

Brantley Blue
Brantley Blue, Commissioner

We concur:

Jerome K. Kuykendall
Jerome K. Kuykendall, Chairman

John T. Vance
John T. Vance, Commissioner

Richard W. Yarborough
Richard W. Yarborough, Commissioner

Margaret H. Pierce
Margaret H. Pierce, Commissioner

Yarborough, Commissioner, concurring:

These additional comments are made in support of the method of valuing the mineral property used in the present case. It will be noted that the method followed here is the same as that used by the Commission in several recent cases such as Western Shoshone Identifiable Group v. United States, Docket 326-K, 29 Ind. Cl. Comm. 5 (1972); Fort Sill Apache Tribe v. United States, Docket 30, et al., 25 Ind. Cl. Comm. 352 (1971), and may be expected to find favor in other cases now pending.

Inasmuch as the method appears to be subject to continuing criticism (see the dissenting opinion of Judge Bennett in United States v. Fort Sill Apache, App. No. 3-72 (Ct. Cl. June 20, 1973), Slip. Op. at 14), some further comments and explanation of the Commission's use of this method seems desirable. The Commission's decision is well supported by precedent and reason, and no harm will be done by restating the rationale succinctly.

The method of evaluation here adopted, with some refinement and modification, is essentially the method proposed by plaintiff's appraisal witness, Mr. Roy P. Full, who was also the plaintiff's appraiser in the case of Tlingit & Haida Indians v. United States, 182 Ct. Cl. 130, 382 F.2d 778 (1968), where his method was approved by the Court of Claims. This precedent the Commission has favored and followed in cases where no better method of evaluation was shown by the evidence. In a broad sense, the method achieves an opinion of fair market value by estimating the ore body and calculating the "profits" to be derived from the

development of the mineral tracts, reduced to the valuation date value. The expert's final opinion is the value of the mineral enhancement of the tract: the present value of future profitable mineral production. As all costs enter the calculations, only potentially profitable minerals will be found to have an enhancing value, and excessively speculative profits may be rejected. See Tlingit & Haida v. United States, 182 Ct. Cl. 130, at 148-9.

The method used is one advanced as being one customarily used by mining engineers in the appraisal of mining properties. The method seeks to estimate the amount and value of the ore present, and deduct from it figures for the costs and hazards of the mining enterprise necessary to realize the value of the ore, with many compensating calculations under the Hoskold formula or the Inwood formula as discussed in the opinion above. The resulting figure equals the net value of the minerals and thus measures the enhancement factor of the existence of the minerals on the tract. That one step in these calculations involves "profits" is not a necessary disqualification of the method; it is a necessary factor in attaining the final mineral evaluation. The cases recognize the necessity:

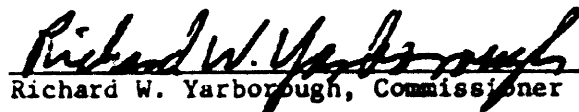
> " ... In order to obtain substantial justice in eminent domain proceedings it is necessary for courts to adopt working rules to fit the particulars of the case ... Estimates and opinions were given as to the possible extent of the deposit, the cost of development and the ultimate reward to the owners if the mines should develop commercially .... We do not believe the verdict to be based upon pure speculation but rather to be an

> informed finding based upon competent evidence reaching a standard dictated by the nature of the case." United States v. Silver Queen Mining Co., 285 F.2d 506, 509 (10th Cir. 1960).
>
> " ... the landowner is entitled to have an expert or lay witness describe the commodity or substance on the land, the quantity thereof, the going price thereof as factors only, upon which the expert may in part base his value as to the fair market value of the parcel in question." United States v. Land In Dry Bed of Rosamond Lake, 143 F. Supp. 314, 318 (S.D. Col. 1956).

In ordinary condemnation cases anticipated profits of a going business conducted on the tract may not be used as an element of value, but such cases concern businesses that may be conducted elsewhere than on the subject tract. See Mitchell v. United States, 267 U.S. 341 (1925). On the other hand, the minerals are an integral part of the tract and must be valued; the "business profits" must be hypothecated to find that value. That the final result is necessarily speculative cannot be avoided, but it is a reasoned determination of how much the mineral deposits of some value justly enhance the land value. Thus Nichols states, in his treatise on Eminent Domain:

> "The rule is widely prevalent in this country that the existence of mineral deposits in or on land is an element to be considered in determining the market value of such land ... In determining just compensation to be paid to the owner, it is not permissable to aggregate the value of the land and the value of the deposit ... However, while the profits, price or value of the minerals, taken separately, may not be considered, yet the value, extent and quality of such minerals as exist upon the land may be considered. If the extent and quality and value ... may not be considered, there would be no way by which the value of the land with the minerals could be considered. All legitimate evidence tending to establish value of land with the minerals in it is permissible." 4 Nichols, Law of Eminent Domain §13.22 (3rd. ed. 1964).

The final figure of the net value of the minerals in the ground, or the mineral enhancement, is the so-called "profit" defined by the appraiser's formula. This represents the whole value of the minerals to the landowner. It is difficult to see why there should be objection to the landowner receiving compensation for the whole value of his property. Valuing a royalty to the landowner does not give him the whole value of his minerals, because a royalty implies a splitting of the minerals between landowner and operator. That the plaintiff landowners are Indians should not mean that their land should be valued by any lesser standard than any other landowner whose property is being taken from him. Our law does not say that a landowner faced with condemnation should have the value of his just compensation to be given by the Government measured by his individual store of business acumen or mining expertise. "And this just compensation, it will be noticed, is for the property, and not to the owner." Monongahela Navigation Co. v. United States, 148 U.S. 312, 326 (1893). One uniform standard for all, the fair market value of the property at the time taken, is that which is followed in the present case with the use of this method. It is neither a lesser standard nor a greater standard for Indian lands than for others' property.



Richard W. Yarborough, Commissioner